MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

October 22, 2015, through December 29, 2015

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COURT OF APPEALS

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WILLIAM B. MURPHY	2019
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KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021
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MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2017
COLLEEN A. O'BRIEN	2017[1]

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] From October 26, 2015.

SUPREME COURT

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BRIAN K. ZAHRA	2023
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[1] From December 14, 2015.

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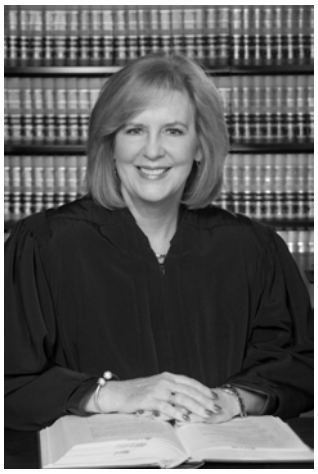

JUDGE

COLLEEN A. O'BRIEN

Judge Colleen A. O'Brien was appointed to the Court of Appeals in October 2015. She graduated from the University of Michigan in 1978 with a Bachelor of Arts degree and from the Detroit College of Law with a Juris Doctor degree in 1981. Judge O'Brien practiced law for 17 years before being elected to the Oakland County Circuit Court in 1998. As a Circuit Judge, she served as the Presiding Judge of the Female Adult Treatment Court for 12 years and as the Presiding Judge of the Civil/Criminal Division for several years.

Judge O'Brien is a longtime member of the Michigan Judges Association and served as President in 2015. She has also served as President of the Oakland County Women's Bar Association and served on the Board of Directors of the Women Lawyers Association of Michigan. An active member of the Oakland County Bar Association, Judge O'Brien received the Distinguished Public Servant Award in 2011.

Judge O'Brien's civic activities include serving on the Advisory Board to Crossroads for Youth, serving as

a member of the Indigent Defense Advisory Commission, and serving as a member of the Interagency Council on Homelessness.

COURT OF APPEALS CASES

PEOPLE v STEANHOUSE

Docket No. 318329. Submitted May 13, 2015, at Detroit. Decided October 22, 2015, at 9:00 a.m. Leave to appeal granted 499 Mich 934.

Alexander Jeremy Steanhouse was convicted by jury in the Wayne Circuit Court of assault with intent to commit murder, MCL 750.83, and receiving and concealing stolen property less than $20,000, MCL 750.535(3)(a). The court, Patricia Fresard, J., sentenced defendant to 30 to 60 years' imprisonment for his assault conviction and 1 to 5 years' imprisonment for his receiving and concealing conviction. Defendant's convictions arose from an incident involving his good friend, Anton Valoppi. Anton was hit over the head and his throat was slashed while defendant was visiting Anton. Anton indicated that defendant was the perpetrator, although he did not actually see who assaulted him. Defendant claimed that another friend of his, Derrin Evans, was present during the incident and that Evans was the perpetrator. After the assault occurred, defendant went to his house to change clothes because there was blood on them. He woke up his girlfriend, Katherine McIntyre, and told her Anton had been stabbed. Defendant did not then indicate who had stabbed Anton. Later, defendant told McIntyre that Evans was responsible for stabbing Anton. Evans admitted being present on the day of the incident, but he denied committing the assault. Defendant moved for a mistrial during closing arguments after the prosecutor's response to defendant's implication that the prosecution had failed to introduce as evidence Anton's medical records because the records would have helped defendant. The prosecutor stated that defendant himself could have and should have introduced his own medical records at trial if he believed that the records supported his defense. The court denied defendant's motion for a mistrial. The jury found defendant guilty of assault with intent to commit murder and receiving and concealing stolen property less than $20,000. Defendant appealed.

The Court of Appeals *held*:

1. Defendant was not prejudiced by the prosecution's failure to include Evans as a res gestae witness. Defendant himself

contended that Evans was at the scene of the assault and so was well aware that Evans could be a res gestae witness. Additionally, the trial court did not abuse its discretion when it precluded Evans from testifying because Evans intended to invoke his Fifth Amendment right against self-incrimination. The trial court rightly found that Evans had validly asserted his Fifth Amendment privilege. Evans had a reasonable fear of incriminating himself if questioned because defendant claimed that Evans was intimately involved with the crimes; in fact, Evans himself admitted being at the scene when Anton was assaulted. Finally, the trial court's preclusion of Evans's testimony did not deprive defendant of his right to present a defense. Defendant presented his defense—that Evans was at the scene and that it was Evans who stabbed Anton—through defendant's own testimony, the testimony of a police detective, and McIntyre's testimony.

2. The trial court did not abuse its discretion by excluding as inadmissible hearsay Evans's statement to the police admitting he was present during the assault. Contrary to defendant's argument, the statement was not admissible as a statement against penal interest, MRE 804(b)(3), nor did the statement fall under the catchall exception to the hearsay rule, MRE 804(b)(7). Although Evans did admit, in his second statement to the police, that he was present at the scene of the assault, Evans's admission included an extensive explanation of the way in which defendant planned and executed the assault against Anton. Because Evans's statement did not suggest that he was actually involved in committing the crimes, his admission was not a statement against penal interest. Evans's statement also did not qualify for admission under the catchall hearsay exception because the statement was not accompanied by circumstances sufficient to corroborate the statement's trustworthiness such as spontaneity, consistency, and timeliness.

3. Defendant failed to demonstrate plain error affecting his substantial rights in support of his claim that he was prejudiced by the prosecutor's use of his girlfriend's prior inconsistent statement as substantive evidence against him. McIntyre first told the police that defendant did not indicate who stabbed Anton. McIntyre later said to the police that when he came home on the night of the assault, defendant admitted he had stabbed Anton. She recanted this statement immediately after giving it. Finally, McIntyre testified at trial that defendant did not say who stabbed Anton. In response to McIntyre's testimony, the prosecution introduced McIntyre's prior inconsistent statement—the police

interview in which she stated that defendant told her on the night of the assault that he had stabbed Anton. Although McIntyre's statement could have been used to impeach her, the statement should not have been used as substantive evidence of defendant's culpability. Therefore, the court plainly erred by allowing the prosecutor to use McIntyre's statement as substantive evidence. Defendant was not, however, prejudiced by the court's error. The prosecution presented overwhelming evidence that defendant was the person who assaulted Anton, including McIntyre's statement to the police, the consistent testimony of Anton's parents, and the physical evidence linking defendant to the assault.

4. Defense counsel's performance arguably fell below an objective standard of reasonableness. Defense counsel failed to object to the prosecutor's improper use of McIntyre's prior inconsistent statement as substantive evidence and failed to request a limiting instruction regarding the jury's proper use of the statement. However, in light of the overwhelming evidence against him, defendant cannot show that there was a reasonable probability that the result would have been different but for his counsel's errors. Further, defendant waived any challenge to the court's jury instructions when his counsel affirmatively expressed satisfaction with the instructions.

5. Defendant was not denied a fair trial by the prosecutor's allegedly improper comments and arguments. The prosecutor's references to defendant's testimony as a "story" and a "lie" were within the limits of proper argument. A prosecutor is entitled to argue the evidence and all reasonable inferences from the evidence and is not required to couch those arguments in the blandest terms. While expressing the conclusion that defendant's credibility was questionable, the prosecutor did not impermissibly indicate to the jury his opinion of the case. In addition, any prejudice that may have resulted from the prosecutor's remarks was cured by the court's instruction that the lawyers' statements and arguments were not evidence.

6. The trial court properly scored Offense Variables (OVs) 5 and 6. OV 5 assesses points for psychological injury requiring professional treatment suffered by a victim's family members as a result of the offense. In this case, the OV 5 score was adequately supported by a preponderance of record evidence. Anton's parents were in the process of seeking psychological help. They were present in their home when the offense occurred, and they found their son with a slit throat, apparently inflicted by one of Anton's good friends. In addition, OV 6 assesses points for a defendant's intent to kill or injure another individual. In this case, a prepon-

derance of the evidence supported the 50-point score. The trial court assessed 50 points for defendant's premeditated attack on Anton. Evidence showed that defendant lay in wait for Anton's return to the basement, struck Anton over the head, and slit his throat. Significantly, defendant did nothing to assist Anton after Anton sustained the injuries.

7. The trial court did not plainly err by considering defendant's scores for OVs 3, 4, 5, and 6 when imposing defendant's sentence for his assault conviction. The trial court departed from the minimum sentence recommended under the sentencing guidelines. Consequently, even if the OV scores were not established by the jury's verdict or admitted by defendant, defendant cannot show plain error.

8. Even though a sentence departure need not be justified by substantial and compelling reasons, the sentence must be reasonable, and to facilitate appellate review, the trial court must state on the record reasons for the sentence. The Court of Appeals readopted the principle of proportionality from *People v Milbourn*, 435 Mich 630 (1990), as the standard for reviewing the reasonableness of a sentence. A reasonable sentence is proportional to the circumstances surrounding the offense and the offender. When deciding on a defendant's sentence, the trial court may consider factors not contemplated by the OVs as well as factors that are inadequately addressed by the OVs.

Convictions affirmed, and case remanded for further proceedings.

SENTENCING — APPELLATE REVIEW — REASONABLENESS — PRINCIPLE OF PROPORTIONALITY.

A sentence imposed must be reasonable, and sentences are reviewed for reasonableness under the principle of proportionality; to be reasonable, a sentence must be appropriate to the circumstances surrounding the offense and the offender; when fashioning a defendant's sentence, a trial court may consider factors not contemplated by the sentencing guidelines, as well as factors that were inadequately addressed by the sentencing guidelines.

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.

State Appellate Defender (by *Chari K. Grove*) for defendant.

Before: WILDER, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, and receiving and concealing stolen property less than $20,000, MCL 750.535(3)(a). He was sentenced to 30 to 60 years' imprisonment for his assault with intent to commit murder conviction and 1 to 5 years' imprisonment for his receiving and concealing stolen property conviction. We affirm defendant's convictions, but remand for further proceedings consistent with this opinion.

I

A

Defendant and Antonin (Anton) Valoppi were good friends and often smoked marijuana in the basement of the home that Anton shared with his parents, Rory and Suzanne Valoppi.[1] In September 2011, the Valoppi residence was robbed. Two weeks later, defendant told Anton that he knew the individuals who had broken into the Valoppi home and offered to retrieve the stolen items if Anton paid him. According to defendant, he discovered that Derrin Evans had committed the robbery, and defendant retrieved the items from Evans. Defendant partially returned the stolen property to Anton, who gave him "reward" money in return. Defendant testified that he subsequently gave a portion of the "reward" money to Evans.

[1] We will refer to Antonin Valoppi by his nickname, "Anton," and will refer to Rory and Suzanne Valoppi by their first names.

On October 16, 2011, defendant went to the Valoppi residence to smoke marijuana with Anton. Anton and Rory did not recall anyone except defendant entering their home. However, defendant testified at trial that he and Evans both went to Anton's home to smoke marijuana.[2] When defendant arrived, Anton and defendant went into the basement. Anton then went upstairs to retrieve his box of marijuana and returned to the basement. The next thing Anton remembered was waking up with his throat "hanging open" and seeing defendant standing in front of him, staring at him, and "wait[ing] for [him] to die." Defendant made no attempt to help Anton.

Anton ran upstairs to get help and told Rory "[t]hat his friend tried to kill him." While Rory and Suzanne were helping Anton, Rory saw defendant run up the stairs and out the side door of their home even though Rory shouted at defendant for help. Suzanne asked Anton what happened, and Anton replied, "A.J. stabbed me."[3] In response to questions by the 911 operator, Anton indicated that A.J. Steanhouse committed the assault and provided defendant's address. Anton did not actually see who assaulted him, but he believed that defendant was the only other person in the basement when the assault occurred. Additionally, Anton believed that he was struck in the head with a wrench before his throat was slit, drawing this inference because he sustained a skull fracture, and he later found a wrench with "hair sticking out of [it]."

According to defendant, Evans was the perpetrator of the assault. When Anton, who was "past over [sic] the level of being high," went upstairs, Evans told defendant that he was going to rob and kill Anton.

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[2] Anton testified that he did not know anyone named Derrin Evans.

[3] "A.J." is defendant, Alexander Jeremy Steanhouse.

After Anton returned to the basement, Evans attacked him, cut his throat, grabbed some marijuana and pills, and left the residence. Defendant then rolled Anton over, at which time the knife came out of his neck, and called Anton's name, waking Anton up. Defendant testified that Anton accused defendant of stabbing him, and defendant excitedly repeated that he was not the one who assaulted Anton. Defendant then ran upstairs and left the residence because he was "under the influence and high," and he was shocked and hurt that Anton would believe that defendant "would do something like this to him."

After leaving Anton's home, defendant went to his own house and changed his clothes because there was blood on them. He woke up his girlfriend, Katherine McIntyre, and told her that he had been at Anton's home and that Anton had been stabbed, but he did not specify the perpetrator of the assault. Defendant then left the house and stayed the night at a friend's residence. Defendant later told McIntyre that Chips[4] had stabbed Anton.

The day after the incident, defendant turned himself in and was arrested. He maintained his innocence and implicated Chips as the perpetrator of the assault. When the police searched defendant's vehicle, they discovered some of the items that were reported as stolen from the Valoppi residence. Police officers also recovered defendant's clothing from his home. Forensic testing of the blood on defendant's clothing and the possible blood stain on the knife blade recovered from the scene matched Anton's DNA. Additionally, forensic testing of the knife handle revealed two DNA types, but only that of the major donor, Anton, could be

[4] "Chips" is Evans's nickname.

identified; the testing could not confirm whether the minor donor's DNA was defendant's or Evans's.

B

After the incident, Evans provided two statements during separate interviews with a police detective. In his first statement, provided after the detective indicated that defendant had implicated Evans as the perpetrator of the assault, Evans stated that he was not present at the scene of the assault. Evans provided his second statement four months later while he was in custody for a separate offense. After the detective informed him again that defendant had implicated him in Anton's assault, and the detective stated that he knew that Evans was present when the crime was committed, Evans admitted that he was present in the basement of Anton's home at the time of the assault. However, Evans claimed that defendant slit Anton's throat, after which Evans ran up the stairs and left the residence.

At a pretrial hearing, the prosecutor informed the trial court of the possibility that Evans could incriminate himself in light of his contradictory police statements and defendant's theory that Evans committed the assault. The prosecutor asked the trial court to appoint counsel for Evans and to conduct a hearing before trial regarding whether Evans would exercise his privilege against self-incrimination. The trial court granted the prosecutor's request.

On the first day of the trial, before jury selection and outside the presence of the prospective jurors, Evans's appointed counsel informed the trial court that he had discussed the Fifth Amendment right against self-incrimination with Evans. Evans's attorney believed that Evans could incriminate himself if he testified,

given the inconsistencies between his two statements and his potential testimony that he was present at the scene of the crime. Evans's attorney stated that he had advised Evans to not testify, and that Evans had decided to invoke his Fifth Amendment privilege. Because Evans would invoke his Fifth Amendment privilege, the trial court ruled that Evans was an unavailable witness and did not compel him to testify. Subsequently, defendant moved to admit the statements that Evans made to the police pursuant to MRE 804(b)(3) (statement against penal interest) and MRE 804(b)(7) (catchall hearsay exception). The trial court ruled that Evans's statements were not admissible under either hearsay exception, finding that neither of Evans's statements was against his penal interest and that the statements lacked sufficient indicia of trustworthiness.

During trial—after McIntyre testified that when defendant came home on the night of the incident, defendant stated that he was at Anton's home and that Anton was stabbed without specifying who stabbed him—the prosecutor introduced a brief excerpt of McIntyre's police interview. During the interview, McIntyre initially told the detective that defendant did not admit that he stabbed Anton on the night of the assault, but she later told the detective that defendant admitted that he had stabbed Anton. After she left the police station, McIntyre immediately called the detective and stated that she lied when she said that defendant admitted that he stabbed Anton. At trial, McIntyre testified that she lied to the police and asserted that defendant never told her that he stabbed Anton. She explained that she made the statement during the interview because she was tired and felt threatened, pressured, not safe, and uncomfortable when the detective mentioned her children and indi-

cated that she could get into trouble even though she was not present during the offense.

During his closing argument, the prosecutor argued, without objection, that defendant's admission to McIntyre that he stabbed Anton was substantive evidence of defendant's guilt. The trial court, also without objection, instructed the jurors that they could consider prior inconsistent statements both for impeachment purposes and as substantive evidence. Afterward, defense counsel expressly approved the instructions provided by the trial court.

Also during his closing argument, the prosecutor argued that defendant was the only person to go inside the home and the only person in the basement except for Anton. The prosecutor referred to defendant's account of the criminal episode as a "lie" and a "story":

> What we have here is the defendant basically, following the old axiom about if you're going to lie, tell a big lie.
>
> Tell one that's so shocking and enormous that people don't just immediately dismiss [it] as a lie, because it's so big but they have to just stand back and look at him; wait a minute, is he really telling me what I think he's telling me.
>
> And what you heard from the defendant about his explanation for what happened, is precisely that. It's the big lie.
>
> And we know that from a lot of different perspectives and for a lot of different reasons.
>
> One of them is the fact that he got caught up in the details of what he was saying, and it turned out there were some pretty major inconsistencies in what he was saying.
>
> Because when you tell the big lie, you can't always keep your little details straight.
>
> * * *

> He has not kept his details straight in the big lie he's told you. And beyond just the details that he's gotten wrong[,] it just doesn't make any sense.

During his rebuttal argument, the prosecutor stated:

> [W]hat they're left with is the defendant's big lie; that [sic] so obviously a big lie that you can't believe it.
>
> * * *
>
> Now, I think you have to ask yourself how is it, and why is it, and when is it that the defendant came up with this story about Chips having done this. . . .[5]
>
> * * *
>
> [H]e's faced with a situation where he's got to tell you the big lie and he's got to have you believe that big lie.

Defense counsel asserted during his closing argument that the prosecutor failed to present Anton's medical records, and therefore, prevented the jury from being able to perform a "fair and meaningful" evaluation of the extent of Anton's injuries. During his rebuttal, the prosecutor stated the following:

> Now, you may have noticed I was taking a few notes while [defense counsel] was talking. So I'm going to address a few of the issues that he did.
>
> And first on that list of issues is, I think what he mentioned, one of the first things, and he kept going back to it, was there's not enough blood here[,] he says. There's no[] medical records to show you what actually happened to Anton Valoppi.
>
> Well it's true; I mean one thing you have to keep in mind throughout this entire process is that, as I've just said, I have the burden of proof.

---

[5] Defense counsel objected to the prosecutor's use of the word "story" at this point.

> The defense has no burden of proof whatsoever. They don't have to call any witnesses.
>
> They didn't have to call his own client to the witness stand, didn't have to call any witnesses whatsoever.
>
> As the Judge told you from the beginning of the trial[,] they could have just sat here and played tic-tac-toe.
>
> And then just got up an argument [sic] in the end, doesn't even have to argue again.
>
> But if they got up and argued again and just said prosecutor didn't prove his case and sat down, you would have to consider all the same instructions whether we've proven the case beyond a reasonable doubt; the defense doesn't have to do anything.
>
> So I mean when you think about that argument about the medical records though, it's true we've had the medical records for three months but so has [defense counsel].
>
> * * *
>
> [Defense counsel] doesn't have to show you the medical records he received[;] he has no burden of proof.
>
> But when he argues to you that I should have shown them to you, at least you ought to think well, if there's something important in there[, defense counsel,] you could have brought it out.
>
> He didn't[] because all he wants to argue to you is that somehow we're being unfair to him. We didn't bring any medical records in here[;] he's had them for three (3) months.

C

At sentencing, defendant objected to the scoring of Offense Variable (OV) 5 and OV 6. The trial court assessed 15 points for OV 5, finding that the evidence and testimony were sufficient to establish psychological injury, especially in light of the trial court's opportunity to observe the witnesses as they testified. The

trial court concluded that there was "no question that psychological injury would be an issue" when a father discovered his son with a slit throat, allegedly inflicted by his son's friend.

The trial court assessed 50 points for OV 6 on the basis of its finding that the jury's verdict and the evidence presented at trial demonstrated that defendant had "a clear, premeditated intent to kill in addition to an intent to rob." Apart from indicating that it believed that defendant intended to torture Anton when he committed the assault, the trial court did not specify the portions of testimony or evidence from which it discerned a premeditated intent to kill. Later, the trial court reiterated that it would score 50 points for OV 6 in light of defendant's statement that he knew the individuals who stole the property from the residence, defendant's offer to return the property, the fact that defendant actually returned some of the property, and the fact that some of the stolen property was found in defendant's car after the incident.

The trial court departed from the minimum range recommended by the sentencing guidelines—171 to 285 months' imprisonment—by 75 months, imposing a sentence of 30 to 60 years' imprisonment for the assault with intent to commit murder conviction. The trial court provided the following reasons for its departure:

> [T]he first two factors that the prosecutor mentions the horrendous, brutal assault on this young man when [it] basically appeared [from] the facts that you thought he was somehow rendered weak or incapacitated by his drug use at that time.
>
> And the action taken by you towards a person who considers you a friend does substantiate the thought that you are a person without a conscience, a person who's

> violent and depraved and that this is an assault that is quite shocking even to people who have been in the courts for 20 and more years.
>
> The Court is going to sentence you accordingly to 30 to 60 years on the charge of assault with intent to commit murder and one to five concurrently on the charge of receiving [and] concealing stolen property between the amounts of [$]1,000 but less than $20,000.

II

First, defendant raises three related claims concerning the prosecution's responsibility to present Evans as a res gestae witness and the trial court's exclusion of Evans's testimony. He contends that the prosecution violated its duty to present the res gestae of the case by failing to acknowledge that Evans was a res gestae witness and by objecting to defendant's efforts to call Evans as a witness. According to defendant, this deprived him of his right to present a defense. We disagree.

Because a defendant must move in the trial court for a posttrial evidentiary hearing or a new trial to preserve a claim that the prosecution failed to produce a res gestae witness, this issue is not preserved for appeal. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. at 763. Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if

the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*.

Because Evans's second statement to the police indicated that he was present when the assault occurred, Evans is arguably a res gestae witness, i.e., "one who is present at the scene of the alleged crime, at the time of the alleged crime, or one who had occasion to observe the surrounding events and circumstances." *People v Dyer*, 425 Mich 572, 577 n 4; 390 NW2d 645 (1986). Contrary to defendant's argument on appeal, following the enactment of MCL 767.40a, the prosecution no longer has an affirmative duty to present the "entire res gestae," or call at trial all of the witnesses who were present when a crime occurred. *People v Koonce*, 466 Mich 515, 518-519; 648 NW2d 153 (2002). Under MCL 767.40a, the prosecutor has a duty to disclose "all known res gestae witnesses, to update the list as additional witnesses bec[o]me known, and to provide to the defendant a list of witnesses the prosecution intend[s] to call at trial." *Koonce*, 466 Mich at 520-521, citing MCL 767.40a(1) to (3). The prosecutor is also "compelled to render reasonable assistance in locating and serving process upon witnesses upon request of the defendant." *Koonce*, 466 Mich at 521, citing MCL 767.40a(5).

Although the prosecutor did not include Evans as a known res gestae witness on his witness list, the record shows that the prosecutor's omission did not prejudice defendant, *Carines*, 460 Mich at 763, or violate his right to present a defense, *People v Unger*, 278 Mich App 210, 249-250; 749 NW2d 272 (2008). Because defendant implicated Evans in the assault, it is apparent that defendant was aware that Evans could be a res gestae witness. Even though he did not intend to present Evans as a witness, the prosecutor subpoenaed

Evans and produced him for trial in the event that the trial court ruled that Evans constituted a res gestae witness and defendant desired to call him, thereby satisfying the prosecution's obligations under MCL 767.40a. As already discussed, the prosecutor properly notified the trial court before trial of the possible need for Evans to be informed of his Fifth Amendment right against self-incrimination. *Dyer*, 425 Mich at 578 n 5. Because Evans invoked his Fifth Amendment privilege against self-incrimination and refused to testify, neither the prosecution nor the defense could call Evans as a witness. *People v Paasche*, 207 Mich App 698, 709; 525 NW2d 914 (1994). Thus, there is no indication that the prosecution committed a plain error affecting defendant's substantial rights by failing to include Evans on the witness list as a res gestae witness, notifying the trial court of the need to inform Evans of his Fifth Amendment right against self-incrimination, and failing to call Evans as a witness.

Defendant next asserts that the trial court failed to adequately inquire into whether Evans validly asserted his Fifth Amendment privilege against self-incrimination and that the trial court erroneously concluded that Evans had a valid Fifth Amendment privilege. As such, defendant argues that the trial court deprived defendant of his right to present a defense when it precluded Evans from testifying. We disagree.

"The decision to admit evidence is within a trial court's discretion, which is reviewed for an abuse of that discretion." *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014). "Preliminary questions of law, such as whether a rule of evidence or statute precludes the admission of particular evidence, are reviewed de novo, and it is an abuse of discretion to admit evidence

that is inadmissible as a matter of law." *Id*. A trial court "abuse[s] its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Additionally, "[w]hether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question that this Court reviews de novo." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 537-538; 775 NW2d 857 (2009).

The Fifth Amendment to the United States Constitution and Article 1, § 17 of the 1963 Michigan Constitution provide that "[n]o person shall be compelled in any criminal case to be a witness against himself." *People v Wyngaard*, 462 Mich 659, 671; 614 NW2d 143 (2000) (quotation marks and citations omitted); *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). "This prohibition 'not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." ' " *Wyngaard*, 462 Mich at 671-672; quoting *Minnesota v Murphy*, 465 US 420, 426; 104 S Ct 1136; 79 L Ed 2d 409 (1984). Thus, a witness, as well as the accused, has a right to exercise his or her privilege against self-incrimination. *Dyer*, 425 Mich at 578. An attorney is not permitted to knowingly call a witness when he or she is aware that the witness "will claim a valid privilege not to testify," because "critical weight is added to the prosecution's case" and an "adverse inference . . . may be drawn against the defendant by the jury from the claim of testimonial privilege." *Paasche*, 207 Mich App at 709 (quotation marks and citation omitted).

Michigan courts have recognized a procedure for "protect[ing] the defendant's rights when the trial court is confronted with a potential witness who plans to assert a testimonial privilege." *Id*. "The proper procedure is for the prosecutor to inform the court, out of the presence of the witness [and the jury], of the possible need for the witness to be informed of Fifth Amendment rights." *Dyer*, 425 Mich at 578 n 5. The "trial court must determine whether the witness understands the privilege and must provide an adequate explanation if the witness does not." *Paasche*, 207 Mich App at 709. "The court must then hold an evidentiary hearing outside the jury's presence to determine the validity of the witness'[s] claim of privilege." *Id*. at 709. "If the court determines the assertion of the privilege to be valid, the inquiry ends and the witness is excused." *Id*. However, "[i]f the assertion of the privilege is not legitimate in the opinion of the trial judge, the court must then consider methods to induce the witness to testify, such as contempt and other proceedings." *Id*. If the witness still refuses to testify, "the court must proceed to trial without the witness, because there is no other way to prevent prejudice to the defendant." *Id*. at 709-710.

The record reveals that the trial court complied with the applicable procedure and properly ordered that Evans could not be called as a witness. The prosecutor informed the trial court at a pretrial hearing of the possibility that Evans may assert his privilege against self-incrimination if he testified at trial. The trial court appointed counsel for Evans and later held a hearing outside the presence of the jury to determine whether Evans intended to invoke his Fifth Amendment privilege. As defendant asserts, the trial court did not question Evans or make an explicit determination on the record concerning the validity of Evans's assertion

of the privilege against self-incrimination. Instead, the trial court conducted an inquiry with Evans's appointed counsel, who indicated that he had counseled Evans regarding his Fifth Amendment privilege and that Evans had decided not to testify. Evans's counsel explained that he had advised Evans not to testify based on the "potentially dangerous" nature of Evans's prospective testimony—Evans's inconsistent statements to the police and possible testimony that he was present when the assault occurred. As such, the record shows that the trial court was notified that Evans's attorney had counseled Evans regarding his Fifth Amendment privilege and that the trial court was aware of the underlying factual basis that supported Evans's assertion of his Fifth Amendment privilege. Additionally, the trial court was aware that defendant had implicated Evans as the perpetrator of the assault, and therefore, any further questioning of Evans regarding the validity of the assertion of his privilege may have incriminated Evans. See *People v Lawton*, 196 Mich App 341, 346-347; 492 NW2d 810 (1992); *Dyer*, 425 Mich at 579. We also find significant that, before trial, the trial court provided defense counsel with an opportunity to further question Evans's appointed counsel regarding Evans's intent to assert his Fifth Amendment right against self-incrimination, but defense counsel did not avail himself of that opportunity; defendant cannot now complain of the trial court's procedure. See *Lawton*, 196 Mich App at 346.

Moreover, we find that Evans validly asserted his Fifth Amendment privilege, and the trial court properly excused Evans as a witness. *Paasche*, 207 Mich App at 709. To properly assert such a privilege, a witness must have a "reasonable basis . . . to fear incrimination from questions . . . ." *Dyer*, 425 Mich at 578. Thus, "a trial court may compel a witness to

answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness." *Id*. at 579. Defendant's statements to the police, his theory of the case, and his testimony at trial indicated that Evans may have been intimately associated with the criminal transaction or involved in the commission of the crimes, thereby demonstrating a reasonable basis for Evans to fear incrimination from questions regarding his participation. *Id*. at 578. Additionally, the prosecutor indicated that he was unable to predict whether charges would be brought against Evans after he testified, which left open the possibility of future prosecution. On this record, we find that Evans had a reasonable basis to fear incrimination from answering questions about the criminal episode, and it is not evident that the trial court could have found, as a matter of law, that Evans's testimony could not incriminate him. *Id*. at 578-579. Accordingly, the trial court did not abuse its discretion when it excluded Evans as a witness. *Bynum*, 496 Mich at 623.

Finally, the trial court's preclusion of Evans's testimony did not violate defendant's right to present a defense. A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses. *Unger*, 278 Mich App at 249-250. "However, an accused's right to present evidence in his defense is not absolute." *Id*. at 250, citing *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). "The 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.' " *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Likewise, as recognized

by the United States Court of Appeals for the Sixth Circuit, "[a] defendant's right to force a witness to testify must yield to that witness'[s] assertion of his Fifth Amendment privilege against self[-]incrimination, where it is 'grounded on a reasonable fear of danger of prosecution.' " *United States v Gaitan-Acevedo*, 148 F3d 577, 588 (CA 6, 1998) (citation omitted). Thus, when a witness legitimately exercises his or her Fifth Amendment right against self-incrimination and refuses to testify, neither the prosecution nor the defense can call him or her as a witness. *Dyer*, 425 Mich at 576; *Paasche*, 207 Mich App at 709. Through his own testimony and testimony elicited from a detective[6] and from McIntyre, defendant was able to present his defense theory that Evans was at the scene of the crime and committed the assault. Thus, the trial court did not deprive defendant of his right to present a defense. *Unger*, 278 Mich App at 249-250.

III

Second, defendant argues that the trial court abused its discretion by excluding as inadmissible hearsay Evans's statement[7] to the police that he was present during the assault. According to defendant, Evans's statement was admissible under the statement against penal interest exception to the hearsay rule, MRE 804(b)(3), or under the "catchall" exception to the hearsay rule, MRE 804(b)(7). We disagree.

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[6] A detective testified that defendant claimed that Evans was present at the scene, which explains why the detective obtained a DNA sample from Evans and submitted it for forensic testing in an attempt to eliminate "a secondary DNA sample that was on the knife handle."

[7] Defendant appears to assert only that the trial court erred by failing to admit Evans's statement that he was present at the crime scene, not the first statement that Evans made to the police, in which he denied that he was present during the offense.

This Court "use[s] a clearly erroneous standard in reviewing the trial court's findings of fact and an abuse of discretion standard in reviewing the trial court's decision to exclude . . . evidence." *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996). However, whether a statement was against a declarant's penal interest is a question of law that this Court reviews de novo. *Id*. at 268.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay statements are not admissible unless they fall under a recognized exception to the hearsay rule. MRE 802. MRE 804(b)(3) provides an exception for a statement against interest, which is defined as

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. [MRE 804(b)(3).]

Under that rule, "if a declarant is unavailable,[8] as defined in MRE 804(a), [the declarant's] out-of-court statement against interest may avoid the hearsay rule if certain thresholds are met[.]" *Barrera*, 451 Mich at 267. "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

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[8] There is no dispute that Evans was unavailable under MRE 804(a) due to the assertion of his Fifth Amendment privilege against self-incrimination. *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998).

MRE 804(b)(3). Whether to admit or exclude a statement against a witness's penal interest offered under MRE 804(b)(3) is determined by considering "(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement." *Barrera*, 451 Mich at 268. A statement against a declarant's penal interest is "not limited to direct confessions," "need not by itself prove the declarant guilty," and "need not have been incriminating on its face, as long as it was self-incriminating when viewed in context." *Id*. at 270-271.

> In exercising its discretion, the trial court must conscientiously consider the relationship between MRE 804(b)(3) and a defendant's constitutional due process right to present exculpatory evidence. Likewise, appellate review necessarily requires a review of the importance of the statement to the defendant's theory of defense in determining whether the trial court abused its discretion by excluding the evidence. [*Id*. at 269 (citation omitted).]

The trial court properly concluded that Evans's second police statement was not a statement against his penal interest. Evans admitted that he was present during the assault after the detective told Evans that defendant had blamed Evans for planning and committing the assault, and the detective claimed that he knew for a fact that Evans was present at the scene of the crime. The context of Evans's admission included an extensive explanation of the way in which defendant planned and executed the assault against Anton, which does not demonstrate that the statement "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's

position would not have made the statement unless believing it to be true." MRE 804(b)(3). Instead, it appears that Evans made the statement in order to emphasize that he was merely present during the offense and had no role in its commission. See *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992) (stating that mere presence is insufficient to prove that someone aided and abetted the commission of a crime). Likewise, "the mere fact that the declarant invoked his Fifth Amendment right not to testify does not make the statement against penal interest." *Barrera*, 451 Mich at 270.

However, even if we construe Evans's statement as being against his penal interest because of his earlier inconsistent statement to the police, we conclude, for the reasons discussed below, that there were no corroborating circumstances clearly indicating the trustworthiness of the statement. MRE 804(b)(7). See *Barrera*, 451 Mich at 274-275 (adopting a totality-of-the-circumstances test). In this case, Evans's statement was not crucial to defendant's theory of defense because it clearly implicated defendant in the assault. As such, "other factors [were appropriately] interjected to weigh against admission of the statement." *Id*. at 279-280.

Moreover, because Evans was in custody when he made the statement to the authorities, there are three additional factors that must be considered: (1) the relationship between the confessing party and the exculpated party and whether the confessor was likely fabricating the story for the benefit of his or her friend, (2) whether the statement was voluntarily made after *Miranda*[9] warnings were provided, and (3) whether the statement was made in order to curry favor with

[9] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

authorities. *Id*. at 275. Here, because the statement incriminated rather than exculpated defendant, Evans did not likely make the statement to benefit defendant. In addition, there was no evidence that the statement was involuntarily made or made to curry favor with authorities. Nevertheless, the totality of the circumstances weighs against admission. Accordingly, the trial court did not abuse its discretion when it precluded the admission of Evans's statement under MRE 804(b)(3).

Likewise, the trial court did not abuse its discretion when it concluded that Evans's statement to the police was not admissible under the catchall exception to the hearsay rule when the declarant is unavailable, MRE 804(b)(7).[10] MRE 804(b)(7) provides for admission of a statement that is not specifically covered by any of the other hearsay exceptions in MRE 804(b),

> but [has] equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. [MRE 804(b)(7).]

In interpreting MRE 803(24), which is nearly identical to MRE 804(b)(7), the Michigan Supreme Court stated, "The first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the

[10] In his brief on appeal, defendant cites MRE 803(24), which is the catchall hearsay exception applicable when the availability of the declarant is immaterial. However, defendant moved in the trial court for the admission of Evans's statement under MRE 804(b)(7).

categorical hearsay exceptions." *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003). A trial court "should consider the 'totality of the circumstances' surrounding each statement to determine whether equivalent guarantees of trustworthiness exist." *Id*. at 291. Although "[t]here is no complete list of factors that establish whether a statement has equivalent guarantees of trustworthiness," *id*., some relevant factors include:

> (1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he [or she] spoke, (7) to whom the statements were made . . . , and (8) the time frame within which the statements were made. [*People v Geno*, 261 Mich App 624, 634; 683 NW2d 687 (2004) (quotation marks and citations omitted).]

The totality of the circumstances does not demonstrate that Evans's statement is trustworthy. It is evident that Evans had personal knowledge of whether he was present when the assault occurred, and there is no indication that Evans's statement was involuntary, especially given that the detective informed Evans of his *Miranda* rights before Evans made the statement. However, his admission was not spontaneous; it was made after the detective reiterated that defendant had implicated Evans in the assault, and the detective stated that he knew that Evans was present during the assault. Additionally, Evans's statements were not consistent. During his first statement to the police, Evans expressly denied being present when the assault occurred, even though he was aware that defendant had implicated him as the perpetrator. Evans's

admission that he was present was made approximately four months after the assault, while he was in custody for a separate offense. Accordingly, the trial court did not abuse its discretion when it precluded the admission of Evans's statement under MRE 804(b)(7).

IV

Third, defendant raises three claims related to the prosecution's use of McIntyre's prior inconsistent statement (that on the night of the assault, defendant told McIntyre that he had stabbed Anton) as substantive evidence of defendant's guilt. Defendant argues that the prosecutor's use of McIntyre's prior inconsistent statement as substantive evidence of defendant's guilt, and the trial court's failure to provide a proper cautionary instruction, violated his right to a fair trial. Additionally, defendant asserts that defense counsel's failure to object to the trial court's improper jury instruction constituted ineffective assistance of counsel. We reject defendant's claims.

Because defendant did not object to the prosecutor's use of McIntyre's statement, did not request a limiting instruction, and did not object to the jury instructions provided by the trial court, this issue is not preserved for appeal. *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994); *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Accordingly, defendant must demonstrate plain error affecting his substantial rights. *Carines*, 460 Mich at 761-764.[11] To the extent that defendant challenges the

[11] We reject the prosecution's argument that defendant waived this issue by introducing McIntyre's police statement in its entirety. In light of the prosecutor's initial introduction of McIntyre's prior inconsistent statement, we find that defendant permissibly "explore[d] the extent of the inconsistencies by showing how those same statements were consis-

jury instructions provided by the trial court, he affirmatively waived any claim of error when defense counsel expressed satisfaction with the instructions provided by the trial court. *People v Gaines*, 306 Mich App 289, 310-311; 856 NW2d 222 (2014).

Defendant's ineffective assistance claim is not preserved for appeal because defendant did not move in the trial court for a new trial or a *Ginther*[12] hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). This Court's review of the issue is therefore limited to errors apparent from the trial court record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id*. (citation omitted). In order to prove that defense counsel was ineffective, a defendant must demonstrate that (1) " 'counsel's representation fell below an objective standard of reasonableness,' " and (2) the defendant was prejudiced, i.e., "that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), quoting *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A defendant must also show that the result that did occur was fundamentally unfair or unreliable." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

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tent with [McIntyre's] trial testimony" and did not invite the purported error. *People v Sayles*, 200 Mich App 594, 595; 504 NW2d 738 (1993); see also MRE 801(d)(1)(B).

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

Extrinsic evidence of a prior inconsistent statement can be used "to impeach a witness even though the statement tends directly to inculpate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). "The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). "[A] prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial." *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994). "[P]rior unsworn statements of a witness are mere hearsay and are generally inadmissible as substantive evidence." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Thus, McIntyre's prior inconsistent statement during which she incriminated defendant could not be admitted to prove the truth of the matter asserted unless it fell within a recognized hearsay exception. MRE 802; *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013); see also *Jenkins*, 450 Mich at 261-262.

The record shows that the prosecutor impermissibly used McIntyre's statement as substantive evidence by arguing that the final piece of evidence was McIntyre's statement to the police that on the night of the assault, defendant told her that he had stabbed Anton. The prosecution does not argue that McIntyre's statement was admissible under a hearsay exception, nor do we believe that an exception applies. Compounding this error, the trial court instructed the jury at the end of the trial, in accordance with M Crim JI 4.5(2), that the jury could consider prior inconsistent statements as substantive evidence. Because McIntyre's police statement implicating defendant in the assault was admissible only to impeach her trial testimony, the prosecu-

tion's use of the statement as substantive evidence of defendant's guilt, and the trial court's instruction, constituted plain error. See *Stanaway*, 446 Mich at 692-693; see also *Carines*, 460 Mich at 763-764, 774. Likewise, because a jury is presumed to follow a trial court's instructions, *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011), it is probable that the jury impermissibly considered McIntyre's statement as substantive evidence that defendant committed the assault.

However, in light of the extensive evidence admitted at trial linking defendant to the assault, we find that these errors did not prejudice defendant. *Carines*, 460 Mich at 763-764, 772. McIntyre's trial testimony, and the admission of McIntyre's police interviews in their entirety, confirmed that she also told the detective that (1) defendant told her that Anton was stabbed but did not indicate who stabbed him and (2) defendant told her that he did not commit the act, both of which were consistent with her written police statement and with her trial testimony. Additionally McIntyre testified that she lied to the detective when she told him that defendant had admitted that he stabbed Anton and that immediately after leaving the police station, she recanted her statement implicating defendant. Further, apart from McIntyre's incriminating police statement, the consistent testimony of Anton, Rory, and Suzanne, as well as the physical evidence linking defendant to the crime, provided overwhelming evidence that defendant committed the assault. Therefore, use of McIntyre's statement as substantive evidence did not constitute plain error that affected defendant's substantial rights. *Id*. at 763-764, 774.

For the same reasons, we conclude that defense counsel's performance did not constitute ineffective

assistance. Defense counsel's performance arguably fell below an objective standard of reasonableness when he failed to (1) object to the prosecution's improper use of McIntyre's prior inconsistent statement as substantive evidence of defendant's guilt, (2) object to the jury instructions as given, or (3) request a limiting instruction regarding the use of McIntyre's statement. *Vaughn*, 491 Mich at 669-671. However, in light of the overwhelming evidence implicating defendant as the perpetrator of the assault, there is not a reasonable probability that the result of the proceedings would have been different but for counsel's errors.[13] *Id*. at 671.

V

Fourth, defendant argues that the prosecutor's improper comments and arguments violated his right to a fair trial. We disagree.

"Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *Unger*, 278 Mich App at 234-235 (quotation marks and citation omitted). Preserved claims of prosecutorial misconduct are reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for outcome-determinative plain error. *Unger*, 278 Mich App at 234-235.

[13] Additionally, defense counsel employed sound trial strategy by introducing McIntyre's police statements in their entirety, which allowed the jury to review the portions of the interview during which McIntyre indicated that defendant did not admit that he stabbed Anton, and during which the police officer allegedly pressured McIntyre into falsely stating that defendant admitted that he committed the assault.

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "[A] prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Additionally, this Court may not "find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Bennett*, 290 Mich App at 476 (quotation marks and citation omitted).

Defendant begins by arguing that the prosecutor improperly expressed his opinion regarding defendant's credibility and guilt by repeatedly referring during his closing argument to defendant's account of the incident as a lie. We disagree.

Defendant did not object to these allegedly improper characterizations of defendant's testimony until defense counsel objected to the prosecutor's characterization of defendant's testimony as a "story" during the prosecution's rebuttal argument. The comments to which defendant did not object are unpreserved and reviewed for plain error affecting defendant's substantial rights, *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011); *Unger*, 278 Mich App at 234-235, and the comment to which defendant did object is preserved and reviewed do novo, *Abraham*, 256 Mich App at 272, 274.

Prosecutors are afforded "wide latitude" with regard to their arguments during trial. *People v Bahoda*, 448

Mich 261, 282; 531 NW2d 659 (1995); *Dobek*, 274 Mich App at 66. In general, prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. However, "prosecutors should not . . . express their personal opinions of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda*, 448 Mich at 282-283. A prosecutor must also refrain from suggesting or implying that he or she has special knowledge regarding whether a witness is worthy of belief, *id*. at 276; *Dobek*, 274 Mich App at 66, but "[a] prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief, and is not required to state inferences and conclusions in the blandest possible terms." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (citation omitted); see also *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

The prosecutor's characterization of defendant's account of the criminal episode as a lie or a "story" did not deprive defendant of a fair and impartial trial, *Dobek*, 274 Mich App at 63, nor did it constitute plain error that affected defendant's substantial rights, *Unger*, 278 Mich App at 235. Reviewing the challenged comments in context, it is evident that the prosecutor's classification of defendant's account of the incident as a lie properly advanced the prosecution's position that defendant's testimony was not credible in light of the contradictory evidence adduced at trial. During his closing argument, the prosecutor pointed out the inconsistencies in defendant's testimony and explained why he believed that defendant's account of the criminal episode was not worthy of belief. The prosecutor did not improperly imply that he had special knowledge that defendant fabricated his account of the

incident. Thus, the prosecutor's argument was properly based on the evidence admitted at trial. *Unger*, 278 Mich App at 236; *Howard*, 226 Mich App at 548. Likewise, the prosecutor's labeling of defendant's account of the criminal episode as a lie was not improper, because the prosecutor was not required to use the blandest possible language in presenting his argument. *Unger*, 278 Mich App at 239.

Moreover, any prejudice that may have resulted from the prosecutor's remarks was cured by the trial court's jury instructions. The trial court informed the jury that the lawyers' statements and arguments were not evidence and that it was the jurors' responsibility to decide the facts of the case, to determine which witnesses to believe, and to assess the importance of the witnesses' testimony. Jurors were also instructed that they should rely on their own common sense and everyday experiences in deciding which testimony to believe. "[J]urors are presumed to follow their instructions." *Id*. at 235.

Defendant next argues that the prosecutor impermissibly shifted the burden of proof by arguing that the defense had Anton's medical records and could have introduced them at trial. We disagree.

We review this unpreserved issue for plain error affecting defendant's substantial rights. *Brown*, 294 Mich App at 382. "[A] prosecutor may not comment on a defendant's failure to testify or present evidence, i.e., the prosecutor may not attempt to shift the burden of proof." *Abraham*, 256 Mich App at 273. "[T]he prosecutor's comments must be considered in light of defense counsel's comments." *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the

defense counsel's argument." *Id*. at 593 (quotation marks and citation omitted; alteration in original).

During his closing argument, defense counsel advanced the theory that the prosecutor failed to present to the jury a "fair [and] meaningful evaluation" of Anton's injuries because the prosecutor failed to produce Anton's medical records, insinuating that the records did not support the prosecution's theory of the case. It is evident that the prosecutor's statements regarding defendant's opportunity to present the medical records were made in response to defense counsel's argument that the prosecutor was deficient or unfair when he failed to present Anton's medical records. Furthermore, the prosecutor did not actually argue that defendant should have introduced Anton's medical records; he only argued that defendant could have introduced the medical records if he believed that something in the records was significant. At most, this seemed to indicate that defendant had no reason to introduce the records, and it did not shift the burden of proof to defendant. Moreover, defendant is unable to demonstrate the requisite prejudice in light of the prosecutor's repeated reminders during his argument that defendant was not obligated to produce any evidence whatsoever and that the prosecutor had the burden of proof. Additionally, because any prejudicial effect caused by the prosecutor's comment about the medical records was cured by the trial court's instruction to the jury indicating that the prosecution, and not defendant, had the burden of proof, *Dobek*, 274 Mich App at 68, we find no error requiring reversal, *Bennett*, 290 Mich App at 476.

Defendant also argues that the prosecutor erroneously referred to an extrajudicial fact when he stated that the defense had the medical records for three

months. "A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case." *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). However, this error was cured by the trial court's instruction that "[t]he lawyer[s'] statements and their arguments are not evidence[;] they're only meant to help you understand the evidence and each side[']s legal theory," and there is no indication that the prosecutor's comment about the medical records denied defendant a fair and impartial trial. *Dobek*, 274 Mich App at 63.

Finally, defendant argues that the prosecutor misled the jury and misrepresented the evidence presented at trial by arguing that no one but defendant and Anton were present when the assault occurred, despite the prosecutor's knowledge that Evans admitted to the police that he was present during the assault. We disagree.

Because defendant objected and moved for a mistrial on the basis of the prosecutor's comment,[14] *Brown*, 294 Mich App at 382, we review de novo the prosecutor's comment to determine whether it denied defendant a fair and impartial trial, *Bennett*, 290 Mich App at 475. "Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Callon*, 256 Mich App at 330.

Anton, Rory, and Suzanne testified that the only other person they saw in the house before and after the incident was defendant. Additionally, Rory testified that he only saw defendant leave the house after the assault. Considering this testimony, the prosecutor

[14] The trial court denied defendant's motion for a mistrial.

properly argued the evidence admitted at trial and reasonable inferences arising from the evidence, *id*., and did not violate defendant's right to a fair trial, *Bennett*, 290 Mich App at 475.

VI

Fifth and lastly, defendant raises several issues related to the validity of his sentences. We remand for further proceedings consistent with this opinion.

As a preliminary matter, we must consider the Michigan Supreme Court's recent decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). In *Lockridge*, the Court held that "the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient." *Id*. at 364. The Court explained that "to the extent that OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e., the defendant's 'mandatory minimum' sentence, that procedure violates the Sixth Amendment." *Id*. at 373-374. Accordingly,

> [t]o remedy the constitutional violation, [the Court] sever[ed] MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory. [The Court] also str[uck] down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure. [*Id*. at 364-365.]

The Court also stated:

> [A] guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and . . . sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness. To preserve as much as possible the legislative intent in enacting the guidelines, however, we hold that a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence. [*Id*. at 365 (citation omitted).]

Likewise, the Court indicated that "[o]ur holding today does nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not." *Id*. at 392 n 28. Therefore, we conclude that, given the continued relevance to the Michigan sentencing scheme of scoring the variables, the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*.

> [T]he circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (citation omitted).]

This Court reviews de novo, as a question of law, the proper interpretation of the sentencing guidelines. *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007).

Defendant argues that the trial court erred in scoring OV 5 because there was insufficient evidence that Anton's parents sustained serious psychological injury. The statutory basis of OV 5 is MCL 777.35, which provides for an assessment of points when there "is psychological injury to a member of a victim's family."

MCL 777.35(1). Fifteen points shall be assessed if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). Zero points shall be assessed if "[n]o serious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(b). "[T]he fact that treatment has not been sought is not conclusive," MCL 777.35(2), but "[t]here must be some evidence of psychological injury on the record," *Lockett*, 295 Mich App at 183 (discussing the assessment of points under OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a victim," *id*. at 182; MCL 777.34).

The trial testimony, which indicated that Anton's parents were present in their home when the crime occurred, and that they found their son with his throat slashed by someone whom they believed to be their son's close friend, clearly demonstrated the traumatic nature of the incident. The trial court's opportunity to observe the demeanor of Anton's parents during their testimony also supported the trial court's finding that Rory and Suzanne sustained psychological injury. Further, Anton testified at the sentencing hearing that his parents were "deeply affected" by the incident and are in the process of seeking psychological help. The facts as found by the trial court were not clearly erroneous and were supported by a preponderance of record evidence. Accordingly, because the evidence sufficiently demonstrated that Anton's parents sustained serious psychological injury that may require professional treatment, the trial court properly assessed 15 points for OV 5. See *Hardy*, 494 Mich at 438; MCL 777.35(1)(a).

Defendant next argues that the trial court erroneously assessed 50 points for OV 6 because there was

insufficient evidence in the record to find that defendant had a premeditated intent to kill Anton. The statutory basis of OV 6 is MCL 777.36, which assesses points for "the offender's intent to kill or injure another individual." MCL 777.36(1). A trial court shall assess 50 points for OV 6 if "[t]he offender had premeditated intent to kill or [a] killing was committed while committing or attempting to commit" one of the offenses enumerated in MCL 777.36(1)(a).[15] MCL 777.36(1)(a). Twenty-five points shall be assessed if "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(b). "The sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(a).

"Premeditation, which requires sufficient time to permit the defendant to take a second look, may be inferred from the circumstances surrounding the killing." *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. . . . [P]remeditation and deliberation characterize a thought process undisturbed by hot blood." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (quotation marks and citation omitted). Nonexclusive "factors that may be considered to establish premeditation include the following: (1) the previous relationship between the de-

[15] The trial court erroneously considered defendant's "intent to rob" when it scored OV 6. A killing was not committed in this case, and therefore, defendant's purported attempt to commit robbery or larceny, which are two of the offenses enumerated in MCL 777.36(1)(a), was not relevant to the scoring of OV 6.

fendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *Id*. Additionally, "[p]remeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation." *Id*. at 301.

The trial court's finding that defendant had a premeditated intent to kill was not clearly erroneous and was supported by a preponderance of record evidence. *Hardy*, 494 Mich at 438. Anton testified that he went upstairs to retrieve his marijuana and when he returned to the basement, he was struck in the head, apparently without warning, and his throat was slit. When Anton woke up and realized that his throat had been slit, he saw defendant staring at him, "[j]ust wait[ing] for [him] to die." Defendant made no effort to assist Anton. There was no evidence of an altercation or argument between defendant and Anton immediately before the assault to indicate that the attack was provoked or instigated by hot blood. From these circumstances, one could reasonably infer that defendant planned the attack before it occurred and was lying in wait to attack Anton when he returned to the basement, *Plummer*, 229 Mich App at 301, which justifies an assessment of 50 points under OV 6, MCL 777.36(1)(a); *Hardy*, 494 Mich at 438. Thus, we find no error in the trial court's scoring of the OVs.

In addition, defendant raises an *Apprendi*/*Alleyne* challenge, arguing that his Sixth and Fourteenth Amendment rights were violated because the trial court's scoring of OV 3, OV 4, OV 5, and OV 6 was based on impermissible judicial fact-finding, which increased the floor of the minimum range recom-

mended by the sentencing guidelines. Because "defendant did not object to the scoring of the OVs at sentencing on *Apprendi*/*Alleyne* grounds, . . . our review is for plain error affecting substantial rights." *Lockridge*, 498 Mich at 392.

In this case, the trial court departed from the minimum range recommended by the sentencing guidelines. Therefore, even if we assume that the facts necessary to score OV 3, OV 4, OV 5, and OV 6 were not established by the jury's verdict or admitted by defendant, defendant cannot establish plain error. As in *Lockridge*, because defendant

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

However, under *Lockridge*, this Court must review defendant's sentence for reasonableness.[16] *Id*. at 365, 392, citing *United States v Booker*, 543 US 220, 264; 125 S Ct 738; 160 L Ed 2d 621 (2005). The appropriate procedure for considering the reasonableness of a departure sentence is not set forth in *Lockridge*. We conclude that there are two approaches that Michigan appellate courts could adopt in order to perform this reasonableness inquiry.

The first option is the standard of review currently employed by the federal courts. After determining whether the sentencing court committed a significant

[16] After *Lockridge*, a trial court is no longer required to provide a substantial and compelling reason for a departure from the sentencing guidelines. Therefore, we need not review defendant's argument concerning whether the reasons articulated by the trial court were substantial and compelling.

procedural error, federal appellate courts review for an abuse of discretion the substantive reasonableness of a sentence. See, e.g., *Gall v United States*, 552 US 38, 56; 128 S Ct 586; 169 L Ed 2d 445 (2007); *United States v Pirosko*, 787 F3d 358, 372 (CA 6, 2015); *United States v Feemster*, 572 F3d 455, 462 (CA 8, 2009). Under *Booker*, 543 US at 261, 264, federal courts are to be guided by the factors listed in 18 USC 3553(a) in determining whether a sentence is reasonable.[17] The factors include: (1) the nature and circumstances of the offense, (2) the history and characteristics of the defendant, (3) the need for the sentence imposed to punish the offender, protect the public from the defendant, rehabilitate the defendant, and deter others, (4) the types of sentences available, (5) the sentencing range established by the sentencing guidelines, (6) pertinent policy statements issued by the United States Sentencing Commission, (7) the need to avoid unwarranted disparities in sentences imposed on defendants with similar records for similar conduct, and (8) the need for restitution. 18 USC 3553(a).

The United States Court of Appeals for the Eighth Circuit, among others, has noted the situations that would involve an abuse of discretion:

> [A]n abuse of discretion may occur when (1) a court fails to consider a relevant factor that should have received significant weight; (2) a court gives significant weight to an improper or irrelevant factor; or (3) a court considers only the appropriate factors but in weighing those factors commits a "clear error of judgment." A discretionary sentencing ruling, similarly, may be unreasonable if a sentencing court fails to consider a relevant factor that

[17] Federal district courts are required to first calculate the applicable guidelines range, and subsequently, to "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Gall*, 552 US at 49-50.

> should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case. [*United States v Haack*, 403 F3d 997, 1004 (CA 8, 2005) (citation omitted).]

See also *United States v Ressam*, 679 F3d 1069, 1086-1087 (CA 9, 2012). Federal appellate courts are permitted to "apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines." *Rita v United States*, 551 US 338, 347; 127 S Ct 2456; 168 L Ed 2d 203 (2007).[18]

The second option is the standard of review that was in place under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), which is similar to the federal standard. When *Milbourn* was decided, the Legislature had not enacted the statutory sentencing guidelines; the guidelines in effect were those developed by the Michigan Supreme Court and promulgated by administrative order. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). Trial court judges were not required to impose a sentence within the range recommended by the sentencing guidelines; they were only required to score the guidelines and articulate the reasons for a departure from the recommended range. *Id*. That context is strikingly similar to the role of the sentencing guidelines after *Lockridge*. See *Lockridge*, 498 Mich at 391-392. In *Milbourn*, the Michigan Supreme Court overruled the "shocks the conscience" test that was previously employed under *People v Coles*, 417 Mich

[18] For examples of the manner in which federal circuit courts have reviewed sentences for reasonableness with regard to § 3553(a), see *Gall*, 552 US at 46-60; *Pirosko*, 787 F3d at 372, 374-375; *United States v Rosales-Bruno*, 789 F3d 1249, 1253-1263 (CA 11, 2015).

523, 550-551; 339 NW2d 440 (1983), and adopted the "principle of proportionality" test as the standard for determining whether a trial court abused its discretion in imposing a sentence. *Milbourn*, 435 Mich at 634-636. Under the new test, "a given sentence [could] be said to constitute an abuse of discretion if that sentence violate[d] the principle of proportionality, which require[d] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. at 636. Accordingly, trial courts were required to impose a sentence that took "into account the nature of the offense and the background of the offender." *Id*. at 651.

With regard to the judicial sentencing guidelines, the Court stated:

> The guidelines represent the actual sentencing practices of the judiciary, and we believe that the second edition of the sentencing guidelines is the best "barometer" of where on the continuum from the least to the most threatening circumstances a given case falls.
>
> . . . We note that departures [from the guidelines] are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. . . . To require strict adherence to the guidelines would effectively prevent their evolution, and, for this reason, trial judges may continue to depart from the guidelines when, in their judgment, the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime. [*Id*. at 656-657.]

The Court also provided the following guidance for appellate courts reviewing a departure from the guidelines:

> Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guide-

> lines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. [*Id*. at 659-660.]

Factors previously considered by Michigan courts under the proportionality standard included, among others, (1) the seriousness of the offense, *People v Houston*, 448 Mich 312, 321; 532 NW2d 508 (1995); (2) factors that were inadequately considered by the guidelines, *id*. at 324; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, *id*. at 323; *Milbourn*, 435 Mich at 660, the defendant's misconduct while in custody, *Houston*, 448 Mich at 323, the defendant's expressions of remorse, *id*., and the defendant's potential for rehabilitation, *id*.

The "principle of proportionality" previously employed by Michigan appellate courts is consistent with the standard of review employed by federal courts after *Booker*.[19] We conclude that reinstating the previous standard of review in Michigan as the means of determining the reasonableness of a sentence, is preferable to adopting the analysis utilized by the federal courts

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[19] Justice MARKMAN noted in his *Lockridge* dissent that the post-severability analysis standard utilized by the United States Supreme Court under *Booker*, 543 US at 246, is consistent with Michigan's previous standard of review under *Milbourn*, 435 Mich at 636. *Lockridge*, 498 Mich at 462 n 40 (MARKMAN, J., dissenting). This conclusion is further supported by the fact that the Sixth Circuit and other circuits have "applied a proportionality principle based on at least two of the § 3553(a) factors . . . ." *United States v Poynter*, 495 F3d 349, 352 (CA 6, 2007); see also *id*. at 355-359.

and is also most consistent with the Supreme Court's directives in *Lockridge*. Unlike the federal district courts, Michigan trial courts are not procedurally required to expressly consider all of the factors listed in 18 USC 3553(a). For example, unlike federal courts, Michigan courts are not expressly required to consider sentences imposed in other cases in order to weigh "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]" 18 USC 3553(a)(6).[20] Instead, under *Lockridge*, sentencing courts are only required "to consult the applicable guidelines range and take it into account when imposing a sentence" and "justify" the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392. It would be unworkable to expect this Court to review a sentence for an abuse of discretion based on the factors in § 3553(a) when the trial court was not required to expressly consider those factors in determining the sentence imposed. Moreover, unlike the United States Sentencing Commission, the Legislature does not issue policy statements under the statutory sentencing scheme, MCL 777.1 *et seq*., so that it is effectively impossible for a trial court or this Court to consider a factor analogous to § 3553(a)(5) to determine whether a sentence is reasonable. Furthermore, although the majority opinion in *Lockridge* expressly cites *Booker*, 543 US at 261, the opinion includes no discussion of § 3553(a), and the significant role of that statutory provision, in the analysis employed by federal appellate courts to determine the reasonableness of a sentence. See *Lockridge*, 498 Mich at 392. Therefore, we hold that a sentence that fulfills the principle of

[20] See also *United States v Begin*, 696 F3d 405, 413-414 (CA 3, 2012) (explaining that a federal district court erred by failing to consider the defendant's argument regarding § 3553(a)(6)).

proportionality under *Milbourn*, and its progeny, constitutes a reasonable sentence under *Lockridge*.

Lockridge overturned the substantial and compelling reason standard for departures, *id*. at 392, which was in place at the time of defendant's sentencing. Given our conclusion that the principle of proportionality established under *Milbourn*, and its progeny, is now the appropriate standard by which a defendant's sentence should be reviewed, we find that the procedure articulated in *Lockridge*, which is modeled on the procedure adopted in *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005), should apply here. *Lockridge*, 498 Mich at 395-399. As recently stated by this Court in *People v Stokes*, 312 Mich App 181, 200-201; 877 NW2d 752 (2015), "the purpose of a *Crosby* remand is to determine what effect *Lockridge* would have on the defendant's sentence so that it may be determined whether any prejudice resulted from the error." While the *Lockridge* Court did not explicitly hold that the *Crosby* procedure applies under the circumstances of this case, we conclude that this is the proper remedy when, as in this case, the trial court was unaware of, and not expressly bound by, a reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing.

"[T]he *Crosby* procedure offers a measure of protection to a defendant. As the first step of this procedure, a defendant is provided with an opportunity 'to avoid resentencing by promptly notifying the trial judge that resentencing will not be sought.' " *Stokes*, 312 Mich App at 201, quoting *Lockridge*, 498 Mich at 398. Given the possibility that defendant could receive a more severe sentence, defendant should be provided the opportunity to avoid resentencing if that is his desire. *Stokes*, 312 Mich App at 202. Accordingly, we remand

this matter to the trial court to follow the *Crosby* procedure outlined in *Lockridge*. Defendant "may elect to forgo resentencing by providing the trial court with prompt notice of his intention to do so. If 'notification is not received in a timely manner,' the trial court shall continue with the *Crosby* remand procedure as explained in *Lockridge*." *Stokes*, 312 Mich App at 203, quoting *Lockridge*, 498 Mich at 398.

We affirm defendant's convictions, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

WILDER, P.J., and OWENS and M. J. KELLY, JJ., concurred.

COVENANT MEDICAL CENTER, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 322108. Submitted October 13, 2015, at Lansing. Decided October 22, 2015, at 9:05 a.m. Leave to appeal granted 499 Mich 941.

Covenant Medical Center, Inc., brought an action in the Saginaw Circuit Court against State Farm Mutual Automobile Insurance Company, alleging that State Farm had unreasonably refused to pay $43,484.80 for medical services rendered to State Farm's insured, Jack Stockford, after he was injured in a motor vehicle accident in 2011. Covenant had billed State Farm for those services, and State Farm responded to the bills in writing in November 2012. On April 2, 2013, however, Stockford entered into a written agreement with State Farm that in exchange for the payment of $59,000 purported to release State Farm from liability regarding all claims incurred through January 10, 2013, as a result of the 2011 accident. Accordingly, State Farm moved for summary disposition, arguing that Covenant's claims were barred by the settlement payments from State Farm to Stockford and the release he signed as part of that settlement. The court, Robert L. Kaczmarek, J., agreed and granted State Farm summary disposition. Covenant appealed.

The Court of Appeals *held*:

MCL 500.3112, part of the no-fault act, MCL 500.3101 *et seq*., provides generally that personal protection insurance benefits are payable to or for the benefit of an injured person. An insurer's good-faith payment of personal protection insurance benefits to or for the benefit of a person the insurer believes is entitled to the benefits discharges its liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. Therefore, if the insurer has written notice of a third party's claim, the insurer cannot discharge its liability to the third party simply by settling with its insured. Such a payment would not be in good faith because the insurer was aware of a third party's right and sought to extinguish it without providing notice to the affected third party. Instead, MCL 500.3112 requires that the insurer apply to the circuit court for an appropriate order directing how the no-fault benefits should be

allocated, which did not happen in this case. Because State Farm had written notice of Covenant's claim, State Farm's payment to Stockford did not discharge its liability to Covenant.

Reversed and remanded.

Miller Johnson (by *Thomas S. Baker* and *Christopher J. Schneider*) for plaintiff.

Smith Bovill, PC (by *Andrew D. Concannon*), for defendant.

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM. Plaintiff, Covenant Medical Center, Inc., appeals by right the circuit court's order granting summary disposition to defendant, State Farm Mutual Automobile Insurance Company, under MCR 2.116(C)(7) (claim barred by release). For the reasons stated in this opinion, we reverse.

In 2011, State Farm's insured, Jack Stockford, was injured in a motor vehicle accident. In 2012, Covenant Medical provided medical services to Stockford for the injuries he sustained. Covenant Medical billed State Farm $43,484.80 for those services, sending bills in July, August, and October 2012. In November 2012, State Farm responded to the bills in writing. Subsequently, on April 2, 2013, in exchange for payment of $59,000, Stockford entered into a written agreement with State Farm that purported to release State Farm from liability "regarding all past and present claims incurred through January 10, 2013," as a result of the 2011 accident.

Thereafter, Covenant Medical filed the instant action, alleging that State Farm had unreasonably refused to pay $43,484.80 for the medical services rendered to Stockford. State Farm moved for sum-

mary disposition, arguing that Covenant Medical's claims were barred by the settlement payments from State Farm to Stockford and the release signed by him as part of that settlement. The trial court concluded that the release barred Covenant Medical's claims and granted summary disposition in favor of State Farm.

On appeal, Covenant Medical argues that because it provided written notice to State Farm regarding the medical services provided to Stockford, it is entitled to pursue the $43,484.80, along with penalties, interests, and costs.[1] We agree.

Resolution of the issue involves the application of MCL 500.3112. "The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (quotation marks and citations omitted). "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Id*. (citations omitted). "If the plain and ordinary meaning of the language of the statute is clear, judicial construction is inappropriate." *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 37; 645 NW2d 59 (2002). "When construing a statute, a court must read it as a whole." *Klooster v City of Charlexvoix*, 488 Mich 289, 296; 795 NW2d 578 (2011).

MCL 500.3112 provides in pertinent part:

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[1] We review de novo a trial court's decision on a motion for summary disposition. *Sholberg v Truman*, 496 Mich 1, 6; 852 NW2d 89 (2014). "Questions of statutory interpretation are also reviewed de novo." *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013).

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in the case of his death, to or for the benefit of his dependents. *Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person*. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. [Emphasis added.]

MCL 500.3112 provides that if the insurer does not have notice in writing of any other claims to payment for a particular covered service, then a good-faith payment to its insured is a discharge of its liability for that service. However, the plain text of the statute provides that if the insurer has notice in writing of a third party's claim, then the insurer cannot discharge its liability to the third party simply by settling with its insured. Such a payment is not in good faith because the insurer is aware of a third party's right and seeks to extinguish it without providing notice to the affected third party. Instead, the statute requires that the insurer apply to the circuit court for an appropriate order directing how the no-fault benefits should be allocated. That was not done in this case. Accordingly, under the plain language of the statute, because State Farm had notice in writing of Covenant Medical's claim, State Farm's payment to Stockford did not discharge its liability to Covenant Medical.

State Farm relies on *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442;

830 NW2d 781 (2013). However, the rule applied in that case does not apply here. The issue presented in *Mich Head & Spine* was "whether an insured's release bars a healthcare provider's claim for payment for medical services rendered to the insured *after the release was executed*." *Id*. at 448 (emphasis added). The circumstances presented in *Mich Head & Spine* did not implicate MCL 500.3112, while the instant case does. When the relevant services were rendered and the insurer received notice of the provider's claim *before* the settlement occurred, the payment and release do not extinguish the provider's rights.

State Farm also relies on *Moody v Home Owners Ins Co*, 304 Mich App 415; 849 NW2d 31 (2014). *Moody* made it clear that a provider's right to no-fault benefits is based on the insured's right to benefits. *Id*. at 442-443. However, it is also well settled that a medical provider has independent standing to bring a claim against an insurer for the payment of no-fault benefits. *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 396-397; 864 NW2d 598 (2014); *Moody*, 304 Mich App at 440; *Mich Head & Spine*, 299 Mich App at 448 n 1; *Lakeland Neurocare*, 250 Mich App at 42-43; *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719, 733; 650 NW2d 129 (2002). And while a provider's right to payment from the insurer is created by the right of the insured to benefits, an insured's agreement to release the insurer in exchange for a settlement does not release the insurer with respect to the provider's noticed claims unless the insurer complies with MCL 500.3112. This is implicitly recognized in the text of the release itself, which provides that Stockford agreed to "indemnify, defend and hold harmless" State Farm "from any liens or demands made by any provider, . . . including . . . Covenant Medical . . . , for payments

made or services rendered . . . in connection with any injuries resulting" from the accident.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ., concurred.

AUTO-OWNERS INSURANCE COMPANY v DEPARTMENT OF TREASURY

Docket No. 321505. Submitted September 10, 2015, at Detroit. Decided October 27, 2015, at 9:00 a.m.

Auto-Owners Insurance Company brought an action in the Court of Claims against the Department of Treasury, seeking a refund of tax levied under the Use Tax Act (UTA), MCL 205.91 *et seq*., in connection with a series of contracts it had entered into with various third-party companies. The main categories of the contracts included (1) insurance-industry-specific contracts, (2) technology and communications contracts, (3) online research contracts, (4) payment remittance and processing support contracts, (5) equipment maintenance and software customer support contracts, and (6) marketing and advertising contracts. The dispute centered on whether the contracts involved the delivery of prewritten computer software, which is tangible personal property subject to the use tax under MCL 205.93(1). The court, MICHAEL J. TALBOT, J., granted plaintiff summary disposition after concluding that the transactions were not subject to use tax because the software involved had not been delivered. The court concluded (1) that the software had remained on third-party servers and what was transferred to plaintiff was instead information processed using the third-party's software, hardware, and infrastructure, (2) that even if prewritten computer software had been delivered to plaintiff, plaintiff did not exercise the requisite use to subject that software to the use tax because plaintiff had no control over the underlying software that the third-party companies used to complete their tasks and was only able to input data in order to control outcomes, and (3) that even if software had been delivered to and used by plaintiff, that use was merely incidental to the services rendered by the third-party companies and could not render the overall transactions subject to the use tax. The court ordered a refund of the taxes, and defendant appealed.

The Court of Appeals *held*:

1. Under MCL 205.93(1), the use tax is levied for the privilege of using, storing, or consuming tangible personal property in

Michigan. MCL 205.92(b) defines "use" as the exercise of a right or power over tangible personal property incident to the ownership of that property, including the transfer of the property in a transaction in which possession is given. The key feature is whether the party had some level of control over the tangible personal property. MCL 205.92(k) defines "tangible personal property" as personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. It includes "prewritten computer software," which is defined by MCL 205.92b(o) as computer software, including prewritten upgrades, that is delivered by any means and is not designed and developed by the author or other creator to the specifications of a specific purchaser. Under MCL 205.92b(c), "computer software" is a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task. For purposes of determining whether prewritten computer software was delivered, the UTA requires that it be conveyed or handed over by any means. Therefore, the transactions at issue in this case were taxable under the UTA if plaintiff exercised control over a set of coded instructions that was conveyed or handed over by any means and was not designed and developed by the author or other creator to the specifications of a specific purchaser.

2. The Court of Claims incorrectly determined that all the software involved remained on third-party servers. To the contrary, a desktop agent was installed on plaintiff's computers with regard to one contracting party, and in another instance plaintiff used third-party software that ran locally on plaintiff's computers. In addition, the Court of Claims improperly narrowed the scope of the term "deliver" to preclude electronic delivery. However, the Court of Claims correctly determined that the mere transfer of information and data that was processed using the software of the third-party businesses did not constitute the delivery of prewritten computer software by any means. In that situation, no prewritten computer software was delivered; instead, only data resulting from third-party use of software was delivered.

3. The majority of the transactions in this case were not taxable under the UTA because they did not involve the delivery of prewritten computer software by any means. Generally, plaintiff accessed the code in such a limited manner that it did not signify ownership or had no access to the code at all. Plaintiff accessed websites that allowed it to submit requests. The code remained on the third-party's server, and the third party con-

trolled it, maintained it, and updated it as the third party saw fit. With respect to one company, no code of any sort was involved. Some of plaintiff's transactions involved software maintenance; those transactions were not subject to taxation under the UTA because they involved the provision of services, rather than the delivery of prewritten computer software.

4. Plaintiff did have prewritten computer software, print materials, and flash and thumb drives delivered to it in connection with several of the transactions. Furthermore, plaintiff exercised an ownership-type right or power over that tangible personal property by taking possession of it, physically installing the software on its computers, and using the software, print materials, and drives as it wished. Those transfers of tangible personal property occurred during the rendering of professional services, however. The test for determining whether a business relationship that involves both the transfer of personal property and the provision of services constitutes a nontaxable service or a taxable property transaction is the incidental-to-service test, which objectively examines the entire transaction to determine whether the transaction was principally a transfer of tangible personal property or the provision of a service. To determine whether the transfer of tangible personal property was incidental to the rendering of professional services for purposes of the UTA, the court should examine (1) what the buyer sought as the object of the transaction, (2) what the seller or service provider was in the business of doing, (3) whether the goods were provided as a retail enterprise with a profit-making motive, (4) whether the tangible goods were available for sale without the service, (5) the extent to which intangible services contributed to the value of the physical item that was transferred, and (6) any other factors relevant to the particular transaction. The first five factors encompassed the main features of each transaction in this case, and no other factors were relevant. Considering all the factors together, the transfer of tangible personal property was incidental to the services that plaintiff received. Therefore, the transactions were not taxable under the UTA, and the trial court did not err by granting plaintiff's motion for summary disposition.

Affirmed.

1. TAXATION — USE TAX — TANGIBLE PERSONAL PROPERTY — PREWRITTEN COMPUTER SOFTWARE.

The Use Tax Act, MCL 205.91 *et seq*., is designed to cover actions that are not covered under the General Sales Tax Act, MCL 205.51 *et seq*.; under MCL 205.93(1), the use tax is levied for the

privilege of using, storing, or consuming tangible personal property in Michigan; MCL 205.92(b) defines "use" as the exercise of a right or power over tangible personal property incident to the ownership of that property, including the transfer of the property in a transaction in which possession is given; the key feature is whether the party had some level of control over the tangible personal property; MCL 205.92(k) defines "tangible personal property" as personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses; it includes "prewritten computer software," which is defined by MCL 205.92b(o) as computer software, including prewritten upgrades, that is delivered by any means and is not designed and developed by the author or other creator to the specifications of a specific purchaser; under MCL 205.92b(c), "computer software" is a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task; for purposes of determining whether prewritten computer software was delivered, the act requires that it be conveyed or handed over by any means.

2. TAXATION — USE TAX — TANGIBLE PERSONAL PROPERTY — PROVISION OF SERVICES — INCIDENTAL-TO-SERVICE TEST.

Under MCL 205.93(1), part of the Use Tax Act, MCL 205.91 *et seq*., the use tax is levied for the privilege of using, storing, or consuming tangible personal property in Michigan; MCL 205.92(b) defines "use" as the exercise of a right or power over tangible personal property incident to the ownership of that property, including the transfer of the property in a transaction in which possession is given; if a business relationship involves both the transfer of personal property and the provision of services, the test for determining whether it constitutes a service that is not taxable under the Use Tax Act or a taxable property transaction is the incidental-to-service test, which objectively examines the entire transaction to determine whether the transaction was principally a transfer of tangible personal property or the provision of a service; to determine whether the transfer of tangible personal property was incidental to the rendering of professional services, the court should examine (1) what the buyer sought as the object of the transaction, (2) what the seller or service provider was in the business of doing, (3) whether the goods were provided as a retail enterprise with a profit-making motive, (4) whether the tangible goods were available for sale without the service, (5) the extent to which intangible services contributed to the value of the physical item that was transferred, and (6) any other factors relevant to the particular transaction.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *June Summers Haas*, and *Brian T. Quinn*) for Auto-Owners Insurance Company.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Scott L. Damich*, Assistant Attorney General, for the Department of Treasury.

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

PER CURIAM. Defendant appeals as of right a final order for the refund of use taxes. We affirm.

I. FACTS

Plaintiff is a Michigan corporation headquartered in Lansing, Michigan. Plaintiff provides insurance services and is represented by more than 35,000 independent agents in 26 states. Plaintiff entered into a variety of contracts between December 1, 2006, and December 31, 2010. Many of these contracts used complex and modern computing arrangements between plaintiff and the third-party companies, which led to the instant controversy regarding whether these contracts were subject to Michigan's Use Tax Act (UTA), MCL 205.91 *et seq*. The six main categories of contracts include (1) insurance industry specific contracts, (2) technology and communications contracts, (3) online research contracts, (4) payment remittance and processing support contracts, (5) equipment maintenance and software customer support contracts, and (6) marketing and advertising contracts.

A. INSURANCE INDUSTRY SPECIFIC CONTRACTS

Plaintiff entered into six contracts in this category. First, plaintiff entered into a contract to use the

services of Marshall & Swift/Boeckh (MSB). MSB provides building information to plaintiff. Plaintiff's agents submit building factors to MSB through the Internet. MSB then analyzes the data and provides plaintiff a valuation number to aid it in determining the appropriate value for building insurance. There is no indication in the record that plaintiff used MSB's software or had MSB software on its computers during the years at issue. Plaintiff also entered into a contract to use the services of Valen Technologies, Inc. Valen provides services to help plaintiff evaluate risks and underwrite insurance policies. Valen works with plaintiff to develop a model specifically tailored to plaintiff. With regard to the model, an agent for plaintiff enters information and data on the Internet through plaintiff's custom interface. The data is submitted to Valen, which runs the data through the model. The result is a score from 1 to 20, with 1 representing the best account to underwrite and 20 representing the worst account to underwrite. Valen operates its own software to run the model, and plaintiff did not receive, license, or have access to Valen's software.

Plaintiff also contracted with the Association for Cooperative Operations Research and Development (ACORD), which is a nonprofit organization that aids in the development of open consensus data standards and standard insurance forms. ACORD provides national insurance standards that create a common coding system for data fields in insurance data transmissions. The ACORD standards create the ability to employ a standard format for the flow of information to and from insurance agencies and to governmental agencies. Plaintiff paid a membership fee to ACORD during the tax years at issue and received ACORD's data standards. According to plaintiff, it did not purchase, receive, or license software from ACORD.

Plaintiff also contracted with CoreLogic's Proxix Solutions (Proxix) with regard to its business in Kentucky. Proxix provides a geospacial system that identifies and verifies the municipality in which a specific piece of property is located. In response to a database query, plaintiff provides longitude and latitude information to Proxix. Proxix verifies and identifies where property is located. Plaintiff also contracted with IVANS, Inc., which is an electronic communication service that aids in managing the confidentiality of data. This system allows parties using different technology infrastructures to communicate. IVANS uses a data exchange service to translate data from plaintiff to an agent system while plaintiff and the agent system use their own technology infrastructure. When an agency writes a new automobile insurance policy, the agency compiles information on its computers, and then that information is sent via the IVANS data exchange system to plaintiff. Plaintiff uses the same secured data line to send back the information that comprises the policy report. Plaintiff uses the IVANS system by sending encrypted data to an IP (Internet protocol) address. Plaintiff also uses the IVANS system to report information to governmental agencies, including delivering automobile policy information to whichever department in a state is involved with registering and licensing motor vehicles. Plaintiff did not receive or download any software in regard to its use of the IVANS system.

Plaintiff also used Lexis-Nexis Choicepoint, which provides data on motor vehicle records and sends electronic notices regarding motor vehicle coverage to secured parties. With regard to the data program, an independent agent inputs information over the Internet or uses an electronic form to conduct a search. Plaintiff's computer system then sends data to Lexis-

Nexis, which uses its in-house database to provide more detailed information to plaintiff. Plaintiff then forwards the results to the independent agent. Plaintiff cannot access the database. Only plaintiff sent data to Lexis-Nexis, and Lexis-Nexis delivered information on the basis of the input data. With regard to the electronic notices, Lexis-Nexis provides a web-based electronic mailing service. Plaintiff collects information and sends the information through an FTP (file transfer protocol) to Lexis-Nexis. Lexis-Nexis uses the information to send notices to secured parties or lienholders.

B. TECHNOLOGY AND COMMUNICATIONS

Plaintiff entered into two contracts that fall under this category. The first contract was with Cisco WebEx, LLC (WebEx). WebEx provides videoconferencing services, webinar services, and online-meeting services. The services work through a link to WebEx's website. According to plaintiff, there was no licensing involved, and only the meeting organizer was required to have a license. WebEx also provides a support center, which several members of plaintiff's Automation Support Unit downloaded. The support center is downloaded through a click box, which opens a session on the user's computer and works with WebEx in fixing any problems.

Plaintiff also contracted with LogMeIn, which provides remote access so that an employee can work on a home computer as if the employee were sitting at his or her desk at work. The employee accesses LogMeIn through a website or a portal hosted by LogMeIn and inputs a password. In order for the system to work, an incidental local client, or desktop agent, must be installed locally on each personal computer using the

system. LogMeIn also provides thumb and flash drives that can be used to access the system from a third-party computer. According to plaintiff, it did not receive any additional property or software from LogMeIn.

C. ONLINE RESEARCH

Plaintiff also contracted with West, a Thomson Reuters business, to conduct legal research by using its online database service. West provides its services through the Internet, and plaintiff did not receive any disks or software from West. Plaintiff also contracted with Wolters Kluwer for an online subscription to Insource Services (NILS). The subscription includes insurance-specific laws, filing guidelines, attorneys general opinions, and bulletins. The online services are housed with Wolters Kluwer, and not with plaintiff. Although plaintiff received a portion of the NILS materials (excluding insurance filing guidelines) in book and print materials, it argues that it subscribed with the intention of obtaining online access, not the printed materials.

D. PAYMENT REMITTANCE AND PROCESSING SUPPORT

Plaintiff contracted with RT Lawrence (RTL) for payment-processing services. RTL's system uses scanners to capture images of checks and stubs, and software to validate data and compare amounts. RTL's software was loaded onto plaintiff's computers. The software uses plaintiff's scanners to process information. The scanners capture images of both the check and the stub and use plaintiff's internal codes to minimize user verification by comparing amounts and validating data. Plaintiff also contracted for support and maintenance of the scanners, training, and cus-

tomer support. According to plaintiff, the transaction that was taxed was solely for software maintenance and support.

E. EQUIPMENT MAINTENANCE AND SOFTWARE CUSTOMER SUPPORT

Plaintiff also contracted with several companies with regard to software it had already purchased, including with Data Center Management Systems, Duck Creek, GT Software, and Software AG USA. Plaintiff contends that all the transactions that were taxed involved support and maintenance of existing software. The invoice that Data Center sent to plaintiff states that plaintiff was billed for maintenance. The invoice related to Duck Creek provides that plaintiff was billed for maintenance. The invoice at issue with regard to GT Software indicates that plaintiff was billed a "Software Fee" in relation to a software upgrade. However, the contract between plaintiff and GT Software provides that 12% of the software licensing fee is for maintenance and support. Plaintiff sought a refund for the use tax paid on the amount that constituted maintenance and support. Software AG's invoices do not clarify whether Software AG billed plaintiff for software or for maintenance. However, the contract between Software AG and plaintiff provides that $73,210 of the software price is for technical services. Plaintiff sought a refund for the taxes paid on this amount.[1]

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[1] There were a number of other transactions in this category. However, neither party discusses on appeal the other transactions in this category. Plaintiff argues that all the transactions in this category involved support and maintenance of existing software. Defendant does not challenge this assertion with regard to the transactions that the parties do not mention on appeal. Therefore, to the extent that defendant challenges any other transactions in this category, defendant has

F. MARKETING AND ADVERTISING

Plaintiff also entered into several contracts with marketing and advertising companies, including Third Person Creative (TPC), Harvest Music and Soundde-sign, and Main Media Marketing (MMM). TPC reviewed plaintiff's marketing prices and provided ideas related to branding. TPC also provided marketing strategies, conducted investigations, and provided ideas for advertisements. Harvest wrote and produced commercials for plaintiff. Plaintiff received digital files containing the commercials. MMM established websites and developed search engine optimization queries for plaintiff. MMM also hosted websites and implemented a pilot program on the Internet for plaintiff.

II. PROCEDURAL HISTORY

Defendant conducted a use-tax audit of plaintiff covering December 1, 2006, to December 31, 2010. The auditors determined two bases for use tax liability: (1) fixed-asset purchase and (2) expense items by looking at purchases. The auditors reviewed the fixed-asset purchases for the entire audit period. In regard to expense items, the auditors used a block sampling method with 2010 as the sample year. On March 28, 2012, defendant issued a bill for taxes due and assessed a use-tax deficiency and interest totaling $871,625.24. Plaintiff paid the amount due, as well as additional interest, under protest.

On June 29, 2012, plaintiff filed a complaint in the Court of Claims, seeking a refund of the use tax paid to

abandoned the argument on appeal. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008) (" '[A]n appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.' ") (citation omitted).

defendant. Plaintiff asserted (1) that the products were not prewritten computer software, (2) that under *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004), any software involved was incidental to the services the products provided, (3) that defendant unlawfully assessed Michigan use tax on transactions subject to Michigan sales tax, and (4) that defendant used improper audit methods. After discovery was conducted, plaintiff moved for summary disposition under MCR 2.116(C)(10). Defendant filed a response, arguing that plaintiff was not entitled to summary disposition and that summary disposition in favor of defendant was proper under MCR 2.116(I)(2).

The Court of Claims granted plaintiff's motion for summary disposition under MCR 2.116(C)(10). The Court of Claims first determined that the transactions were not subject to use tax because the software involved in the case was not "delivered by any means." Focusing on the dictionary definition of the word "deliver," the Court of Claims held that the software was not "handed over, left, or transferred" to plaintiff because any software remained on the third-party's server and what was transferred to plaintiff was information that had been processed using the third-party's software, hardware, and infrastructure. The Court of Claims also noted that the Legislature could not have contemplated the transactions involved because on the effective date of the relevant statute, September 1, 2004, software was delivered electronically or physically and the court would have to extend the construction of the phrase "delivered by any means" in order to include remote access technology. The Court of Claims next held that even if "prewritten computer software" was "delivered" to plaintiff, defendant's assessment would still be invalid because plaintiff did not exercise the requisite "use" to subject the software to Michi-

gan's use tax. The court held that plaintiff had no control over the underlying software used by the third-party companies to complete the necessary tasks. Instead, plaintiff was only able to input data in order to control outcomes.

The court next held that even if "prewritten computer software" was "delivered" to and "used" by plaintiff, that use was merely incidental to the services rendered by the third-party providers and would not subject the overall transactions to use tax. The court did not address plaintiff's argument that it cannot be held responsible for use tax simply because the sales took place within Michigan or plaintiff's argument challenging defendant's audit methods. The Court of Claims also entered a final order for the refund of taxes.

III. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Williams v Enjoi Transp Solutions*, 307 Mich App 182, 185; 858 NW2d 530 (2014). "In reviewing a grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. Summary disposition is appropriate when there is no genuine issue of material fact and the party moving for summary disposition is entitled to judgment as a matter of law. *Id*.

The UTA is analyzed under the general rules of statutory interpretation. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). We review de novo issues of statutory interpretation. *Id*. at 135-136. We construe a statute in order to determine and give effect to the Legislature's

intent. *Id*. at 136. "The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 303 Mich App 441, 447; 844 NW2d 727 (2013), aff'd 497 Mich 337 (2015). "If the language employed by the Legislature is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and this Court must enforce the statute as written." *Ameritech Publishing*, 281 Mich App at 136. "Tax laws will not be extended in scope by implication or forced construction." *Id*. An ambiguity in a tax law is construed in favor of the taxpayer. *Id*.

IV. USE OF PREWRITTEN COMPUTER SOFTWARE

Defendant argues that the Court of Claims erred when it determined that the transactions were not taxable under the UTA. We disagree.

The UTA is designed to cover transactions that are not covered under the General Sales Tax Act (GSTA), MCL 205.51 *et seq*. *WPGP1, Inc v Dep't of Treasury*, 240 Mich App 414, 416; 612 NW2d 432 (2000). "A sales-use tax scheme is designed to make all tangible personal property, whether acquired in, or out of, the state subject to a uniform tax burden. Sales and use taxes are mutually exclusive but complementary, and are designed to exact an equal tax based on a percentage of the purchase price of the property in question." *Catalina*, 470 Mich at 19 n 3 (citation and quotation marks omitted). The use tax is levied "for the privilege of using, storing, or consuming tangible personal property" in Michigan. MCL 205.93(1). The use tax is assessed "at a total combined rate equal to 6% of the price of the property or services . . . ." *Id*.

"Use" is defined in the UTA as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." MCL 205.92(b). The UTA does not explain what a right or power incident to ownership of tangible personal property entails. However, this Court has held that the key feature in determining whether a party exercised a right or power over tangible personal property is whether the party had some level of control over that property. See *WPGP1*, 240 Mich App at 417-419 (noting that the plaintiff did not "use" the airplanes under the meaning of the term in the UTA since the plaintiff did not have control over them).

"Tangible personal property" is defined as "personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and *prewritten computer software*." MCL 205.92(k) (emphasis added). The UTA defines "prewritten computer software" as "computer software, including prewritten upgrades, *that is delivered by any means* and that is not designed and developed by the author or other creator to the specifications of a specific purchaser." MCL 205.92b(o) (emphasis added). Finally, the UTA defines "computer software" as "a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task." MCL 205.92b(c).

The UTA does not define the term "deliver." However, this Court may consult a dictionary definition to determine the plain and ordinary meaning of a term. *Aroma Wines*, 303 Mich App at 447.[2] *Merriam-Webster's Colle-*

[2] We disagree with defendant's assertion that the meaning of the term "deliver" is readily discernable from reading the statute itself. Plaintiff

giate Dictionary (11th ed) defines the term "deliver," in relevant part, as "to take and hand over to or leave for another : CONVEY[.]" The UTA, therefore, requires that the prewritten computer software be conveyed or handed over by any means. See MCL 205.92b(o). Therefore, the transactions at issue in this case were taxable under the UTA if plaintiff exercised control over a set of coded instructions that was conveyed or handed over by any means and was not designed and developed by the author or other creator to the specifications of a specific purchaser. See MCL 205.92(k); MCL 205.92b(c) and (o).

We first note that the Court of Claims incorrectly determined that all the software remained on a third-party server. The Court of Claims focused its analysis on the phrase "that is delivered by any means" in the definition of "prewritten computer software," holding that this phrase created a requirement that the software be "delivered" (i.e., handed over, left, or transferred). The court held that no software was ever delivered because all the software remained on the third-party servers, and what was transferred to plaintiff was information that had been processed using the third-party's software, hardware, and infrastructure. However, a desktop agent was installed on each computer with regard to LogMeIn, and RTL used software that ran locally on plaintiff's computers. Therefore, the Court of Claims erred to the extent that it found that all the software was located on third-party servers.

In addition, the Court of Claims applied a narrow definition of the term "deliver" without examining how

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and defendant dispute whether the term "deliver" includes accessing the functionality of prewritten computer software, and the statute does not clarify this point. Therefore, the plain and ordinary meaning of the term is unclear, and it is proper to consult a dictionary to determine the plain and ordinary meaning. See *Aroma Wines*, 303 Mich App at 447.

the term operates in the broader context in which it is placed in the statute. The meaning of language cannot be divorced from the context in which it is found. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 508; 866 NW2d 817 (2014) (" 'Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.' ") (citation omitted). The phrase "delivered by any means" indicates that the Legislature was aware that software could be purchased at a store and "delivered" by tangible storage media or purchased online and "delivered" electronically. See MCL 205.92b(o). By using the word "any," the Legislature made plain that the means by which the software is delivered is immaterial. Therefore, the Court of Claims improperly narrowed the scope of the term "deliver" to preclude electronic delivery. See MCL 205.92b(o); *Rental Props*, 308 Mich App at 508. However, the Court of Claims correctly determined that the mere transfer of information and data that was processed using the software of the third-party businesses did not constitute delivery by any means of prewritten computer software. See MCL 205.92b(o). In that situation, no prewritten computer software is delivered, and only data resulting from third-party use of software is delivered. See *id*.

The majority of the transactions in this case were not taxable under the UTA because they did not involve the delivery of prewritten computer software by any means. With regard to West, plaintiff never exercised an ownership-type right or power over any West computer software. Instead, all the code remained on West's server. West controlled the code, maintained it, and updated it as it saw fit. Plaintiff only accessed a website that allowed it to submit

requests to the West system that controlled the code. Accessing West's code in such a limited manner is not an exercise of a right or power over the code incident to the ownership of that code because accessing the code in such a limited manner does not signify ownership. Therefore, plaintiff did not use tangible personal property with regard to West. See MCL 205.92(b); MCL 205.92b(o); *WPGP1*, 240 Mich App at 417-419.

The same is true for the online services provided by Wolters Kluwer. Plaintiff accessed the Wolters Kluwer system via a web browser, and plaintiff never had access to any of the code that enabled the Wolters Kluwer website and its features. Therefore, plaintiff never used prewritten computer software from Wolters Kluwer under the meaning of the UTA. See MCL 205.92(b); MCL 205.92b(o).[3] However, plaintiff did receive print materials from Wolters Kluwer, which constitutes tangible personal property. See MCL 205.92(k). Plaintiff exercised a right over the print materials incident to ownership since plaintiff received the print materials from Wolters Kluwer, had possession over them, and was able to use them at will. Therefore, plaintiff used tangible personal property under the meaning of the UTA in connection with the print materials. See MCL 205.92(b); *WPGP1*, 240 Mich App at 417-419.

In regard to MSB, plaintiff's computer system sent data electronically to MSB, MSB processed the data,

[3] Defendant determined that the transactions involved prewritten computer software on the basis of the contracts between plaintiff and the third-party companies. However, the agreements do not establish that prewritten computer software was delivered. Instead, to the extent that the agreements provide for the delivery of prewritten computer software, the agreements only contemplate the delivery on a future date and do not indicate that prewritten computer software was delivered on the dates that the agreements were signed. See MCL 205.92b(o).

and then MSB sent back a number indicating the appropriate value for the building insurance. Under this arrangement, plaintiff never had access to any of the code that enabled MSB's system. The same is true for Valen. Plaintiff's computer system sent data electronically to Valen, Valen processed the data through its econometric model, and Valen returned a numerical score from 1 to 20 to plaintiff. Plaintiff never had access to any of the code that enabled Valen's system. Likewise, with Proxix, plaintiff queried the Proxix database for longitude and latitude information to identify the Kentucky municipality in which a specific Kentucky property was located. Plaintiff never had access to any of the code that enabled Proxix's system. Thus, plaintiff never used prewritten computer software with regard to these companies. See MCL 205.92(b); MCL 205.92b(o); *WPGP1*, 240 Mich App at 417-419.

Similarly, TPC reviewed plaintiff's marketing prices and provided ideas related to branding and advertising. Harvest wrote and produced commercials for plaintiff. MMM established websites and developed search engine optimization queries for plaintiff. MMM also hosted websites and implemented a pilot program on the Internet for plaintiff. None of the three marketing and advertising companies delivered prewritten computer software to plaintiff. Plaintiff never had access to any of the code that enabled the systems of TPC, MMM, or Harvest. Therefore, these transactions were not subject to taxation under the UTA. See MCL 205.92(b); MCL 205.92b(o).

With Lexis-Nexis, plaintiff's computer system sent data electronically to Lexis-Nexis, and Lexis-Nexis processed the data and then returned more detailed information to plaintiff. Plaintiff never had access to

any of the code that enabled the Lexis-Nexis system. As for sending notices to lienholders and secured parties, plaintiff uploaded a file to the Lexis-Nexis server, and then Lexis-Nexis processed that file and sent out the necessary notices. Under this arrangement, plaintiff likewise never had access to any of the code that enabled the Lexis-Nexis system. Therefore, plaintiff did not use tangible personal property under the meaning of the UTA with regard to Lexis-Nexis. See MCL 205.92(b); MCL 205.92b(o); *WPGP1*, 240 Mich App at 417-419.

Plaintiff never had access to any ACORD code because there is no ACORD code. The "data standards information" that ACORD provides is not "computer software" because it does not "cause a computer . . . to perform a task." MCL 205.92b(c). Rather, all plaintiff has is access to a list of standards that help it and the other ACORD members use a common coding system for their data fields. Similarly, plaintiff contracted with IVANS to use its secure communication infrastructure, which IVANS built and maintains. Plaintiff never had access to any code that enabled the IVANS system, and plaintiff used its own code to access the IVANS system. Therefore, plaintiff did not use tangible personal property under the meaning of the UTA with regard to IVANS and ACORD. See MCL 205.92(b); MCL 205.92b(o); *WPGP1*, 240 Mich App at 417-419.

Finally, plaintiff entered into a number of contracts with software companies to provide maintenance and support services. The transactions with Data Center and Duck Creek involved software maintenance. Defendant failed to present evidence in the Court of Claims showing that prewritten computer software was delivered to plaintiff in connection with the transactions with Data Center and Duck Creek. Instead,

plaintiff presented evidence that it contracted with the companies for software support and maintenance. Therefore, the support and maintenance transactions were not subject to taxation under the UTA since they involved the provision of services, rather than the delivery by any means of prewritten computer software. See MCL 205.92(b); MCL 205.92b(o). As noted, plaintiff conceded in its motion for summary disposition that the transactions involving GT Software and Software AG included the purchase of software. However, plaintiff argued that the invoices included amounts for maintenance and support, and plaintiff requested a refund with regard to these amounts. Plaintiff was entitled to a refund with regard to these amounts because the cost for maintenance and support was separately listed in the agreements between the parties and no prewritten computer software was delivered to plaintiff in exchange for the amount taxed for software maintenance and support. MCL 205.92(b); MCL 205.92b(o).

However, plaintiff received prewritten computer software that was delivered to it with regard to several of the transactions at issue in this case. With regard to WebEx, plaintiff purchased access to a network that is designed and used for web-conferencing. Plaintiff accessed the WebEx system via the WebEx website and never had access to any code that enabled the WebEx system. See MCL 205.92(b); MCL 205.92b(o). However, WebEx provided a support center, which was downloaded onto several computers and aided the user in fixing problems. The support center constituted computer software because it was a set of coded instructions designed to cause a computer or automatic data-processing equipment to perform a task. See MCL 205.92b(c). The prewritten computer software was delivered to plaintiff since it was downloaded onto

plaintiff's computers at plaintiff's request. See MCL 205.92b(o). Plaintiff had control over the control center when it used the program. It did not merely access the functionality of the software. See *id*. Therefore, plaintiff exercised an ownership-type right or power over the support center because the software was installed on plaintiff's computers and plaintiff was able to control when and how the software was used. See MCL 205.92(b); *WPGP1*, 240 Mich App at 417-419.

Plaintiff also used prewritten computer software provided by RTL. The software was delivered since plaintiff had actual possession of the software. Plaintiff ran the software on its own computers and used the software at its own will. Under these circumstances, plaintiff exercised an ownership-type right or power over the software from RTL by taking possession of the software, physically installing the software on its computers, and using the software as it wished. See MCL 205.92(b); MCL 205.92b(o); *WPGP1*, 240 Mich App at 417-419. Plaintiff did not merely access the functionality of the software. See *WPGP1*, 240 Mich App at 417-419. Plaintiff argues that defendant taxed the remaining balance on an invoice for maintenance of the RTL software, rather than for the software itself. RTL sent plaintiff an initial invoice with regard to the transaction at issue, and RTL later sent plaintiff an invoice for the remaining balance on the initial invoice. The first entry on the initial invoice was for software, and the remaining entries were for support. The invoice for the remaining balance did not separately list the amount owed for maintenance and support. Thus, the transaction at issue involved the delivery by any means of prewritten computer software since prewritten computer software was delivered to plaintiff, and there is no indication that the transaction that was

taxed only involved the provision of services. See MCL 205.92(b); MCL 205.92b(o); *WPGP1*, 240 Mich App at 417-419.

With regard to LogMeIn, plaintiff used a remote access agent that LogMeIn supplied and that was necessary to run locally on plaintiff's machines in order to access the network and its features. The local client, or desktop agent, was installed on each computer. The desktop agent constituted prewritten computer software because it included a set of coded instructions designed to cause the computer to perform a task. See MCL 205.92b(c). The software was delivered because plaintiff had actual possession of the desktop agent. Plaintiff used the software since it ran the software on its own computers and could control the software at its own will. See MCL 205.92(b); *WPGP1*, 240 Mich App at 417-419. Plaintiff also received a number of flash drives and thumb drives from LogMeIn, which also constitute tangible personal property. See MCL 205.92(k). Under these circumstances, plaintiff exercised an ownership-type right or power over tangible personal property by taking possession of the property, physically installing the software on its computers, and using the software and drives as it wished. See MCL 205.92(b). Therefore, plaintiff used the tangible personal property provided by LogMeIn under the meaning of the term in the UTA. See *id*.

V. INCIDENTAL-TO-SERVICE TEST

Although plaintiff exercised a right or power over tangible personal property, the transfer of tangible personal property occurred during the rendering of professional services. The test for determining whether a business relationship that involves both the transfer of personal property and the provision of

services constitutes a nontaxable service or a taxable property transaction is the incidental-to-service test. *Catalina*, 470 Mich at 24. "The 'incidental to service' test looks objectively at the entire transaction to determine whether the transaction is principally a transfer of tangible personal property or a provision of a service." *Id*. at 24-25. The Michigan Supreme Court in *Catalina* adopted the following six-factor test for determining whether the transfer of tangible personal property is incidental to the rendering of professional services:

> In determining whether the transfer of tangible property was incidental to the rendering of personal or professional services, a court should examine what the buyer sought as the object of the transaction, what the seller or service provider is in the business of doing, whether the goods were provided as a retail enterprise with a profit-making motive, whether the tangible goods were available for sale without the service, the extent to which intangible services have contributed to the value of the physical item that is transferred, and any other factors relevant to the particular transaction. [*Id*. at 26.][4]

The software and other tangible personal property provided to plaintiff were incidental to the services that the companies provided to plaintiff. The first factor concerns what plaintiff sought as the object of the transactions. From WebEx, plaintiff primarily sought access to networking infrastructure. With re-

[4] The Michigan Supreme Court articulated the incidental-to-service test in the context of a challenge under the GSTA, rather than the UTA. See *Catalina*, 470 Mich at 24-25. However, neither party challenges whether the incidental-to-service test applies with regard to the UTA. Furthermore, the test that the Michigan Supreme Court articulated applies broadly to all business relationships that involve both the provision of services and the transfer of personal property. See *id*. at 24. The Court did not limit the standard to transactions under the GSTA. See *id*. at 14, 24-26.

gard to RTL, plaintiff sought a system that could capture images of checks and stubs, validate the data on the checks and stubs, and compare it to other data to minimize the task of user verification. For the transactions with Wolters Kluwer, plaintiff sought online information services. However, with regard to LogMeIn, plaintiff sought the software and drives that were designed to allow remote computer access, as well as the web-based access. Thus, this factor weighs in favor of plaintiff for every transaction except for the transaction with LogMeIn. See *Catalina*, 470 Mich at 26.

The second factor concerns what the seller or service provider is in the business of doing. WebEx provides access to networking infrastructure that it maintains. RTL is in the business of streamlining remittance processing, reconciliation, and research. LogMeIn is in the business of providing a system that is designed to allow remote computer access. Wolters Kluwer is in the business of providing information services. Thus, all of the businesses provide services. Therefore, this factor weighs in favor of plaintiff. See *Catalina*, 470 Mich at 26.

The third factor is whether the tangible personal property was provided as part of a retail enterprise with a profit-making motive. All the transactions that involved the transfer of personal property occurred with for-profit retail enterprises. However, each business had a motive to profit from providing a service to plaintiff, rather than from providing tangible personal property to plaintiff. With regard to RTL, the motive of the company is to provide payment and remittances services. The software that was downloaded on plaintiff's computers was only an insignificant part of the overall transaction. WebEx has a motive to provide

web-based conference services, and the support center is a minor part of the larger enterprise. Wolters Kluwer also has a motive to provide information services, rather than tangible property. The issue is a closer call with regard to LogMeIn. LogMeIn provides desktop agents and thumb or flash drives to users in order to facilitate the remote access program. However, the required software was minimal in light of the extensive computing and networking infrastructure that LogMeIn maintains so that the software can operate properly. Therefore, this factor weighs in plaintiff's favor as well. See *id*.

The fourth factor is whether the tangible goods were available for sale without the service. For all the transactions, there is no indication that plaintiff could purchase any underlying tangible personal property without purchasing the services. Instead, plaintiff obtained the tangible personal property only when it contracted for services. There is no indication that any of the companies provided software or other tangible personal property apart from the services it provided. Thus, this factor weighs in favor of plaintiff. See *Catalina*, 470 Mich at 26. The fifth factor is the extent to which intangible services contributed to the value of the physical item that was transferred. The prewritten computer software and other tangible personal property provided had no value without the associated services. The only tangible personal property that may have had some value apart from the services was the print materials provided by Wolters Kluwer. Therefore, this factor weighs in favor of plaintiff for each transaction except the transaction with Wolters Kluwer. See *id*.[5]

[5] We do not find any other factor relevant in determining whether the transfer of tangible personal property was incidental to the provision of

Considering all the factors together, the transfer of tangible personal property was incidental to the services that plaintiff received. With regard to Wolters Kluwer, RTL, LogMeIn, and WebEx, plaintiff contracted with the businesses in order to receive services, and the transfer of the tangible personal property was merely incidental to the provision of services. There is no indication that plaintiff could purchase the software or other tangible personal property independently of the services, and the services gave value to the software and other tangible personal property. Therefore, the transactions were not taxable under the UTA. See *id*. Accordingly, the Court of Claims did not err by granting plaintiff's motion for summary disposition. We need not address the other issues raised in defendant's brief on appeal since we conclude that the Court of Claims properly determined that the transactions were not subject to taxation under the UTA.

Affirmed. No costs, a public question being involved. See MCR 7.219(A).

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

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services as the first five factors encompass the main features of each transaction. See *Catalina*, 470 Mich at 26.

CHELIK v CAPITOL TRANSPORT, LLC

Docket No. 322349. Submitted October 6, 2015, at Lansing. Decided October 27, 2015, at 9:05 a.m.

Michael Chelik brought an action in the Ingham Circuit Court against Capitol Transport, LLC, and Sparrow Hospital. Chelik fell, injuring his left arm, and was taken to Sparrow for treatment. He was admitted to the hospital around midnight. Staff at Sparrow advised Chelik that he would need to see an orthopedic surgeon the next day, discharged Chelik, and called Capitol Transport, a taxicab company, to pick Chelik up and take him to the hotel where he was staying. As the taxicab driver attempted to help Chelik into the taxicab, he fell again, injuring his right arm. Chelik's claim against Capitol Transport was settled, but his claim against Sparrow—that Sparrow was negligent when it failed to assist him into the taxicab—proceeded to a jury trial. At the close of Chelik's proofs, Sparrow moved for a directed verdict, asserting that it had no duty to assist a discharged patient into a waiting vehicle and that Chelik had failed to produce any evidence of causation because his inability to work stemmed from the original injury to his left arm. The court, Clinton Canady III, J., granted Sparrow's motion. Chelik moved for reconsideration, which the court denied. Chelik appealed and Sparrow cross-appealed.

The Court of Appeals *held*:

A negligence action may only be maintained if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. Before a duty may be imposed, there must be a relationship between the parties and the harm must have been foreseeable. Under Michigan common law, generally there is no duty for one person to aid or protect another, absent a special relationship based on control. In this case, Sparrow had no control over Chelik. Sparrow had discharged Chelik before he fell and injured his right arm. While Sparrow called for the taxicab at Chelik's request, this did not constitute control over Chelik. As a result, at the time of the injury, there was no special relationship between Sparrow and Chelik, and Chelik failed to establish that

Sparrow had any duty to act on his behalf at the time he sustained the injury to his right arm. In addition, before Chelik was discharged, staff at Sparrow evaluated Chelik and determined that that his condition was stable, and he passed a fall-risk assessment. Accordingly, it was not reasonably foreseeable that Chelik would fall and injure himself while being assisted into the taxicab. Consequently, for this reason too, Sparrow did not have a duty to assist Chelik into the taxicab. The trial court correctly granted Sparrow's motion for a directed verdict.

Affirmed.

HOEKSTRA, J., concurred in the result only.

ACTIONS — NEGLIGENCE — DUTY — ASSISTING A DISCHARGED PATIENT WITH TRANSPORTATION.

A hospital does not generally have a legal duty to assist a discharged patient into a vehicle.

McCarthy Law Group PC (by *Timothy H. McCarthy Jr.*) for Michael Chelik.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman* and *Richard J. Suhrheinrich*) for Sparrow Hospital.

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

SAAD, J.

I. NATURE OF THE CASE

After plaintiff broke his arm in a fall and after defendant Sparrow Hospital[1] administered medical treatment, Sparrow advised plaintiff that it could do no more for him, recommended that he see a specialist the next day, and discharged plaintiff from the hospital. Though plaintiff preferred to stay the night at the

[1] Because defendant Capitol Transport, L.L.C., was dismissed from the suit before trial began, Sparrow Hospital is the only defendant at issue in this appeal.

hospital, a doctor advised him that the hospital facilities could not be used for mere overnight rest and therefore a cab was called to take him back to his hotel. Hospital personnel took plaintiff by wheelchair to the waiting room, where plaintiff waited for his cab, by himself. Upon arrival at the hospital, the cab driver assisted plaintiff out of the wheelchair and attempted to help plaintiff into the cab whereupon plaintiff fell once again and injured his other arm. Thereafter, plaintiff saw doctors for his broken arms. Plaintiff sued Sparrow for his injuries. Notably, however, plaintiff did not sue Sparrow for medical malpractice either for Sparrow's treatment or discharge of him. Rather, plaintiff claimed that Sparrow had breached a common-law duty to assist plaintiff with his transportation after Sparrow discharged him from the hospital. After the close of plaintiff's proofs, the trial court granted Sparrow's motion for directed verdict on the grounds that Sparrow had no common-law duty to assist a discharged patient, such as plaintiff, with transportation from the hospital and that, were the court to find such a duty, there was no evidence that Sparrow's alleged breach was the proximate cause of plaintiff's damages.

For reasons that we explain below, we hold that Michigan law does not impose a duty on a hospital to assist a discharged patient with transportation. And, because there is no duty, we need not address the causation issue, but we note that, were we to decide this issue, we would hold that plaintiff failed to prove that any of his damages were caused by Sparrow.

II. BASIC FACTS

In November 2010, plaintiff lived in New Jersey, worked for Disney in its Broadway musical touring

division, and, as a member of the touring production, performed at the Wharton Center on the campus of Michigan State University in East Lansing. After an evening performance, plaintiff, who weighed 345 pounds, fell while walking to his car. The fall broke plaintiff's left elbow and left forearm.

It was near midnight by the time plaintiff was admitted into the emergency department at Sparrow. Unable to do anything for plaintiff immediately, the Sparrow staff molded a splint for his left arm and told him to see an orthopedic surgeon the following day. Plaintiff testified that he did not want to be discharged because he was tired; he did not want to travel the 20 or 25 minutes to his hotel and preferred to sleep at the hospital. The doctor responded that the hospital could not use a bed as a place to spend the night and ultimately discharged plaintiff at 5:55 a.m. The medical records show that the doctor's decision to discharge plaintiff was based on the following findings: plaintiff's condition had improved, plaintiff's pain was controlled, an exam of plaintiff showed him to be "stable," and a repeat exam also showed that plaintiff was "stable." Furthermore, the nurse in charge conducted a "fall risk assessment" and, after watching plaintiff stand up by himself and walk across the room, concluded that plaintiff passed the assessment. When discharged, plaintiff was offered a wheelchair, which he used.

A technician in the emergency department pushed plaintiff in the wheelchair to the emergency room waiting area and then left. Soon thereafter, the cab driver arrived and pushed plaintiff to the vehicle. Plaintiff was concerned with the driver's ability to effectively assist, but the driver reassured him that he had done this before and "don't worry about it." After clearing out room in the front passenger seat, plaintiff

asked the driver if the wheelchair was locked, and the driver replied that "Yeah, it's locked" and "I got you." With the assistance of the driver, plaintiff pushed himself to a standing position, but he immediately felt wobbly and went back to sit down. But plaintiff felt that the chair was no longer in place because the driver had already moved it away, so instead of falling back, plaintiff pushed himself into the front of the vehicle and fell into the passenger compartment's foot well on his right side. This fall resulted in injuries to plaintiff's right elbow. X-rays taken later that day revealed that plaintiff's right elbow was now broken and his left arm had the same injuries as before.

A few days later, plaintiff underwent surgery for his left arm, and two days after that, surgery was performed on his right elbow. These surgeries left plaintiff in a precarious state because he could not use either of his arms. After returning to his home in New Jersey, plaintiff saw an orthopedic surgeon, who prescribed six weeks of physical therapy for the right arm. After that six-week session was complete, the plan was for therapy to focus on the more severely injured left arm. After the therapy on the right arm, plaintiff was able to do "normal" things with it, but he nevertheless could not work anymore because of his inability to use his left arm.

In his suit, plaintiff alleged negligence on the part of Sparrow in failing to assist him into the taxi cab. Notably, he did not claim malpractice regarding his treatment or discharge at Sparrow. At the close of plaintiff's proofs, Sparrow moved for directed verdict on two grounds. First, Sparrow argued that it had no duty to assist a discharged patient into a waiting vehicle. Second, Sparrow argued that plaintiff failed to present any evidence of causation. Specifically, the

evidence indicated that plaintiff could no longer work because he could no longer use his *left* arm and elbow. But Sparrow claimed that plaintiff never produced any medical testimony explaining how plaintiff's *right* elbow injury—the injury at issue from the cab incident—contributed to his inability to work. After hearing arguments from both sides, the trial court granted Sparrow's motion based on a lack of causation evidence.

Plaintiff moved for reconsideration. The trial court denied plaintiff's motion but stated that "[a]lthough the Court did give a detailed rationale as to why a directed verdict would have been appropriate regarding causation and damages, the primary issue and determining factor in this case was that Sparrow did not owe Plaintiff a duty." The court noted that the evidence established that Sparrow did not have a policy requiring employees to assist discharged patients into awaiting vehicles and there also was no evidence that Sparrow assumed the responsibility of assisting such patients into vehicles.

III. ANALYSIS

On appeal, plaintiff's sole argument is that the trial court erred in its determination that Sparrow did not have a duty to assist plaintiff into the taxi cab. We disagree.

In a negligence analysis, the question of whether a duty exists is a question of law that we review de novo. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Additionally, decisions on a motion for directed verdict are reviewed de novo as well. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). When deciding a motion for directed verdict, the evi-

dence and all legitimate inferences are reviewed in the light most favorable to the nonmoving party. *Id*. Such a motion "should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id*.

> To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. [*Loweke*, 489 Mich at 162.]

Regarding the element of duty, "[a] negligence action may only be maintained if a *legal* duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) (emphasis added); see also Prosser & Keeton, Torts (5th ed), § 53, p 356 (defining "duty" as "an obligation, to which *the law* will give recognition and effect, to conform to a particular standard of conduct toward another") (emphasis added). Because the question of whether the common law, as a matter of public policy, ought to impose a duty on one for the benefit of another necessarily involves a balancing of interests and societal costs and prudence calls for consistency in application, this is a question of law, which courts, not juries decide. See *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007); *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 601; 513 NW2d 773 (1994) (opinion by RILEY, J.); Prosser & Keeton, § 37, p 236 (stating that deciding on the existence of a duty requires "reference to the body of statutes, rules, principles and

precedents which make up the law; and it must be determined only by the court"). As explained by our Supreme Court:

> Because the ultimate inquiry in determining whether a duty should be imposed involves balancing the social benefits of imposing a duty with the social costs of imposing that duty, we cannot decide whether a duty should be imposed without assessing the competing policy considerations. We must be concerned with whether it is appropriate public policy to impose liability. In fixing the bounds of duty, not only logic and science, but policy play an important role. There is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree. In determining whether a duty exists, courts must be mindful of the precedential effects of their rulings, and limit the legal consequences of wrongs to a controllable degree. Moreover, any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs. [*In re Certified Question*, 479 Mich at 518-519 (quotation marks, citations, brackets, and ellipses omitted).]

Furthermore, leaving the question of duty to juries to decide would result in inconsistent outcomes even when juries were confronted with factually indistinguishable circumstances. See *Moning v Alfono*, 400 Mich 425, 435; 254 NW2d 759 (1977). This would be an untenable situation because people could never know with any certainty if they had any particular legal duty.

Factors for a court to consider when deciding whether to impose a duty include the following: "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661; 822 NW2d 190 (2012) (citation and

quotation marks omitted). Although the relationship of the parties has been described as the most important factor, *In re Certified Question*, 479 Mich at 505, the foreseeability of the harm is just as important. That is because " '[b]efore a duty can be imposed, there must be a relationship between the parties *and* the harm must have been foreseeable.' " *Hill*, 492 Mich at 661, quoting *In re Certified Question*, 479 Mich at 509 (alteration in original; emphasis added). Consequently, "[i]f either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors." *Hill*, 492 Mich at 661.

Here, plaintiff asserts that Sparrow was negligent through nonfeasance, which is passive inaction or the failure to actively protect others from harm, and not misfeasance, which is active misconduct causing personal injury. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498; 418 NW2d 381 (1988). That is, plaintiff alleges that Sparrow had a duty to assist or aid plaintiff but failed to do so. Under Michigan common law, generally there is no duty for one person to aid or protect another, absent a special relationship based on control. *Id*. at 498-499. "The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself." *Id*. Here, Sparrow had no control over plaintiff. Sparrow had already discharged plaintiff when plaintiff attempted to get into a taxi cab parked outside the hospital. While Sparrow called for the cab at plaintiff's request, this did not constitute control over plaintiff. As a result, at the time of the injury, there was no special relationship between Sparrow and plaintiff, and clearly Sparrow had no control over plaintiff. Therefore, we hold that plaintiff has failed to

establish that Sparrow had any duty to act on behalf of plaintiff at the time plaintiff sustained his injury when he fell into the cab.

Furthermore, the analysis on the foreseeability factor is fatal to plaintiff's claim as well. Again, plaintiff was evaluated before being discharged, and it was determined that his condition had improved, his pain was controlled, and two exams showed that he was "stable." Additionally, plaintiff had passed a "fall risk assessment" after being able to stand up and walk by himself across the room. These facts reveal that plaintiff was in better condition than he was when he arrived at the hospital and was capable of ambulating from a seated position. In light of these facts, it was not reasonably foreseeable that plaintiff would injure himself while being assisted into a cab. Consequently, we hold that Sparrow did not have a legal duty to assist plaintiff into an awaiting vehicle. Therefore, the trial court properly held that Sparrow had no duty to plaintiff and correctly granted a directed verdict.

A holding to the contrary would appear to be unprecedented. Plaintiff has failed to identify any caselaw in Michigan, or any other state, that provides that a hospital has a legal duty to assist its discharged patients into vehicles, and our research has not uncovered such precedent. In fact, what caselaw exists directly supports the conclusion that no such duty exists. See, e.g., *Cameron v New York*, 322 NYS2d 562, 566; 37 AD2d 46 (1971) ("[T]he law does not impose upon a hospital the continuing duty to exercise a parental role over discharged patients."). The reason is clear. It would be an unreasonable imposition upon hospitals and health-care providers for the law to require that they aid every properly discharged patient with transportation. The legal obligations thus im-

posed would be endless, unpredictable, and therefore unreasonable. A health-care provider has no common-law legal duty to assist a discharged patient with transportation.[2]

Affirmed. Sparrow, as the prevailing party, may tax costs pursuant to MCR 7.219.[3]

BOONSTRA, P.J., concurred with SAAD, J.

HOEKSTRA, J. (*concurring in result*). I concur in the result only.

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[2] We also note that much of plaintiff's testimony focused on the fact that he thought he was not as capable as Sparrow had determined before he was discharged. However, to the extent that Sparrow did misevaluate plaintiff's condition at discharge, that would be a medical malpractice claim—not the ordinary negligence claim that is the issue in the instant case. Accordingly, the fact that plaintiff avers that he was not stable and not able to keep his balance after being discharged is not relevant for the pertinent analysis.

Although we have decided this case on the dispositive issue of duty, we note that even if a duty existed, reversal would not be required because, as the trial court alternatively ruled, there was no evidence that the injuries plaintiff suffered at Sparrow caused any of the work-loss damages he sought. Those damages, instead, were solely caused by plaintiff's prior injury to his left arm.

[3] Sparrow filed a "cross-appeal" and in its raised issue claims that plaintiff's brief on appeal is inadequate to present his issue to this Court because it simply incorporated by reference plaintiff's prior submission to this Court in Docket No. 319518, in which Sparrow was the appellant and sought leave to appeal the trial court's denial of its motion for summary disposition. Notwithstanding Sparrow's label to the contrary, this issue is not a "cross-appeal." It does not appeal or challenge anything that happened at the trial court. As such, we simply have treated it as an alternative argument for this Court to rule against plaintiff in *his appeal*. However, we decline to deem plaintiff's appeal waived or abandoned on this basis, especially in light of the fact that plaintiff did provide a thorough briefing in his reply brief.

MEEMIC INSURANCE CO v MICHIGAN MILLERS MUTUAL INSURANCE

Docket No. 322072. Submitted October 14, 2015, at Lansing. Decided October 27, 2015, at 9:10 a.m. Leave to appeal denied 499 Mich 935.

MEEMIC Insurance Company brought an action in the Wexford Circuit Court against Rick Putvin, Kip Cergenul, and their automobile no-fault insurers, Michigan Millers Mutual Insurance Company and Auto-Owners Insurance Company, as a subrogee to recover the losses that two of its insureds incurred from a fire in a commercial storage facility. The fire occurred when Putvin and Cergenul were in the storage facility flushing the fuel lines of a vehicle owned by Putvin's father, John Putvin, and the fuel vapors ignited. Plaintiff alleged that Rick Putvin and Cergenul could be held liable for their negligence under Michigan's no-fault act, MCL 500.3101 *et seq*. After Rick Putvin and Cergenul presented evidence that John Putvin had not driven the stored vehicle in more than one year and had purchased comprehensive coverage for it through State Farm Mutual Auto Insurance Company, plaintiff stipulated to dismiss its claims against Rick Putvin, Cergenul, and their no-fault insurers. Plaintiff then amended its complaint to add a claim against Home-Owners Insurance Company, which had issued a no-fault policy to John Putvin for the vehicles that he drove, although it did not insure the stored vehicle. Plaintiff alleged that, given that John Putvin was the owner or registrant of the vehicle involved in the fire, Home-Owners was liable to pay property protection insurance benefits for the losses caused by the fire under MCL 500.3121 and MCL 500.3125. Home-Owners moved for summary disposition of plaintiff's claim against it under MCR 2.116(C)(10), arguing that when coverage is not required under Michigan's no-fault act, the terms of the policy control, and because the stored vehicle was not required to have property protection insurance under the no-fault act and the Home-Owners policy unambiguously excluded the vehicle from coverage, Home-Owners had no obligation to cover the losses arising from the vehicle's maintenance. The court, William M. Fagerman, J., granted the motion, and plaintiff appealed.

The Court of Appeals *held*:

The trial court did not err when it determined that, as a matter of law, Home-Owners had no obligation to cover the loss at issue. Under MCL 500.3101(1), every owner or registrant of a motor vehicle required to be registered in this state must maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. However, during a period in which the motor vehicle is not driven or moved upon a highway, an insurer may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect. Because John Putvin did not drive or move the vehicle upon a highway during the period at issue, he was not required to maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance, and he instead elected to insure his vehicle with a policy that provided comprehensive coverage alone. Construing MCL 500.3101(1) in harmony with MCL 500.3125 led to the conclusion that an insurer of an owner of a motor vehicle involved in an accident was not statutorily required to pay property protection insurance benefits to a person suffering accidental property damage if the motor vehicle involved in the accident was not driven or moved upon a highway and the owner or registrant elected to forgo that coverage in favor of comprehensive coverage. Because the coverage was optional in such cases, whether the policy provided coverage had to be determined from the policy itself. Under the plain terms of the policy at issue, Home-Owners was not liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of the stored vehicle. Accordingly, the trial court did not err by granting defendant's motion for summary disposition.

Affirmed.

INSURANCE — NO-FAULT — PROPERTY PROTECTION INSURANCE — VEHICLES NOT DRIVEN OR MOVED UPON A HIGHWAY.

An insurer of an owner of a motor vehicle involved in an accident is not statutorily required to pay property protection insurance benefits to a person suffering accidental property damage if the owner of the vehicle was not required to maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance because the vehicle was not being driven or moved upon a highway

> during that period and the owner or registrant elected to forgo such security in favor of comprehensive coverage (MCL 500.3101(1); MCL 500.3125).

Hewson & Van Hellemont, PC (by *Andy J. VanBronkhorst* and *Nicholas S. Ayoub*), for plaintiff.

Willingham & Coté, PC (by *John A. Yeager* and *Curtis R. Hadley*), for defendant.

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM. In this insurance coverage dispute, plaintiff, MEEMIC Insurance Company, appeals by right the trial court's opinion and order granting the motion for summary disposition by defendant, Home-Owners Insurance Company, and dismissing MEEMIC's claim under MCR 2.116(C)(10). We conclude that the trial court did not err when it determined that—as a matter of law—Home-Owners had no obligation to cover the loss at issue. Accordingly, we affirm.

I. BASIC FACTS

The facts of this case are undisputed. John Putvin owned several cars, including a 1966 Corvette, which he stored in a commercial storage facility. As a result of his declining health, John Putvin had not driven the Corvette in 2012 or 2013. Catherine Eppard and Kevin Byrnes stored personal property at this same storage facility.

In April 2013, Rick Putvin (John Putvin's son) and Kip James Cergenul went to the storage facility to perform maintenance on John Putvin's automobiles and prepare them for eventual sale. Rick Putvin and

Cergenul were flushing the Corvette's fuel lines when gasoline vapors ignited and caused a fire. The fire destroyed more than $125,000 in personal property that Eppard and Byrnes stored at the facility. MEEMIC insured Eppard and Byrnes against fire losses and compensated them.

In October 2013, MEEMIC, as the subrogee of Eppard and Byrnes, sued Rick Putvin and Cergenul, along with their automobile no-fault insurers, Michigan Millers Mutual Insurance Company and Auto-Owners Insurance Company, to recover its losses. MEEMIC alleged, in relevant part, that Rick Putvin and Cergenul could be held liable for their negligence under Michigan's no-fault act. See MCL 500.3101; MCL 500.3135(3). After Rick Putvin and Cergenul presented evidence that John Putvin had not driven the Corvette in more than one year and had purchased comprehensive coverage for it through State Farm Mutual Auto Insurance Company, which was permitted under MCL 500.3101(1), MEEMIC stipulated to dismiss its claims against Rick Putvin, Cergenul, and their no-fault insurers in January 2014. However, the trial court gave MEEMIC permission to amend its complaint to add a claim against Home-Owners Insurance Company.

In January 2014, MEEMIC filed its first amended complaint. It alleged that Home-Owners issued an automobile no-fault policy to John Putvin, which covered the automobiles that he continued to drive. MEEMIC also alleged that, given that John Putvin was the owner or registrant of the Corvette involved in the fire, Home-Owners was liable to pay property protection insurance benefits for the losses caused by the fire under MCL 500.3121 and MCL 500.3125, even though it did not insure the Corvette.

In February 2014, Home-Owners moved for summary disposition of MEEMIC's claim against it under MCR 2.116(C)(10). Home-Owners argued that, when coverage is not required under Michigan's no-fault act, the terms of the policy control. Inasmuch as it was undisputed that the Corvette did not have to have property protection insurance under Michigan's no-fault act and the policy that Home-Owners issued to John Putvin unambiguously excluded the Corvette from coverage, Home-Owners maintained that it had no obligation to cover the losses arising from the Corvette's maintenance.

The trial court determined that the priority provision stated under MCL 500.3125 did not compel Home-Owners to pay for the loss at issue. The court reasoned that Home-Owners had no statutory obligation to pay for losses involving the Corvette because the Legislature authorized insurers to allow owners or registrants of a motor vehicle that is not driven or moved upon a highway to delete the coverage required under the no-fault act and maintain comprehensive coverage. See MCL 500.3101(1). The trial court granted Home-Owners' motion for summary disposition and dismissed MEEMIC's claim on that basis.

MEEMIC now appeals in this Court.

II. MANDATORY NO-FAULT INSURANCE BENEFITS

A. STANDARDS OF REVIEW

On appeal, MEEMIC argues that the trial court erred when it determined that Home-Owners could lawfully exclude coverage for unlisted motor vehicles such as the Corvette and granted Home-Owners' motion for summary disposition on that basis. Because MCL 500.3125 unambiguously obligated Home-Owners to cover the

loss at issue as an insurer of an owner or registrant of a vehicle involved in the accident, MEEMIC maintains, the trial court should have determined that Home-Owners could not exclude coverage for an unlisted motor vehicle and granted judgment in MEEMIC's favor. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 507; 853 NW2d 481 (2014). This Court also reviews de novo whether the trial court properly interpreted and applied the statutory provisions to the facts. See *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012).

B. ANALYSIS

Every "owner or registrant of a motor vehicle required to be registered in this state" must "maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." MCL 500.3101(1). However, the applicable version of MCL 500.3101(1) provided that the security "shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway."[1] And, for a motor vehicle that is not driven or moved upon a highway, an insurer "may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect." *Id*.

It was undisputed that John Putvin did not drive or move the Corvette upon a highway during the period at issue. Therefore, he was not required to maintain

[1] The language of this provision has changed slightly as a result of 2014 PA 492; however, the changes were not substantive and do not affect our analysis.

"security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance" in effect for that period. MCL 500.3101(1). Instead, he permissibly elected to insure his Corvette with a policy that provided comprehensive coverage alone. See *id*. In addition, consistently with the requirements of MCL 500.3101(1), John Putvin purchased a no-fault policy that included property protection insurance for the motor vehicles that he continued to drive upon a highway.

An insurer who issues a no-fault insurance policy that includes property protection insurance "is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and . . . [MCL 500.3125] . . . ." MCL 500.3121(1). Under MCL 500.3125, a person who suffers accidental property damage "shall claim property protection insurance benefits" first from "insurers of owners or registrants of vehicles involved in the accident . . . ." MCL 500.3125. This Court has construed other priority provisions within the no-fault act and concluded that language similar to that used in MCL 500.3125 requires an insurer to pay benefits whenever it has issued a no-fault policy to an owner of a vehicle involved in the accident, even if the policy did not specifically include coverage for that vehicle. See *Titan Ins Co v American Country Ins Co*, 312 Mich App 291; 876 NW2d 853 (2015) (examining priority under MCL 500.3114); *Farmers Ins Exch v Farm Bureau Gen Ins Co*, 272 Mich App 106, 113-114; 724 NW2d 485 (2006) (interpreting MCL 500.3114(5)(a)); *Pioneer State Mut Ins Co v Titan Ins Co*, 252 Mich App 330, 335-336; 652 NW2d 469 (2002) (construing MCL 500.3115(1)(a)). For that reason, if we were to construe MCL 500.3125 in the same way, Home-Owners would be an insurer of an

owner of a motor vehicle involved in the fire loss. Moreover, assuming that the fire loss arose "out of the ownership, operation, maintenance or use" of the Corvette as "a motor vehicle," MCL 500.3121, MEEMIC—as the subrogee of Eppard and Byrnes—would be entitled to claim property protection insurance benefits from Home-Owners because Home-Owners issued an insurance policy to John Putvin and he was the owner of the Corvette, which was involved in the accident. Nevertheless, even accepting that Home-Owners is the insurer of an owner of a motor vehicle involved in the accident under MCL 500.3125 and would be liable to pay property protection benefits under MCL 500.3121, if the Corvette were required to be insured under MCL 500.3101(1), we conclude that the trial court did not err when it concluded that Home-Owners was not obligated to pay property protection benefits under the specific facts of this case.

Although the Legislature generally required the "owner or registrant of a motor vehicle required to be registered in this state" to maintain security for the payment of property protection insurance benefits, it stated that the security "shall only be *required* to be *in effect* during the period the motor vehicle is driven or moved upon a highway." Former MCL 500.3101(1) (emphasis added). Because the security is only required to be in effect during those periods, the Legislature authorized insurers to allow their insureds to delete property protection insurance from their no-fault coverage for the period when a motor vehicle is not driven or moved upon a highway:

> Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved on a highway may allow the insured owner or registrant of the motor

> vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect. [MCL 500.3101(1).]

When construing the no-fault act, this Court must be careful to interpret the words used in the statute in "light of their ordinary meaning and their context within the statute" and must read the various provisions "harmoniously to give effect to the statute as a whole." *Johnson*, 492 Mich at 177 (quotation marks and citation omitted). By authorizing insurers under MCL 500.3101(1) to allow their insureds to "delete" the specified "coverages" and maintain only the "comprehensive coverage portion" of the policy, the Legislature unambiguously expressed its intent to make the specified types of coverage optional for motor vehicles that the insured owns or has registered, but that are not driven or moved upon a highway. Thus, construing MCL 500.3125 in harmony with MCL 500.3101(1), we conclude that an insurer of an owner of a motor vehicle involved in an accident is not statutorily required to pay property protection insurance benefits to a person suffering accidental property damage if the motor vehicle involved in the accident was not driven or moved upon a highway and the owner or registrant elected to forgo that coverage in favor of comprehensive coverage, as permitted under MCL 500.3101(1).[2] Because the coverage is optional in such cases, whether the policy provides coverage must be determined from the policy itself.[3] See *Husted v Auto-Owners Ins Co*, 459 Mich 500, 511-512; 591 NW2d 642

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[2] Because this case only involves property protection insurance, we express no opinion as to whether the same would be true for claims involving personal protection insurance or residual liability insurance.

[3] If Rick Putvin and Cergenul had driven the Corvette to a different location in order to perform the maintenance that led to the fire, the coverage would no longer have been optional under MCL 500.3101(1). If

(1999) (stating that, when coverage is not mandatory under the no-fault act, the terms of the insurance agreement control whether there is coverage).

In this case, it is undisputed that the Corvette had not been driven or moved upon a highway during the relevant period. Consequently, John Putvin was not required to maintain security for the payment of benefits under MCL 500.3101(1), and, because he purchased a policy from State Farm insuring the Corvette with comprehensive coverage, Home-Owners could lawfully exclude the Corvette from coverage under the no-fault policy that it issued to him. See *Husted*, 459 Mich at 516-517.

In its policy, Home-Owners stated that it would pay property protection insurance benefits for accidental damage to tangible personal property that arose out of the ownership, operation, maintenance, or use of an "insured motor vehicle as a motor vehicle[.]" It further defined an insured motor vehicle to mean a motor vehicle with respect to which the policy applies and for which a specific premium is charged, or with respect to which John Putvin was "required to maintain security" under MCL 500.3101(1). John Putvin did not pay a premium for coverage of the Corvette and, as already discussed, he was not required to maintain security for the Corvette under MCL 500.3101(1). Consequently, under the plain terms of the policy at issue, Home-Owners was not "liable to pay benefits for accidental damage to tangible property" arising out of the ownership, operation, maintenance, or use of John Putvin's Corvette. MCL 500.3121(1).

The trial court did not err when it granted Home-Owners' motion for summary disposition.

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that were the case, we would agree that Home-Owners would have had an obligation to pay property protection benefits under MCL 500.3125.

Affirmed. As the prevailing party, Home-Owners may tax its costs. MCR 7.219(A).

M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ., concurred.

DOE v RACETTE

Docket No. 322150. Submitted October 14, 2015, at Lansing. Decided October 27, 2015, at 9:15 a.m.

John Doe brought a tort action in the Ingham Circuit Court in 2012 that included claims of assault and battery, intentional infliction of emotional distress, and false imprisonment against Wendall A. Racette, alleging that Racette had sexually abused him while serving as his childhood dentist. Plaintiff claimed that the abuse had occurred over five years, beginning in 1995 when he was five years old, and that defendant had threatened to kill him and rape his sisters if he disclosed the abuse. The court, James S. Jamo, J., granted defendant's motion for summary disposition under MCR 2.116(C)(7), ruling that the applicable limitations periods had elapsed and that equitable estoppel did not apply. Plaintiff appealed.

The Court of Appeals *held*:

The trial court did not err by declining to apply the doctrine of equitable estoppel and granting defendant's motion for summary disposition under MCR 2.116(C)(7), although it erred in its reasoning. Equitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption. In order to invoke the equitable estoppel doctrine, a plaintiff must generally establish that (1) the defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) the plaintiff justifiably relied on this belief, and (3) the plaintiff was prejudiced as a result of relying on the belief that the clause would not be enforced. In this case, the trial court erred by ruling that equitable estoppel did not apply because the purpose of defendant's alleged threats were not clearly designed to induce plaintiff from bringing his claim within the limitations period. If a defendant threatens to murder a victim should he or she disclose instances of sexual abuse, that conduct is clearly intentionally designed to induce the plaintiff to refrain from taking any action against the defendant, including bringing an action within the period fixed by statute. Accordingly, a threat to murder a plaintiff and harm his family should he or she disclose instances of sexual abuse can establish the first element of equitable estop-

pel. However, plaintiff was also required to show that he acted within a reasonable time to bring suit after the coercive effect of the threat had ended. In this case, plaintiff disclosed the abuse to the police in December of 2010 and testified at defendant's criminal proceedings in 2011, which demonstrated that his fears no longer constrained him to remain silent; however, he did not bring this action until December of 2012. Following his public disclosure, plaintiff had a primary obligation to secure prompt resolution of his claim in the courts, and his failure to do so precluded application of the doctrine of equitable estoppel.

Affirmed.

MURRAY, J., concurring, agreed that defendant could not be equitably estopped from asserting the statute of limitations because plaintiff did not bring suit within a reasonable amount of time after the coercive effect of defendant's alleged threat had ended. However, because that conclusion alone was sufficient to reject plaintiff's invocation of equitable estoppel, Judge MURRAY would not have engaged in any discussion of whether a threat of murder could be sufficient. He further noted that it was unclear whether plaintiff had established the first element of equitable estoppel.

LIMITATION OF ACTIONS — EQUITABLE ESTOPPEL — THREATS.

In order to invoke the equitable estoppel doctrine to avoid the application of a statutory limitation period, a plaintiff generally must establish that (1) the defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) the plaintiff justifiably relied on this belief, and (3) the plaintiff was prejudiced as a result of relying on the belief that the clause would not be enforced; a threat to murder a plaintiff and harm the plaintiff's family if the plaintiff discloses instances of sexual abuse can establish the first element of equitable estoppel if the plaintiff brought suit within a reasonable time after the coercive effect of the threat ended.

Levine Benjamin, PC (by *Greg M. Liepshutz*), and *Daryl Royal* for plaintiff.

Farhat & Story, PC (by *Linda L. Widener*), for defendant.

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's ruling granting defendant's motion for summary disposition under MCR 2.116(C)(7) (claim barred by the statute of limitations) in this action involving various torts stemming from alleged incidents of sexual abuse. We affirm.

In December 2012, plaintiff filed a complaint against defendant, claiming assault and battery, intentional infliction of emotional distress (IIED), and false imprisonment. He alleged that, starting in 1995 when he was just five years old, his parents brought him to defendant's dentistry practice for dental services. He alleged that, during the next five years, defendant subjected him to various forms of sexual abuse, which he did not disclose because defendant threatened to kill him and rape his sisters if he told anyone about the abuse.[1]

In response, defendant filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claims were time-barred because plaintiff waited more than 12 years after the alleged abuse to file a lawsuit. Plaintiff conceded that the applicable limitations periods had expired. See MCL 600.5805(2) (claims for false imprisonment and assault and battery are governed by a two-year limitations period), MCL 600.5805(10) (claims for IIED are governed by a three-year limitations period), and MCL 600.5851(1) (if a claim accrues when a plaintiff is a minor the limitations period is extended for one year after the disability

[1] Plaintiff disclosed the abuse to the police in December 2010. In 2012, defendant was convicted of 5 counts of criminal sexual conduct in the first degree, MCL 750.520b(1)(a), and 10 counts of criminal sexual conduct in the second degree, MCL 750.520c(1)(a). On appeal, this Court reversed his convictions and remanded for a new trial. *People v Racette*, unpublished opinion per curiam of the Court of Appeals, issued September 1, 2015 (Docket No. 314895).

is removed). Nevertheless, plaintiff argued that defendant should be equitably estopped from raising the statute of limitations as a defense because his threats to kill plaintiff and harm his sisters prevented plaintiff from bringing his claim within the limitations periods. The trial court, however, ruled that the applicable limitations periods had elapsed and that equitable estoppel did not apply. This appeal followed.

A trial court's ruling on a motion for summary disposition brought under MCR 2.116(C)(7) is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004). "If a party supports a motion under MCR 2.116(C)(7) by submitting affidavits, depositions, admissions, or other documentary evidence, those materials must be considered" unless their substance and content is inadmissible as evidence. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001), citing MCR 2.116(G)(5). "[T]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Pusakulich*, 247 Mich App at 82.

Equitable estoppel is a judicially created "exception to the general rule which provides that statutes of limitation run without interruption[.]" *Lothian v Detroit*, 414 Mich 160, 176; 324 NW2d 9 (1982). "It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar." *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). "[A]bsent intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action," Michigan courts have been "reluctant to recognize an estoppel[.]" *Id*.

(emphasis omitted). Such equitable power "has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake" because a "court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking[.]" *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005). In the past, we have typically applied equitable estoppel in cases in which the defendant induced the plaintiff to believe the limitations period would not be enforced. See *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008) (holding that in order to invoke the equitable estoppel doctrine, the plaintiff must generally establish that "(1) defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that the clause would not be enforced"). In this case, defendant correctly points out that there is nothing on the record indicating that his alleged threat to kill plaintiff and harm his sisters induced plaintiff to believe the limitations periods would not be enforced. However, there are no Michigan cases addressing whether a threat of murder can be grounds for invoking the equitable estoppel doctrine. Therefore, it is an issue of first impression whether a defendant can be equitably estopped from raising the statute of limitations as a bar when the plaintiff failed to file suit within the limitations periods because of the defendant's threats to kill the plaintiff and harm his family if he disclosed instances of sexual abuse.

In this case, the trial court ruled that equitable estoppel could not be extended to this situation because the purpose of defendant's alleged threats was not clearly to induce plaintiff from bringing his claim within the limitations periods. We disagree. If a defen-

dant threatens to murder a victim should he or she disclose instances of sexual abuse, the threat necessarily encompasses all forms of disclosure, including disclosure in the form of a timely filed lawsuit. In such circumstances, the defendant's conduct is clearly *intentionally* designed to induce the plaintiff to refrain from taking *any* action against the defendant, including "bringing action within the period fixed by statute." *Lothian*, 414 Mich at 177 (quotation marks and citation omitted); see also *Cincinnati Ins Co*, 454 Mich at 270. Accordingly, a threat to murder a plaintiff and harm his family should he or she disclose instances of sexual abuse can establish the first element of equitable estoppel.

However, in addition to showing the existence of a threat, plaintiff must show that he or she acted within a reasonable time to bring suit after the coercive effect of the threat had ended. See *McDonald*, 480 Mich at 205 (holding that equitable estoppel did not apply when there was "no evidence that plaintiff relied on anything defendant did or said" when she delayed bringing suit within the limitations period); see also *Lothian*, 414 Mich at 178-179 (holding that equitable estoppel did not apply when the plaintiff's failure to bring suit within the limitations period was not because of the defendant's actions). In this case, it is undisputed that plaintiff disclosed the abuse to the police in December 2010, when he was almost 21 years old. In February 2011, he testified at the preliminary examination in defendant's criminal case. In November 2011, he testified at defendant's first trial, which ended in a hung jury. In August 2012, he testified at defendant's second trial, which ended with his conviction on multiple counts of criminal sexual conduct. However, it was not until Decem-

ber 2012—about two years after he first disclosed the abuse to the police—that defendant opted to file the present suit.

While plaintiff's failure to bring suit during the predisclosure period may have been the result of the fear engendered by defendant's threats, the undisputed evidence shows that plaintiff continued to delay filing suit well after the grounds for such fear had ended with the disclosure to the police. Alternatively put, plaintiff's disclosure to the police in December 2010 demonstrates that his fears no longer constrained him to remain silent and so estoppel based upon that fear cannot have remained effective until December 2012. Following his public disclosure, plaintiff "had a primary obligation to secure prompt resolution of his claim in the courts." *Lothian*, 414 Mich at 179. His failure to do so precludes application of the doctrine of equitable estoppel.

Affirmed.

M. J. KELLY, P.J., and SHAPIRO, J., concurred.

MURRAY, J. (*concurring*). I concur in the majority opinion's decision to affirm the trial court's order granting defendant's motion for summary disposition on the basis of the statute of limitations. MCR 2.116(C)(7). More specifically, I concur in the majority opinion's holding that defendant cannot be equitably estopped from asserting the statute of limitations because under the undisputed facts, plaintiff did not bring suit within a reasonable amount of time after the coercive effect of defendant's alleged threat ended. Because that conclusion is alone sufficient to reject plaintiff's attempt to invoke equitable estoppel, it is unnecessary to engage in any discussion as to whether

a threat of murder can alone be sufficient to meet the first prong of the test for equitable estoppel as articulated in *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008).

In addition, even if it were a proper subject of inquiry, it is not clear that plaintiff has established the first prong of equitable estoppel. As defendant argues and the majority opinion recognizes, there is nothing in the record indicating that defendant's alleged threat to kill plaintiff or harm his sisters while they were patients of defendant, induced plaintiff to believe that the limitations periods would not be enforced. According to *McDonald*, that is one of the necessary proofs. *Id*. And outside the insurance context of *McDonald*, our Court has recently stated that the first element requires proof of " 'a false representation or concealment of a material fact[.]' " *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 333; 869 NW2d 635 (2015), quoting *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). A threat, even a threat of murder, is not a false representation, nor does it involve the concealment of a material fact. See, e.g., *Hollander v Brown*, 457 F3d 688, 694-695 (CA 7, 2006) (holding under a broader Illinois equitable estoppel doctrine that a threat of murder is neither a misrepresentation nor a concealment of evidence).

For these reasons, plaintiff's failure to file suit within a reasonable time after the coercive effect of the alleged threat was made requires us to reject plaintiff's attempted invocation of equitable estoppel and to affirm the trial court's order of dismissal.

CHIROPRACTORS REHABILITATION GROUP, PC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

ELITE HEALTH CENTERS, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket Nos. 320288 and 322317. Submitted July 14, 2015, at Detroit. Decided October 29, 2015, at 9:00 a.m. Leave to appeal sought.

Chiropractors Rehabilitation Group, PC, brought an action against State Farm Mutual Automobile Insurance Company in the 46th District Court, seeking payment for services it rendered to Raynard Jackson for injuries he allegedly sustained in a motor vehicle accident. As permitted by MCL 500.3151, State Farm had requested that Jackson submit to a medical examination (ME). State Farm had also previously requested that Jackson submit to an examination under oath (EUO) in accordance with its insured's no-fault policy. Jackson failed to attend the scheduled examinations, and State Farm notified Jackson that it was suspending his claim for benefits. When State Farm refused to pay Chiropractors Rehabilitation, Chiropractors Rehabilitation brought suit. State Farm moved for summary disposition. The court, William J. Richards, J., denied the motion. State Farm appealed. The Oakland Circuit Court, Daniel P. O'Brien, J., affirmed. State Farm sought leave to appeal that decision. The Court of Appeals granted the application in Docket No. 320288.

Elite Health Centers, Inc., Elite Chiropractic, PC, and Horizon Imaging, LLC, brought an action against State Farm in the 46th District Court, seeking payment for services they rendered to Ricky Johnson for injuries he allegedly sustained in a motor vehicle accident. State Farm had requested that Johnson appear for an EUO, which he failed to do. When State Farm refused to pay the healthcare providers, the providers brought suit. State Farm moved for summary disposition and to amend its affirmative defenses. The court, Debra Nance, J., denied the motions. State Farm sought leave to appeal. The Oakland Circuit Court, Colleen A. O'Brien, J., denied the application. State Farm then sought leave to appeal in the Court of Appeals. The Court of Appeals

granted the application in Docket No. 322317 and consolidated that appeal with State Farm's appeal in Docket No. 320288.

The Court of Appeals *held*:

1. Under the no-fault act, MCL 500.3101 *et seq*., medical service providers have the right to be paid for an injured person's no-fault medical expenses, and MCL 500.3112 specifically contemplates the payment of benefits to someone other than the injured person. Therefore, the Legislature intended to confer standing on a healthcare provider to bring a claim against an insurer in order to enforce the provider's right to be reimbursed for medical services rendered to an injured person. Accordingly, healthcare providers may bring a direct action to recover personal protection insurance (PIP) benefits under the no-fault act.

2. A healthcare provider's eligibility to recover medical expenses is dependent on the injured party's eligibility for no-fault benefits. In these cases, State Farm argued that the injured parties' failure to cooperate with the requested ME and EUOs established that they were not entitled to no-fault coverage. Under *Roberts v Farmers Ins Exch* 275 Mich App 58 (2007), a suspension of benefits is proper if a claimant repeatedly fails to comply with his or her statutory duty to submit to an ME, but a suspension of benefits does not constitute an irrevocable denial of benefits and does not mean that the claimant is not entitled to benefits. Similarly, using compliance with EUO provisions as a condition precedent to the recovery of no-fault benefits is not permissible because doing so would vitiate the insurer's statutory duty to pay benefits in a timely manner. Accordingly, the failure to submit to an EUO does not establish as a matter of law that an injured person is not entitled to benefits. The failure of the injured parties to submit to the ME and EUOs requested by State Farm in these cases, therefore, did not demonstrate that there is no genuine issue of material fact with regard to whether plaintiffs, as the injured parties' healthcare providers, were entitled to no-fault benefits as a matter of law, because the injured parties' failure to comply did not conclusively establish the ineligibility of the injured parties to PIP benefits. State Farm remained statutorily obligated to pay benefits in a timely manner if the injured parties complied with the requirements of the no-fault act, which included submitting to an ME if requested, demonstrating that they were eligible for benefits under a no-fault policy, and providing reasonable proof of the fact and of the amount of loss sustained. The injured parties' failure to comply with the ME and EUOs did not establish that State Farm was entitled to summary disposition as a matter of law.

3. Under MCR 2.118(A)(2), leave to amend pleadings must be given freely when justice so requires. While futility may warrant an order denying a motion to amend a pleading, in Johnson's case, the proposed amendment was not necessarily futile. A healthcare provider's ability to recover medical expenses under the no-fault act depends on whether the injured party is eligible for such no-fault benefits. Thus, if it were established that Johnson is not eligible for no-fault benefits, the provider's cause of action would be precluded. In its brief in support of its motion to amend its affirmative defenses and for summary disposition, State Farm cited authority in support of its position that the healthcare providers stand in the shoes of Johnson, such that the healthcare providers are no more entitled to recover benefits than Johnson. Therefore, to the extent that State Farm's proposed amendment included an allegation that Johnson's ineligibility for no-fault benefits barred plaintiff's claims, State Farm should have been given leave to amend its answer. The affirmative defense, if proven, would have defeated the healthcare providers' claims. Therefore, the court abused its discretion when it failed to permit the proposed amendment to State Farm's affirmative defenses.

District court orders denying State Farm's motions for summary disposition in Docket Nos. 320288 and 322317 affirmed; district court order denying State Farm's motion to amend its affirmative defenses in Docket No. 322317 reversed; cases remanded for further proceedings.

INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — FAILURE TO SUBMIT TO A MEDICAL EXAMINATION — SUSPENSION OF BENEFITS — EFFECT ON A HEALTHCARE PROVIDER'S ELIGIBILITY TO RECOVER MEDICAL EXPENSES.

A healthcare provider's eligibility to recover medical expenses under the no-fault act is dependent on the injured party's eligibility for no-fault benefits; a suspension of benefits is proper if an injured party repeatedly fails to comply with his or her statutory duty to submit to a medical examination under MCL 500.3151, but a suspension of benefits does not constitute an irrevocable denial of benefits and does not mean that the claimant is not entitled to benefits; the failure to submit to an examination under oath in accordance with a no-fault policy also does not establish as a matter of law that an injured person is not entitled to benefits; the insurer remains statutorily obligated to pay benefits in a timely manner if the injured party complies with the requirements of the no-fault act, including submitting to a medical examination if requested, demonstrating that he or she is eligible

for benefits under a no-fault policy, and providing reasonable proof of the fact and of the amount of loss sustained (MCL 500.3101 *et seq*.).

Docket No. 320288:

Andreopoulos & Hill, PLLC (by *L. Louie Andreopoulos* and *David T. Hill*), for Chiropractors Rehabilitation Group, PC.

E. Smith & Associates, PC (by *Eric D. Smith* and *Scott W. Malott*), for State Farm Mutual Automobile Insurance Company.

Docket No. 322317:

Bauer & Hunter PLLC (by *Christopher C. Hunter* and *Richard A. Moore*) for Elite Health Centers, Inc., Elite Chiropractic, PC, and Horizon Imaging, LLC.

Scarfone & Geen, PC (by *Robert J. Scarfone* and *Keisha L. Glenn*), and *James G. Gross, PLC* (by *James G. Gross*), for State Farm Mutual Automobile Insurance Company.

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

WILDER, P.J. These consolidated appeals are before this Court by leave granted.[1] In each case, defendant, State Farm Mutual Automobile Insurance Company (State Farm), appeals a circuit court order affirming a district court order denying a motion for summary disposition. In Docket No. 322317, State Farm also

[1] *Chiropractors Rehab Group, PC v State Farm Mut Auto Ins Co*, unpublished order of the Court of Appeals, entered June 25, 2014 (Docket No. 320288); *Elite Health Ctrs, Inc v State Farm Mut Auto Ins Co*, unpublished order of the Court of Appeals, entered July 11, 2014 (Docket No. 322317).

challenges the district court's order denying leave to amend its affirmative defenses. We affirm in part and reverse in part.

I

Plaintiffs in both cases are healthcare providers that rendered medical treatment to individuals allegedly injured in motor vehicle accidents. The medical providers brought actions in the district court, under the no-fault act, MCL 500.3101 *et seq*., seeking reimbursement for medical expenses related to the treatment rendered. State Farm, the no-fault insurer allegedly responsible for payment of personal protection insurance (PIP) benefits under the no-fault act, filed motions for summary disposition in which it argued, among other things, that the injured parties were not eligible for the payment of PIP benefits and, therefore, the healthcare providers were similarly precluded from seeking such benefits. The district courts denied State Farm's motion for summary disposition in each case.

A

In Docket No. 320288, Raynard Jackson allegedly sustained injuries on or about September 4, 2011, while a passenger in a motor vehicle owned and operated by Mohammed Abdullah. At the time, Abdullah's vehicle was insured under a no-fault policy issued by State Farm. Because of incomplete and conflicting police reports and medical records, there were questions regarding whether Jackson was injured in the accident. Consequently, in response to Jackson's claim for PIP benefits, State Farm requested that Jackson submit to a medical examination (ME) as permitted under MCL 500.3151 and an examination under oath (EUO). Jackson failed to appear for two ME appoint-

ments scheduled in February and March 2012. He similarly failed to attend the EUO. In April 2012, State Farm advised Jackson, through his legal counsel, that because of Jackson's failure to cooperate with its investigation of the claim, State Farm was suspending his claim for benefits.

Sometime after the accident, Jackson sought treatment from plaintiff, Chiropractors Rehabilitation Group, PC. When State Farm failed to reimburse plaintiff for the charges associated with its treatment of Jackson, plaintiff filed a complaint alleging that, under the no-fault act, it was entitled to reimbursement from State Farm for the services it provided to Jackson. On May 10, 2013, State Farm moved for summary disposition under MCR 2.116(C)(10), arguing that it was not responsible for charges associated with plaintiff's treatment of Jackson. State Farm asserted that because Jackson had failed to cooperate in its investigation of the claims, he was not eligible for coverage under the policy. State Farm then reasoned that Jackson's ineligibility for coverage barred the claims of any healthcare provider seeking coverage on Jackson's behalf.

The district court denied State Farm's motion for summary disposition. The court held that questions of fact existed regarding whether Jackson was eligible for coverage under the no-fault act and whether Jackson's ineligibility would bar the provider's claims. The district court also denied State Farm's motion for reconsideration. On appeal, the circuit court affirmed the district court's order.

B

In Docket No. 322317, Ricky Johnson was purportedly a passenger in a vehicle involved in an accident on June 28, 2012, but the traffic report identified only

"Qutrel Monteque" as a passenger. Johnson purportedly gave the police a false name at the time of the accident. On August 23, 2012, Johnson sought treatment from plaintiff Elite Health Centers, Inc. Johnson complained of neck and back pain that he attributed to injuries sustained in the accident. Johnson also sought treatment from plaintiff Horizon Imaging, LLC, in September 2012, where he underwent three MRIs.

On September 19, 2012, Johnson filed a claim for PIP benefits with State Farm, which had issued a policy of no-fault insurance to Veretta Robinson, the owner of the vehicle in which Johnson was allegedly a passenger. On January 22, 2013, State Farm requested that Johnson appear for an EUO on February 4, 2013. Johnson failed to appear for this scheduled EUO and later failed to appear at EUOs rescheduled for March 20, 2013 and March 22, 2013.

On September 6, 2013, plaintiffs filed a first amended complaint seeking PIP benefits from State Farm. Plaintiffs sought reimbursement of nearly $20,000 in outstanding medical expenses related to plaintiffs' treatment of Johnson. On November 19, 2013, State Farm filed a motion to amend its affirmative defenses and for summary disposition. Through this motion, State Farm sought to include as an affirmative defense that plaintiffs' suit was barred because Johnson had failed to cooperate with State Farm's investigation of the claim. State Farm also argued that summary disposition of plaintiffs' claims was appropriate because Johnson's ineligibility for PIP benefits precluded plaintiffs from seeking such benefits. Additionally, State Farm asserted that the policy language at issue required Johnson to submit to an EUO as a condition precedent to the recovery of benefits. State Farm argued that Johnson's failure to

cooperate made it impossible to establish whether a loss occurred or whether it was first in priority to provide no-fault coverage to Johnson. State Farm, therefore, reasoned that summary disposition was appropriate under MCR 2.116(C)(10). In response, plaintiffs argued that because EUO provisions in insurance contracts may not act as a condition precedent to the recovery of PIP benefits, State Farm was not entitled to summary disposition.

The district court denied State Farm's motion to amend its affirmative defenses and for summary disposition. The court ruled that State Farm had provided no legal authority to warrant an amendment to the affirmative defenses. With respect to the summary disposition motion, the court held that Johnson's actions did not preclude a healthcare provider's claim because a healthcare provider has a right to a separate cause of action.

On January 30, 2014, State Farm moved for reconsideration of the district court's order denying leave to amend its affirmative defenses. In this motion, State Farm argued that healthcare providers lacked standing to pursue a claim for PIP benefits, asserting that only the injured party could pursue such a claim. On February 4, 2014, the district court denied State Farm's motion for reconsideration.

The circuit court denied State Farm's application for leave to appeal, finding that State Farm had failed to show that it would suffer substantial harm by awaiting final judgment. This Court thereafter granted leave to appeal.

II

In both appeals, State Farm argues that the lower courts erred by denying its motions for summary

disposition. We review de novo a trial court's decision on a motion for summary disposition, *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013), as well as a circuit court's affirmance of a district court's decision on a motion for summary disposition, *First of America Bank v Thompson*, 217 Mich App 581, 583; 552 NW2d 516 (1996). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court must consider, in the light most favorable to the party opposing the motion, "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties' . . . ." *Calhoun Co v Blue Cross Blue Shield Mich*, 297 Mich App 1, 11; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Dillard v Schlussel*, 308 Mich App 429, 444-445; 865 NW2d 648 (2014) (quotation marks and citation omitted). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party," *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008), or "when the evidence submitted 'might permit inferences contrary to the facts as asserted by the movant,' " *Dillard*, 308 Mich App at 445, quoting *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982).

A

State Farm first argues in Docket No. 322317 that healthcare providers do not have standing under the

no-fault act to bring an action against an insurer to obtain no-fault PIP benefits. We disagree.

This issue is not properly preserved because State Farm raised this argument for the first time in a motion for reconsideration. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). However, we will review this issue because it is an issue of law and all of the relevant facts are available. *Id*.

Whether a party has standing to bring an action is a question of law reviewed de novo on appeal. *Gyarmati v Bielfield*, 245 Mich App 602, 604; 629 NW2d 93 (2001).

> [A] litigant has standing whenever there is a legal cause of action. . . . Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or *right*, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large *or if the statutory scheme implies that the Legislature intended to confer standing on the litigant*. [*Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (emphasis added).]

This Court has frequently restated the following principles of statutory construction:

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is

> appropriate. [*CG Automation & Fixture, Inc v Autoform, Inc*, 291 Mich App 333, 338; 804 NW2d 781 (2011) (quotation marks and citation omitted).]

Courts should give effect to every word and phrase in a statute and avoid an interpretation that renders any part of a statute surplusage or nugatory. *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 238; 814 NW2d 646 (2012).

In *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 381-381; 554 NW2d 49 (1996), this Court previously recognized that medical service providers have the "*right* to be paid for the injureds' no-fault medical expenses . . . pursuant to MCL 500.3105, 500.3107, and 500.3157 . . . ." (Emphasis added.)[2] Similarly, a healthcare provider's right to reimbursement for medical expenses in a first-party no-fault action is evident in the statutory language of MCL 500.3112,

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[2] MCL 500.3105(1) provides, "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." In relevant part, MCL 500.3107 states:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

Finally, MCL 500.3157 provides:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.

especially when the language is considered in context with MCL 500.3105, MCL 500.3107, and MCL 500.3157. MCL 500.3112 states, in pertinent part, that "[p]ersonal protection insurance benefits are payable to *or for the benefit of* an injured person or, in the case of his death, to or for the benefit of his dependents." MCL 500.3112 (emphasis added). "The word 'or' is a disjunctive term indicating a choice between alternatives." *Jesperson v Auto Club Ins Ass'n*, 306 Mich App 632, 643; 858 NW2d 105 (2014). Accordingly, the plain language of the statute reveals a Legislative intent to allow either the injured person *or* a party that provided benefits to an injured person to recover the payment of benefits from an insurer; the injured person is not the only party who has this right. Consistently with this construction, this Court has held that MCL 500.3112 "specifically contemplates the payment of benefits to someone other than the injured person," and has recognized that "it is common practice for insurers to directly reimburse health care providers for services rendered to their insureds." *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 39; 645 NW2d 59 (2002). Therefore, given the text of MCL 500.3112, especially when read in conjunction with MCL 500.3105, MCL 500.3107, MCL 500.3157, and this Court's previous interpretations of the language, we conclude that the statutory scheme of the no-fault act indicates that the Legislature intended to confer standing on a healthcare provider to bring a claim against an insurer in order to enforce the provider's right to be reimbursed for medical services rendered to an injured party covered under a no-fault policy. See *Lansing Sch Ed Ass'n*, 487 Mich at 372.

This conclusion is consistent with other opinions issued by this Court that have acknowledged the viability of first-party claims brought by healthcare

providers.[3] Most recently, after quoting MCL 500.3105(1) and 500.3112 and summarizing the development of the caselaw concerning this issue, this Court, in *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 396-398; 864 NW2d 598 (2014), expressly stated that healthcare providers may bring a direct action to recover PIP benefits. This Court stated, "the fact that a healthcare provider is entitled to payment, as well as the fact that a healthcare provider can sue to enforce the penalty provision of the no-fault act,[4] indicates that a healthcare provider may bring a cause of action to recover the PIP benefits under the no-fault act." *Id*. at 398.[5] Ac-

[3] See, e.g., *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 313 Mich App 50, 54; 880 NW2d 294 (2015) ("[I]t is . . . well settled that a medical provider has independent standing to bring a claim against an insurer for the payment of no-fault benefits."); *Moody v Home Owners Ins Co*, 304 Mich App 415, 440; 849 NW2d 31 (2014) ("[Healthcare] providers may bring an independent cause of action against a no-fault insurer . . . ."); *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 447-449 and 448 n 1; 830 NW2d 781 (2013) ("We note that the language "or on behalf of" in the release is similar to the phrase 'or for the benefit of' in MCL 500.3112, which this Court has recognized creates an independent cause of action for healthcare providers."); *Lakeland*, 250 Mich App at 42 ("Plaintiff was a health care provider that had the right to, and did, submit claims for medical benefits for the benefit of defendant's insured. Plaintiff's claims were repeatedly denied, *forcing plaintiff to commence legal action against defendant that led to full recovery of the benefits* . . . .") (emphasis added); *id*. at 42-43 ("The no-fault act does not, however, accomplish its purpose or goal by sanctioning actions of no-fault insurers that include unreasonable payment delays and denials of no-fault benefits *that force the commencement of legal action by the injured person's health care provider*.") (emphasis added); *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719, 733; 650 NW2d 129 (2002) ("Although [healthcare providers] may have derivative claims, *they also have direct claims for personal protection insurance benefits*.") (emphasis added).

[4] See *Lakeland*, 250 Mich App at 37-40.

[5] In *Wyoming Chiropractic*, this Court relied on the following prior opinions of this Court: *Lakeland*, 250 Mich App at 36-39; *Univ of Mich Regents*, 250 Mich App at 731-734; and *Munson*, 218 Mich App at 381.

cordingly, in light of the statutory framework and applicable caselaw, State Farm's argument that the healthcare providers do not have standing to bring causes of action to recover PIP benefits is without merit.

B

Next, State Farm argues in both appeals that the healthcare providers' ability to seek no-fault PIP benefits is dependent on whether the injured party would be eligible to receive those PIP benefits. Accordingly, State Farm contends that the trial courts erred by denying its motions for summary disposition because the medical providers' claims were barred because Jackson and Johnson were ineligible for benefits given that they had failed to submit to the MEs and EUOs that State Farm had requested and, consequently, failed to provide reasonable proof of a compensable loss. We agree with State Farm's general statement of the law, but disagree that the medical providers' claims are barred as a matter of law at this stage of the proceedings.

A review of relevant Michigan caselaw indicates that a healthcare provider's eligibility to recover medical expenses is dependent on the injured party's eligibility for no-fault benefits under the insurance policy. Our decision in *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39; 795 NW2d 229 (2010), is instructive. In that case, the healthcare provider brought suit seeking payment of PIP benefits under the no-fault act. *Id*. at 40. The plaintiff had provided medical treatment to Eric Afful, who was allegedly injured in a motor vehicle accident. *Id*. at 40-41. State Farm, however, had refused to pay Afful's claim, contending that the claims were fraudulent. *Id*. at 40. Afful filed suit

against State Farm, and the jury found that Afful was not entitled to no-fault benefits on account of his fraudulent conduct. *Id*. In the provider's suit, this Court found that the provider was similarly barred from claiming no-fault benefits:

> Here, there is no serious dispute whether the judgment in the first case was a final judgment on the merits. The jury determined that Afful had submitted a fraudulent claim for benefits, and a judgment pursuant to the verdict was entered on June 3, 2008. Further, there is no question whether plaintiff's claims were, or could have been, resolved in the first lawsuit. This is because the essential evidence presented in the first case sustained dismissal of both actions. See *Eaton Co Rd Comm'rs* [*v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994)]. Plaintiff, by seeking coverage under the policy, is now essentially standing in the shoes of Afful. Being in such a position, there is also no question that plaintiff, although not a party to the first case, was a "privy" of Afful. "A privy of a party includes a person so identified in interest with another that he represents the same legal right . . . ." *Begin* [*v Mich Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009)].[6] As noted, the jury determined that Afful submitted a fraudulent claim. The result under the plain language of the exclusion provision interpreted in the first action is that Afful and his privies were not entitled to coverage under the policy. Plaintiff is simply attempting to relitigate precisely the same issue in order to obtain coverage under the policy. The trial court properly dismissed plaintiff's suit to the extent that it found its claim was barred by res judicata. For this reason, plaintiff's claim of appeal fails. [*TBCI*, 289 Mich App at 43-44.]

Similarly, in *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424-425; 864 NW2d 609 (2014), this Court held that the healthcare providers' claims for PIP

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[6] *Begin* was overruled on other grounds in *Admire v Auto-Owners Ins Co*, 494 Mich 10 (2013).

benefits were barred by the fraudulent conduct of the named insured. Citing *TBCI*, 289 Mich App at 44, this Court stated, "Because [the healthcare providers] stood in the shoes of the named insured, if [the named insured] cannot recover benefits, neither can [the healthcare providers]." *Id*. at 424. Accordingly, this Court concluded that "[b]ecause [the insured's] claim for PIP benefits is precluded, [the providers'] claim for PIP benefits is similarly barred . . . ." *Id*. at 426.

In *Mich Head & Spine Institute v State Farm Mut Auto Ins Co*, 299 Mich App 442; 830 NW2d 781 (2013), this Court also acknowledged the interdependence between the claims of a healthcare provider and an injured party. In that case, the healthcare provider rendered services and accommodations to Pellumbesha Biba and brought an action against Biba's no-fault insurer, State Farm, seeking to recover payment for those services. *Id*. at 445-446. In exchange for $35,000 and in settlement of ongoing litigation with State Farm, Biba executed a contract that released State Farm from liability for no-fault benefits incurred to date or which might be incurred in the future. *Id*. at 444-445. Six months after signing the release, Biba began treatment with the plaintiff, Michigan Head & Spine. *Id*. at 445. In reliance on the release, State Farm refused to pay Michigan Head & Spine for its treatment of Biba. *Id*. at 445. State Farm appealed an order granting summary disposition in favor of Michigan Head & Spine, and this Court had to determine "whether an insured's release bars a healthcare provider's claim for payment for medical services rendered to the insured after the release was executed." *Id*. at 448. Applying contract principles, this Court held that the plain language of the release "demonstrate[d] that, in exchange for defendant's payment of $35,000, the parties intended to discharge [State Farm's] liability

altogether, including its liability for future medical services." *Id*. Therefore, this Court held that summary disposition should have been granted in State Farm's favor. *Id*. at 450.[7]

Additionally, in *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392; 838 NW2d 910 (2013), this Court implicitly recognized that a healthcare provider's claim is dependent on the injured party's entitlement to benefits under a no-fault insurance policy, although it did not directly rule on the issue. The case was initiated by the plaintiff healthcare provider that treated the injuries of a motorcyclist who was insured by the defendant insurance company. *Id*. at 394. The trial court entered judgment in favor of the healthcare provider based on its conclusion that the motor vehicle associated with the incident was sufficiently involved in the accident for the plaintiff healthcare provider to recover no-fault benefits. *Id*. at 394. This Court held that summary disposition should have been granted in favor of the defendant insurance company because the *motorcyclist* was not entitled to personal protection insurance benefits pursuant to the no-fault act under the facts of the case. *Id*. at 399.[8]

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[7] Notably, the services and billings at issue in *Mich Head & Spine* were incurred and submitted *after* the insured entered into a release with the insurer. That case did not address the situation in which an insured receives medical services and the medical provider notifies the insurer of its right to payment before the execution of a release by the insured, a situation that raises particular issues under the text of MCL 500.3112. See *Covenant Med Ctr*, 313 Mich App at 53 (holding that when the insurer has written notice of a medical provider's claim, the insurer cannot discharge its liability to the provider by settling with its insured).

[8] This Court's decision in *Moody*, 304 Mich App at 440, stating that the providers' claims were "completely derivative of and dependent on Moody's having a valid claim of no-fault benefits against [the insurer]," is also consistent with the other cases discussed in this opinion.

In light of this caselaw, we conclude that a health-care provider's ability to recover an injured party's medical expenses under the no-fault act is dependent on the injured party's eligibility for no-fault benefits.[9] Accordingly, resolution of the ultimate issue in these cases turns on whether the injured persons, Jackson and Johnson, would have been entitled to recover first-party PIP benefits under the insurance policies. For the reasons stated later in this opinion, we conclude that the district courts did not err by finding that genuine issues of material fact precluded summary disposition.

State Farm argues that the district courts' focus on whether Jackson and Johnson were involved in the accidents or sustained injures related thereto was misplaced. Instead, according to State Farm, the courts should have focused on the undisputed fact that the injured parties failed to submit to the requested MEs and EUOs. State Farm contends that this failure

[9] Although the specific issue is not before us for decision, in our view, whether an injured party is *eligible* for benefits is a different question than whether an injured party may recover benefits when that injured party fails to timely file a cause of action to recover benefits that the injured party is eligible to receive. Were the question before us, we would conclude that an injured party's failure to timely bring suit would not, in and of itself, bar a provider's timely action against the insurer. An injured party may be *eligible* for benefits under MCL 500.3105(1) even though his or her claim is barred by the one-year statute of limitations under MCL 500.3145(1). In such a case, a provider's claim, which is dependent on the injured party's eligibility, would be unaffected. See *Moody*, 304 Mich App at 440. It is well settled that each claim in an action is subject to its own applicable statute of limitations and the untimeliness of one claim does not, without more, bar another timely filed claim. Moreover, if the provider's claim is timely filed, the purposes of statutes of limitations—to encourage plaintiffs to diligently pursue claims and to protect defendants from having to defend against stale and fraudulent claims—are satisfied. See *Wright v Rinaldo*, 279 Mich App 526, 533; 761 NW2d 114 (2008).

to cooperate conclusively established that the injured parties were prohibited from seeking no-fault coverage. We disagree.

In order to resolve this issue, a brief review of the statutes and caselaw addressing MEs and EUOs is warranted. Beginning with MEs, MCL 500.3151 provides that "[w]hen the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians." MCL 500.3153 addresses the repercussions that may result if a claimant refuses to comply with a request to submit to an examination. The statute permits a court to enter orders regarding the refusal that include, but are not limited to:

> (a) An order that the mental or physical condition of the disobedient person shall be taken to be established for the purposes of the claim in accordance with the contention of the party obtaining the order.
>
> (b) An order refusing to allow the disobedient person to support or oppose designated claims or defenses, or prohibiting him from introducing evidence of mental or physical condition.
>
> (c) An order rendering judgment by default against the disobedient person as to his entire claim or a designated part of it.
>
> (d) An order requiring the disobedient person to reimburse the insurer for reasonable attorneys' fees and expenses incurred in defense against the claim.
>
> (e) An order requiring delivery of a report, in conformity with section 3152, on such terms as are just, and if a physician fails or refuses to make the report a court may exclude his testimony if offered at trial. [MCL 500.3153.]

Thus, under MCL 500.3153, a court is authorized to dismiss an injured person's claim for failure to submit

to an examination. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 188-189; 732 NW2d 88 (2007). However, no such order was entered in either case.

This Court's decision in *Roberts v Farmers Ins Exch*, 275 Mich App 58; 737 NW2d 332 (2007), is instructive. *Roberts* indicates that a suspension of benefits is proper if a claimant repeatedly fails to comply with his or her statutory duty to submit to MEs. *Id*. at 69. In *Roberts*, after the insured, Brittany Underwood, repeatedly missed scheduled MEs and failed to pay cancellation fees, the insurer discontinued first-party no-fault benefits. *Id*. at 61. This Court, in reviewing the propriety of the insurer's actions, held:

> Underwood repeatedly failed or refused to attend the physical and psychological [MEs]. Underwood therefore breached her statutory duty to "submit to mental or physical examination by physicians." MCL 500.3151. *Farmers did not conclude that because of Underwood's breach, benefits were irrevocably denied; rather, it merely suspended those benefits until Underwood (1) paid the $1,000 cancellation fee and (2) submitted to a psychological* [*ME*]. Because Underwood had breached her statutory duty to submit to [MEs], Farmers had a legitimate statutory question, namely, whether a claimant, upon breach of her statutory duty to submit to [MEs], remains entitled to continuing PIP benefits. The statute provides no penalty for a claimant's breach of his or her duty to submit to [MEs]; therefore, Farmers raises a legitimate statutory question regarding the appropriate consequence of Underwood's breach of her statutory duty. Because Farmers had a legitimate question of statutory construction, its suspension of benefits to Underwood was reasonable. *McCarthy* [*v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994)]. *We hold that where a claimant repeatedly breaches his or her statutory duty to submit to* [*MEs*]*, an insurer may properly suspend benefits pending completion of any requisite* [*ME*]*. Otherwise, an insured could breach with impunity his or her duty to submit to* [*MEs*]*, and the*

> *insurer would have no way of investigating whether the injury claims were legitimate*.
>
> In addition to the statutory duty to submit to [MEs], Farmers' no-fault policy imposes on a person claiming coverage under the policy a duty to "[s]ubmit to physical examinations at our expense by doctors we select as often as we may reasonably require." The policy does not articulate the remedy for breach of this duty. The general rule is that a remedy for breach of contract should make the nonbreaching party whole or "place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625-626; 544 NW2d 278 (1996). Allowing Farmers to suspend benefits places Farmers in as good a position as if Underwood had submitted to a neuropsychological [ME] because it puts Farmers in the same position as it would be had the [ME] shown that Underwood lacked a brain injury caused by the accident. Whether viewed as a remedy for breach of the statutory duty to submit to [MEs] or as a remedy for breach of a contractual duty to submit to [MEs], the proper remedy is for the insurer to suspend performance of its duties. [*Id*. at 68-70 (emphasis added).]

Therefore, under *Roberts*, State Farm may reasonably suspend claims by the injured parties due to a failure to submit to MEs, and a suspension of benefits is not an irrevocable denial of benefits; the eligibility for PIP benefits is simply suspended until compliance with the ME. Likewise, we conclude that evidence that an injured party failed to submit to an ME that later results in a suspension of the claim is not tantamount to dispositive evidence that the injured person is *not entitled* to PIP benefits.

With regard to the effect of an injured party's failure to submit to an EUO, the Supreme Court's decision in *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588; 648 NW2d 591 (2002), is instructive. In *Cruz*, the Court held that EUO provisions may be included in no-fault

polices, but they are only enforceable to the extent that they do not conflict with the statutory requirements of the no-fault act. *Id*. at 590. Accordingly, a policy provision requiring a claimant to submit to an EUO that is "designed only to ensure that the insurer is provided with the information relating to proof of the fact and of the amount of the loss sustained . . . would not run afoul of the statute." *Id*. at 598. However, "a no-fault policy that would allow the insurer to avoid its obligation to make prompt payment upon the mere failure to comply with an EUO would run afoul of the statute and accordingly be invalid." *Id*.

State Farm contends, *inter alia*, that the injured parties are ineligible for PIP benefits because they failed to submit to EUOs. However, taken to its logical extension, State Farm's argument, that the failure to submit to an EUO is alone sufficient to render the injured person ineligible for PIP benefits, would cause compliance with EUO provisions to effectively operate as a condition precedent to State Farm's duty to pay no-fault benefits.[10] However, using compliance with EUO provisions as a condition precedent to the recovery of no-fault benefits is precluded by *Cruz*, which held that an insurance company and its insured are not permitted to contract in a manner that vitiates the insurance company's "duty to pay benefits in a timely fashion as required by the statute. Once 'reasonable

[10] As State Farm argues in Docket No. 322317, it does appear that the *purpose* of invoking the EUO provision was to ensure that it was provided with information regarding Johnson's eligibility for PIP benefits under the insurance policy. However, as we explain in this opinion, we hold that the injured party's failure to submit to an EUO or provide other documentation does not establish, as a matter of law, that the injured party is *not entitled* to PIP benefits, such that a healthcare provider is not entitled to receive payment for medical services as a matter of law.

proof of the fact and of the amount of loss sustained' [is] received by [the insurer], it [must] pay benefits or be subject to the penalties." *Id*. at 600. Accordingly, we hold that the failure to submit to an EUO does not establish, as a matter of law, that an injured party is not entitled to no-fault benefits.

In these cases, it is apparent that an irrevocable denial[11] of benefits had not been issued by State Farm in either case: State Farm had only suspended Jackson's claim for benefits because of its inability to determine whether Jackson was eligible for outstanding or future benefits, and there is no indication that State Farm took any action following Johnson's failure to appear at the EUOs. Therefore, we conclude that the injured parties' failure to submit to the MEs and EUOs requested by State Farm did not demonstrate that there is no genuine issue of material fact as to whether plaintiffs, as the injured parties' healthcare providers, were entitled to no-fault benefits as a matter of law, because the injured parties' failure to comply does not conclusively establish the ineligibility of the injured parties to PIP benefits and plaintiffs' related inability to recover payment for services from State Farm. State Farm remained statutorily obligated to pay benefits in a timely manner if the injured parties complied with the requirements of the no-fault act, which includes submitting to an ME if requested,[12] demonstrating that they are eligible for benefits under the policy,[13] and providing "reasonable proof of the fact and of the

[11] See *Roberts*, 275 Mich App at 69.

[12] MCL 500.3151.

[13] See *Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012) (stating that MCL 500.3105(1) includes two threshold requirements that a plaintiff must establish in order to show entitlement to PIP benefits: (1) "the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident" and (2) the

amount of loss sustained."[14] Viewing the evidence in the light most favorable to the parties opposing the motions for summary disposition, see *Calhoun Co*, 297 Mich App at 11-12, the medical records proffered by plaintiffs in the district courts established that there were genuine issues of material fact regarding whether the injured parties' claims were causally connected to accidental bodily injuries arising out of an automobile accident, which involved the use of a motor vehicle. Likewise, the medical records provided by plaintiffs established a genuine issue of material fact regarding whether plaintiffs had proffered reasonable proof of the fact and of the amount of loss sustained, such that State Farm was required to pay PIP benefits to plaintiffs. Therefore, because "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party," *Allison*, 481 Mich at 425, and "the evidence submitted 'might permit inferences contrary to the facts asserted by the movant,' " *Dillard*, 308 Mich App at 445 (citation omitted), the district courts did not err by denying State Farm's motions for summary disposition under MCR 2.116(C)(10).

Our conclusion here is consistent with the public policy goals of the no-fault act. As discussed by this Court in *Wyoming Chiropractic*, 308 Mich App at 401:

> [t]he goal of the no-fault act is " 'to provide victims of motor vehicle accidents with *assured, adequate, and prompt* reparation for certain economic losses.' " The no-

"injuries [arose] out of or [were] caused by the ownership, operation, maintenance or use of a motor vehicle") (citation and quotation marks omitted).

[14] MCL 500.3142 ("Personal protection insurance benefits are overdue if not paid within 30 days *after an insurer receives reasonable proof of the fact and of the amount of loss sustained*.") (emphasis added); see also *Cruz*, 466 Mich at 600.

> fault act was designed to remedy " 'long delays, inequitable payment structure, and high legal costs' " in the tort system. Allowing a healthcare provider to bring a cause of action expedites the payment process to the healthcare provider when payment is in dispute. [Emphasis added; citations omitted.]

See also *Shavers v Attorney General*, 402 Mich 554, 621-623; 267 NW2d 72 (1978) (describing operational deficiencies in the previous tort system and the corresponding changes enacted under the no-fault personal injury protection system). However, "[i]t is clear that the Legislature did not intend for no-fault insurers to pay all claims submitted without reviewing the claims for lack of coverage, excessiveness, or fraud." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 378; 670 NW2d 569 (2003) (quotation marks, citation, and emphasis omitted). Although it is evident that the no-fault act balances injured parties' interests in assured payment with insurance providers' interests in ensuring that they do not pay ineligible, excessive, or fraudulent claims, the statutory scheme and public policy goals of the act demonstrate a significant emphasis on assured, adequate, and prompt reparation for the victims of motor vehicle accidents and, correspondingly, those who may claim benefits "for the benefit of an injured person," i.e., healthcare providers. MCL 500.3112. As recognized in *Wyoming Chiropractic*, a healthcare provider's suit for the payment of PIP benefits when payment is in dispute, even when an injured party has failed to comply with MEs or EUOs, expedites the payment process, and increases the probability of assured payment, for the healthcare provider. Likewise, given that plaintiffs are still required to establish the injured parties' eligibility for benefits in order to receive pay-

ment,[15] State Farm's interest in preventing payment for claims barred by lack of coverage, excessiveness, or fraud is still preserved. See *Advocacy Org*, 257 Mich App at 377-379. Therefore, for the reasons stated in this opinion, we hold that the injured parties' failure to comply with the MEs and EUOs did not establish that State Farm was entitled to summary disposition as a matter of law.

III

Finally, State Farm argues in Docket No. 322317 that the district court abused its discretion when it failed to grant State Farm's request for leave to amend its affirmative defenses to include an allegation that Johnson's ineligibility for no-fault benefits barred plaintiffs' claims. We agree.

This Court reviews for an abuse of discretion a trial court's ruling on a motion for leave to amend a pleading. *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 346; 715 NW2d 324 (2006). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Brown v Home-Owners Ins Co*, 298 Mich App 678, 690; 828 NW2d 400 (2012) (quotation marks and citation omitted).

MCR 2.111(F)(3) requires that a party state its affirmative defenses in the party's responsive pleading, either as originally filed or as amended under MCR 2.118. Specifically, pursuant to MCR 2.111(F)(3)(b), a party must state the facts constituting "a defense that

[15] Given that State Farm properly suspended benefits in Docket No. 320288 because Jackson failed to submit to an ME, Chiropractors Rehabilitation Group, whose claim is derivative and dependent on Jackson's eligibility for benefits, would still be subject to the suspension of benefits until Jackson complied with the investigation. See *Moody*, 304 Mich App at 440.

by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part[.]" Under MCR 2.118(A)(2), leave to amend pleadings "shall be freely given when justice so requires."

> A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons:
>
> > [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . . [*Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) (quotation marks and citation omitted; alterations in original).]

In Johnson's case, the trial court denied State Farm's motion to amend on the basis that it failed to make a legal argument or cite any caselaw indicating that justice required an amendment of State Farm's affirmative defenses. The trial court's reasoning was equivalent to a finding that the amendment would be futile. "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). While futility may warrant denying a motion to amend a pleading, *Weymers*, 454 Mich at 658, in Johnson's case, the proposed amendment was not necessarily futile. As we explained in Part II(B), a healthcare provider's ability to recover medical expenses under the no-fault act depends on whether the injured party is eligible for no-fault benefits. Accordingly, if it were established that Johnson is not eligible for no-fault benefits, the providers' cause of action would be precluded. In its brief in support of its motion to amend its affirmative

defenses and for summary disposition, State Farm cited authority in support of its position that the healthcare providers stand in the shoes of Johnson, such that the healthcare providers are no more entitled to recover benefits than Johnson. Therefore, to the extent that State Farm's proposed amendment included an allegation that Johnson's ineligibility for no-fault benefits barred plaintiffs' claims, State Farm should have been given leave to amend its affirmative defenses. Such an affirmative defense, if proven, would, in fact, defeat plaintiffs' claims. Therefore, the court abused its discretion when it failed to permit the proposed amendment to State Farm's affirmative defenses.

We affirm the district court orders denying State Farm's motions for summary disposition in Docket Nos. 320288 and 322317, reverse the order denying State Farm's motion to amend its affirmative defenses in Docket No. 322317, and remand for further proceedings consistent with this opinion in both appeals. As the prevailing party in Docket No. 320288, Chiropractors Rehabilitation Group may tax costs pursuant to MCR 7.219. No taxable costs in Docket No. 322317, none of the parties having prevailed in full. We do not retain jurisdiction.

SHAPIRO and RONAYNE KRAUSE, JJ., concurred with WILDER, P.J.

SMITH v CITY OF FLINT

Docket No. 320437. Submitted July 8, 2015, at Detroit. Decided November 5, 2015, at 9:00 a.m. Leave to appeal sought.

Kevin Smith filed a complaint in the Genesee Circuit Court against the city of Flint, in which he alleged a violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., arising from defendant's assignment of plaintiff to third-shift road patrol in the north end of Flint, following the elimination of his day-shift position as union president. Plaintiff claimed that the job assignment was in retaliation for his publicly expressed disapproval of defendant's use of $5.3 million raised after voters approved a six-mill millage to collect funds for public safety. Plaintiff complained publicly that defendant was not using the funds raised by the millage increase to hire as many police officers as possible. Defendant filed a motion under MCR 2.116(C)(8) for summary disposition of plaintiff's WPA claim, which the court, Joseph J. Farah, J., granted. Plaintiff filed an application for leave to appeal in the Court of Appeals. It was denied. Plaintiff then filed an application for leave to appeal in the Supreme Court. The Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 497 Mich 920 (2014).

The Court of Appeals *held*:

1. The trial court properly granted summary disposition in favor of defendant on plaintiff's WPA claim because plaintiff failed to satisfy the second element of a prima facie case under the WPA. A prima facie case under the WPA requires a plaintiff to show that (1) the plaintiff was engaged in a protected activity defined by the WPA, (2) the defendant took an adverse employment action against the plaintiff, and (3) there is a causal connection between the protected activity and the adverse employment action. In this case, plaintiff failed to show that defendant took an adverse employment action against him; that is, plaintiff failed to show that defendant discharged, threatened, or otherwise discriminated against him in a manner that affected his compensation, terms, conditions, location, or privileges of employment. Plaintiff claimed that his assignment to patrol duty was a retaliatory action because he publicly complained about defendant's use of the millage funds. However, an adverse employment action is a decision that is

materially adverse to a reasonable person; it is more than a mere inconvenience or alteration of job responsibilities. There must be objective evidence that the decision constituted an adverse employment action; a plaintiff's subjective impressions are not controlling. Plaintiff failed to show either that he was retaliated against within 90 days of filing his complaint or that his assignment to patrol duty in the north end of Flint was an adverse employment action. The elimination of plaintiff's job as union president occurred long before he was assigned to patrol duty and before plaintiff publicly complained about the millage funds. The Court of Appeals concluded that the change in the location of plaintiff's job was an employment decision squarely within defendant's exercise of discretion, and that a move from one location to another location in the same city plaintiff was sworn to protect, did not constitute a significant or an objective change in location for purposes of the WPA.

2. The Court of Appeals also determined that even if it were to hold that plaintiff suffered an adverse employment action under the WPA, plaintiff could not establish that he was engaged in a protected activity before he was assigned to patrol duty. Plaintiff did not participate in an investigation by a public body, and therefore, he was required to allege facts to establish that he reported or was about to report a violation of the law to a public body. In this case, plaintiff did not assert what rule or law was violated by defendant's use of the millage fund. In fact, plaintiff merely disagreed with defendant's policy decisions with regard to the millage fund. Defendant's expenditures did not violate any rule or law.

Affirmed.

FORT HOOD, P. J., dissenting, would have reversed the trial court's decision and remanded the matter to the trial court for further proceedings. Plaintiff created a question of fact about whether defendant discriminated against him regarding the terms, conditions, location, or privileges of his employment. In this case, plaintiff worked the day shift as the union president before that position was eliminated. He was later assigned to the night shift to patrol a dangerous part of the city. In between the elimination of his position as union president and his patrol assignment, plaintiff publicly criticized the way defendant was using the money collected from the millage increase. The patrol assignment changed the location of plaintiff's "workplace," and the change from day shift to night shift represented a change in the terms of plaintiff's employment. Viewing the complaint in the light most favorable to plaintiff, plaintiff established a question of fact about whether a reasonable person would consider defendant's

actions to be objectively and materially adverse to the terms and location of plaintiff's employment.

WHISTLEBLOWERS' PROTECTION ACT — ADVERSE EMPLOYMENT ACTIONS — CHANGE IN LOCATION OF EMPLOYMENT — PUBLIC SAFETY.

An adverse employment action is a decision that is objectively and materially adverse to a reasonable person; a mere inconvenience or alteration of job responsibilities is not an adverse employment action; a change in the location of employment must be a significant and objective one to qualify as an adverse employment action; an employee's assignment from one city to another, or when an employer has multiple locations, from one location to another, is the sort of significant and objective change contemplated by the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.; a police officer's change of assignment and location within the same city he or she was sworn to protect does not constitute a significant change of location under the WPA; the decision about an officer's patrol area falls squarely within the discretion exercised by a police department in its fundamental role of securing public safety.

Tom R. Pabst for plaintiff.

Anthony Chubb for defendant.

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

SAAD, J. Plaintiff appeals from the order that granted partial summary disposition to defendant.[1] Specifically, plaintiff challenges the trial court's grant of summary disposition to defendant under MCR 2.116(C)(8) on plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. For the reasons provided below, we affirm.

I. BASIC FACTS

Plaintiff, a police officer with the Flint Police Department, had been president of the City of Flint Police

[1] This Court initially declined to grant leave, but our Supreme Court remanded for consideration as on leave granted. *Smith v City of Flint*, 497 Mich 920 (2014).

Officers Union since approximately February 2011. As the union president, he worked from 8:00 a.m. until 4:00 p.m., handling all work-related grievances filed against defendant by Flint police officers. On April 24, 2012, Michael Brown, Flint's emergency manager, issued Order 18, which eliminated the position of full-time union president. However, plaintiff continued to act as union president for the remainder of 2012.

In November 2012, Flint voters passed a five-year, six-mill millage to collect funds for public safety. The total amount of funds for the first year was projected to be $5.3 million. After the millage increase was passed, plaintiff publicly complained that the revenue from the millage was not being used to hire as many new police officers as possible. On March 8, 2013, defendant's police chief informed plaintiff in writing that he was to be placed on road patrol beginning March 11, 2013. Plaintiff asserted that defendant retaliated against him for publicly criticizing the misuse of the millage revenue by assigning him to patrol Flint's north end, which he claimed was the most dangerous part of the city.

Plaintiff thereafter filed a complaint against defendant that included, among other claims, a claim for retaliation in violation of the WPA. Defendant moved for summary disposition under MCR 2.116(C)(8) of plaintiff's WPA claim, arguing that plaintiff's assignment to the north end of Flint did not constitute an adverse employment action under the WPA. The trial court agreed and granted defendant's motion for summary disposition of plaintiff's WPA claim.

II. STANDARDS OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *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. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Id*. at 119-120 (quotation marks and citations omitted).]

Further, we review questions of statutory interpretation de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). "When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature." *Id*. "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Id*.

III. ANALYSIS

"The underlying purpose of the [WPA] is protection of the public." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378; 563 NW2d 23 (1997). "The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body." *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). "The statute meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id*. at 631 (quotation marks and citation omitted). Additionally, "[t]he WPA is a remedial statute and must be liberally construed to favor the persons that the Legislature intended to benefit." *Id*.

The relevant portion of the WPA provides the following:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362.]

Thus, in order to establish a prima facie case under the WPA, a plaintiff must show that "(1) the plaintiff was engaged in protected activity as defined by the [WPA], (2) the defendant took an adverse employment action against the plaintiff, and (3) 'a causal connection exists between the protected activity' and the adverse employment action." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013), quoting *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998).

A. ADVERSE EMPLOYMENT ACTION

In its order, our Supreme Court directed us to specifically address whether plaintiff established a prima facie case with respect to the second element, i.e., "whether the plaintiff has stated a claim that he suffered discrimination regarding his terms, conditions, location, or privileges of employment." *Smith*, 497 Mich 920.

In interpreting this element, Michigan courts have routinely characterized the retaliatory actions that are

prohibited under MCL 15.362 as "adverse employment actions." See *Wurtz v Beecher Metro Dist*, 495 Mich 242, 251 n 14; 848 NW2d 121 (2014). And consistent with that interpretation, Michigan courts typically state that a plaintiff must plead and be able to prove that he or she suffered an adverse employment action in order to establish a WPA claim. See, e.g., *Whitman*, 493 Mich at 313. "The term 'adverse employment action' was originally developed and defined in the context of federal antidiscrimination statutes to encompass the various ways that an employer might retaliate or discriminate against an employee on the basis of age, sex, or race." *Wurtz*, 495 Mich at 251 n 14.

The trial court relied on *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 311; 660 NW2d 351 (2003), which "defined an adverse employment action as an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities." (Quotation marks and citations omitted.) The *Peña* Court explained that "there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions . . . are not controlling." *Id*. (quotation marks and citations omitted). The Court stated that a "typical" adverse employment action "takes the form of an ultimate employment decision, such as 'a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.' " *Id*. at 312, quoting *White v Burlington N & S F R Co*, 310 F3d 443, 450 (CA 6, 2002), vacated for en banc rehearing 321 F3d 1203 (CA 6, 2003). "In determining the existence of an adverse employment action, courts must keep in mind the fact that '[w]ork places are rarely idyllic

retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' " *Peña*, 255 Mich App at 312, quoting *Blackie v Maine*, 75 F3d 716, 725 (CA 1, 1996) (alteration in original). Although *Peña* involved a retaliation claim pursuant to the Michigan Civil Rights Act, this Court has applied the reasoning in that context to the context of the WPA. See *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 492; 705 NW2d 689 (2005), overruled in part on other grounds *Brown v Mayor of Detroit*, 478 Mich 589; 734 NW2d 514 (2007).

Plaintiff asserts that the federal law on which *Peña* relied has been overruled. We note that federal courts have rejected the interpretation that an adverse employment action must take the form of an "ultimate employment decision." In *White v Burlington N & S F R Co*, 364 F3d 789, 801-802 (CA 6, 2004), the United States Court of Appeals for the Sixth Circuit, sitting en banc, rejected the "ultimate employment decision" limitation imposed on retaliation claims. The United States Supreme Court affirmed that decision and explained that actionable retaliation was not properly limited to "ultimate employment decisions." *Burlington N & S F R Co v White*, 548 US 53, 67; 126 S Ct 2405; 165 L Ed 2d 345 (2006). The Supreme Court explained that the anti-retaliation provision of Title VII claims may include actions and harms occurring both in and out of the workplace, but any actions must be materially adverse to a reasonable employee or job applicant. *Id*. at 67-68.[2]

[2] "While Michigan courts are not bound by federal title VII precedent in interpreting Michigan Civil Rights Act cases, such precedent is highly persuasive." *Cole v Gen Motors Corp*, 236 Mich App 452, 456; 600 NW2d 421 (1999).

Consistent with the federal courts, our Supreme Court has also expressed an intention to move away from language that interprets the construct of a retaliatory action in a way not prescribed by statute. In *Wurtz*, our Supreme Court rejected the assertion that a plaintiff may establish a WPA claim by showing that he or she suffered some "abstract" adverse employment action. *Wurtz*, 495 Mich at 251 n 14. The Court explained:

> While the term "adverse employment action" may be helpful shorthand for the different ways that an employer could retaliate or discriminate against an employee, this case illustrates how such haphazard, telephone-game jurisprudence can lead courts far afield of the statutory language. That is, despite courts' freewheeling transference of the term from one statute to another, the WPA actually prohibits *different* "adverse employment actions" than the federal and state antidiscrimination statutes. So we take this opportunity to return to the express language of the WPA when it comes to the necessary showing for a prima facie case under that statute. Put another way, a plaintiff's demonstration of some abstract "adverse employment action" as that term has developed in other lines of caselaw will not be sufficient. Rather, the plaintiff must demonstrate one of the specific adverse employment actions listed in the WPA. [*Id*.]

Accordingly, in order to establish an adverse employment action under the WPA, a plaintiff has to show that he was discharged, threatened, or otherwise discriminated against, in a manner that affected his *compensation, terms, conditions, location, or privileges of employment*. *Id*. at 251. Moreover, in determining whether a retaliatory action listed in the statute occurred, we hold that the objective and material standard provided by *Peña* continues to apply. Namely, an adverse employment action (regarding an employee's compensation, terms, conditions, location, or privileges

of employment) must be more than a mere inconvenience or an alteration of job responsibilities. There must be some objective basis for concluding that the change is adverse. A plaintiff's subjective impressions as to the desirability of one position over another are not controlling. See *Peña*, 255 Mich App at 314.

Here, plaintiff has not alleged sufficient facts to show that he suffered an actual adverse employment action within 90 days of filing his complaint.[3] Plaintiff's removal as full-time union president and his return to work as a patrol officer was accomplished by the emergency financial manager's order in April 2012, which was well over 90 days before plaintiff filed his complaint on May 31, 2013. In fact, the decision to return plaintiff to work as a police officer was made before plaintiff complained about the use of the millage revenue.

Further, plaintiff's subsequent assignment to patrol duty in the north end of Flint does not constitute an adverse employment action. While retaliation related to an employee's "location" is expressly covered by the WPA, we do not construe "location" under the statute to encompass the action here. Plaintiff's assignment to patrol an area of the city is better characterized as a "job duty" that falls squarely within the discretion exercised by a police department in its fundamental role of securing public safety. We discern the statute's reference to a change in location to be a significant, objective one, such as a move from one city to another or, when an employer has multiple locations, from one location to another. Here, the area where officers patrol *within the same city they were sworn to protect* concerns job assignments; patrol areas are not a matter of

[3] MCL 15.363(1) requires a plaintiff to bring a WPA claim "within 90 days after the occurrence of the alleged violation of th[e] act."

"location" for purposes of the WPA. As a result, plaintiff's assignment to a particular patrol duty within the city of Flint is, objectively, simply not covered by the WPA.

In sum, under the facts pleaded by plaintiff, defendant's alleged acts of retaliation do not constitute an adverse employment action under the WPA. Accordingly, summary disposition in defendant's favor is proper under MCR 2.116(C)(8). Although the trial court erroneously equated an "adverse employment action" with an "ultimate employment decision," we will not reverse when the court reaches the right result, albeit for the wrong reason. *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

B. PROTECTED ACTIVITY

We also note that even if we were to hold that plaintiff pleaded sufficient facts to show that he suffered an adverse employment action under the WPA, summary disposition would nonetheless be appropriate because plaintiff failed to establish that he participated in any protected activity under the statute.

The WPA protects two types of whistleblowers. A "type 1 whistleblower" is "one who, on his own initiative, takes it upon himself to communicate the employer's wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation." *Henry v Detroit*, 234 Mich App 405, 410; 594 NW2d 107 (1999). A "type 2 whistleblower" is "[one] who participate[s] in a previously initiated investigation or hearing at the behest of a public body." *Id*.

Initially, we note that plaintiff does not allege any facts that would indicate that he was a type 2 whistleblower. While he merely reproduced in his complaint

the keywords of the WPA—that he "participated in an investigation and/or inquiry and/or hearing by a public body"—plaintiff alleged zero facts in support of this conclusory assertion. Consequently, this unsupported assertion that he was a type 2 whistleblower is not sufficient to survive a motion for summary disposition. See *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 544; 730 NW2d 481 (2007) ("It is axiomatic that conclusory statements unsupported by factual allegations are insufficient to state a cause of action.").

Accordingly, if plaintiff is to prevail, he must allege facts to show that he qualified as a type 1 whistleblower, i.e., that he reported or was about to report a violation of the law to a public body. Here, plaintiff did not demonstrate that he engaged in any protected activity. First and foremost, plaintiff has not alleged what law or rule was violated when defendant chose to use the $5.3 million from the millage in the manner it did. At the heart of any protected activity is a violation or a suspected violation of an established law or rule. See MCL 15.362. What is clear is that plaintiff simply disagreed with the *policy decisions* that defendant made with respect to the funds. A person's mere disagreement with a governmental body's decisions does not mean that the governmental body violated the law. Certainly, there are countless examples of how government has made illogical or highly questionable decisions, but the lack of logic or wisdom in those decisions does not make the government's actions illegal. Moreover, we take judicial notice that the millage proposal in question sought the funds "for the sole purpose of providing police *and* fire protection." (Emphasis added.) Nowhere did the proposal state that all of the funds raised were to be dedicated to the police department, and the proposal also did not state that all

of the funds would be used to hire new people. Clearly, there are other nonpersonnel expenses that are necessary for both the police and fire departments, so that the entirety of the funds could not be used for new hires.

Consequently, plaintiff not only failed to allege sufficient facts to show that he suffered an adverse employment action under the WPA, plaintiff also failed to allege sufficient facts to show that he was engaged in any protected activity.[4] Thus, dismissal of his WPA claim was appropriate under MCR 2.116(C)(8), and the fact that this element of a prima facie WPA claim was not specifically challenged in the trial court is of no consequence. See MCR 2.116(I)(1) ("If the pleadings show that a party is entitled to judgment as a matter of law, . . . the court shall render judgment without delay.").

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

RIORDAN, J., concurred with SAAD, J.

FORT HOOD, P.J. (*dissenting*). I respectfully dissent from the majority opinion. I agree with the majority's determinations regarding the applicable law, but I disagree with the analysis. I would conclude that a question of fact exists with regard to whether defendant discriminated against plaintiff regarding the terms,

[4] To be clear, our holding is limited to plaintiff's WPA claim. While objecting to a government's policy decisions does not implicate the WPA because the complained-of conduct is ordinarily not illegal, such objection may implicate an employee's right to be protected from retaliation on First Amendment grounds. See *Pickering v Bd of Ed*, 391 US 563; 88 S Ct 1731; 20 L Ed 2d 811 (1968). However, plaintiff never made a First Amendment claim, and the issue is not before us.

conditions, location, or privileges of his employment, and I would reverse and remand for further proceedings.

Concerning plaintiff's change from full-time union president to road patrol, I agree that plaintiff has not established a question of fact about whether the change constituted discrimination under MCL 15.362. Defendant's emergency manager eliminated the position of full-time union president in April 2012, months before plaintiff initiated any public criticism of defendant. While acting as union president may have been a privilege of plaintiff's employment, there is no question that eliminating the position was not retaliatory given the timing of the events.

However, plaintiff's assignment to the night shift in Flint's north end presents a closer question. Plaintiff, who had worked from 8:00 a.m. until 4:00 p.m. in his capacity as union president, was informed in writing that he was being assigned to road patrol. The letter stated that plaintiff's hours would be 8:00 a.m. to 4:00 p.m. However, plaintiff was actually assigned the night shift in the north end of Flint. Plaintiff asserts that the north end was "considered crime ridden and a much more dangerous area of assignment for police officers" and that the south end was "a more safe area" compared to the north end. Plaintiff indicated that he did not know of any other patrol officers that were assigned to work the north end (or any other area) exclusively. Plaintiff also alleged that he was told that he would not be allowed to work in the south end. In addition, plaintiff claimed that his assignment to night shift prevented him from conducting his union duties, which must be performed during daylight hours. According to plaintiff, his assignment to the night shift was deliberately designed to thwart

his union duties. In response, defendant claimed that plaintiff's concerns regarding his hours and shift were only his subjective complaints, and that plaintiff did not produce any objective evidence that his transfer affected the terms, conditions, location, or privileges of his employment.

I would hold that there is a question of fact regarding whether defendant's conduct constitutes discrimination. I believe that the change in plaintiff's hours and location relates to the terms and location of his employment. In particular, plaintiff was informed in writing that his hours on road patrol would be 8:00 a.m. until 4:00 p.m., which was consistent with his former schedule. Plaintiff's work hours relate to a term of his employment. Moreover, accepting plaintiff's claims as true, it does appear as though he would be unable to perform his union duties during his shift, even if he was able to obtain a supervisor's permission to do so, as required by Order 18. In addition, plaintiff was assigned to patrol the north end exclusively, which relates to the terms and location of his employment. Plaintiff alleged that this area was more dangerous than other areas of the city and that no other officers were assigned to that area exclusively. Viewing the complaint in a light most favorable to plaintiff, *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), I believe that plaintiff has established a question of fact about whether defendant's actions could be objectively and materially adverse to a reasonable person. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003). Accordingly, I would hold that there is a question about whether defendant's actions constituted discrimination under MCL 15.362 with regard to the terms and

location of defendant's employment.[1]

For the reasons stated, I would reverse and remand to the trial court for further proceedings.

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[1] I limit my dissent to the issue that our Supreme Court directed this Court to consider, and thus, do not address the majority's discussion of whether plaintiff pleaded sufficient facts to establish a protected activity. *Smith v City of Flint*, 497 Mich 920 (2014).

TRANTHAM v STATE DISBURSEMENT UNIT

Docket No. 322289. Submitted November 3, 2015, at Lansing. Decided November 10, 2015, at 9:00 a.m. Vacated in part 500 Mich 872.

Jeffrey Trantham, on behalf of himself and all others similarly situated, brought an action in the Court of Claims against the State Disbursement Unit, the Department of Health and Human Services, and the Office of Child Support. Plaintiff challenged the $3.50 monthly charge collected, in accordance with MCL 600.2538, by the Friend of the Court (FOC) from child and spousal support payments. The court, MICHAEL J. TALBOT, J., granted defendants' motion for summary disposition brought under MCR 2.116(C)(8). Plaintiff appealed.

The Court of Appeals *held*:

1. Under Title IV, Part D (Title IV-D) of the Social Security Act, 42 USC 651 through 42 USC 669b, the federal government appropriates funds to states to assist with child support enforcement. In turn, states must establish certain programs and procedures related to the provision of child support services. Under MCL 600.2538, persons who make support payments through the FOC system pay a monthly charge of $3.50 for services that are not reimburseable under Title IV-D. Specifically, of the $3.50 charge, $2.25 is sent to the county treasurer to be used to fund FOC services that are not required or reimburseable under Title IV-D, MCL 600.2538(1)(a); $.25 is sent to the State Treasurer for deposit into the Attorney General's Operations Fund, MCL 600.2538(1)(b); and $1 is sent to the State Treasurer for deposit into the State Court Fund, MCL 600.2538(1)(c). The Court of Claims did not clearly err by concluding that the $2.25 portion of the monthly charge that is sent to local counties to fund FOC services that are not reimbursable under Title IV-D and the $1 that is sent to the State Treasurer for deposit into the State Court Fund are valid user fees associated with use of the circuit court and the FOC system to collect child support payments. Plaintiff paid this amount because he had an open FOC case in one of the circuit courts of this state and, therefore, he imposed costs on this system. It was reasonable for him to bear those costs rather than the public at large. It was not dispositive that

plaintiff did not use every service offered by the FOC because he received a benefit in that the services were available for his use and the portion of the charge disbursed under MCL 600.2538(1)(a) and (c) was not unreasonable or disproportionate to the direct and indirect costs of the government services that plaintiff and others with open FOC cases received. On the other hand, it was evident from the face of MCL 600.2538 that the 25 cents charged to plaintiff and others similarly situated and disbursed to the Attorney General's Operating Fund was designed to raise revenue for the general operating expenses of the Attorney General's office. To the extent the Attorney General's office claimed that the funds distributed to it were valid user fees because it enforces support orders, those services were reimbursable under Title IV-D, 42 USC 654, and were, therefore, explicitly excluded from providing a basis for the charge under MCL 600.2538(1). In light of its predominant revenue raising function, the 25-cent charge disbursed under MCL 600.2538(1)(b) was a tax. Contrary to plaintiff's claim, however, the $3.50 did not constitute an unconstitutional taking because neither taxes nor user fees are takings, and the Court of Claims correctly rejected that argument. Nonetheless, the case had to be remanded for the Court of Claims to address whether the 25-cent tax was unconstitutional because it violated the Title-Object or Direct-Statement Clauses of the Michigan Constitution.

2. The Due Process Clauses of the United States and Michigan Constitutions, US Const, Am XIV; Const 1963, art 1, § 17, provide that no one may be deprived of property without due process of law. The general test for deciding a substantive due process claim challenging legislation is whether the legislation bears a reasonable relation to a permissible legislative objective. The Court of Claims did not clearly err by concluding that the $3.50 monthly charge satisfied substantive due process standards. MCL 600.2538 imposes a charge for a legitimate government purpose: to fund the FOC and court systems and raise revenue for the attorney general's operations. The class of persons subject to the charge consists of every person who is required to make payments of support or maintenance through the FOC or the State Disbursement Unit. It is reasonable for FOC service participants, who impose specific costs on government and society, to pay for the available services from the FOC, the trial court, and the attorney general.

Court of Claims judgment affirmed to the extent it granted summary disposition with regard to plaintiff's due process claim and to the extent it rejected plaintiff's argument that the $3.50

charge constituted an unconstitutional taking; Court of Claims judgment reversed to the extent it upheld the charge in its entirety; case remanded to the Court of Claims for further proceedings concerning the constitutionality of the 25-cent disbursement to the Attorney General's Operating Fund.

Kickham Hanley PLLC (by *Gregory D. Hanley* and *Jamie Warrow*) for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Joshua S. Smith* and *Kelley McLean*, Assistant Attorneys General, for defendants.

Amici Curiae:

The Law Offices of Carson J. Tucker (by *Carson J. Tucker*) for Macomb, Oakland, and Wayne Counties.

Before: GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ.

GADOLA, P.J. Plaintiff, Jeffrey Trantham, individually and on behalf of other individuals similarly situated, filed an action in the Court of Claims against defendants, State Disbursement Unit (SDU), Department of Health and Human Services (DHHS), and Office of Child Support (OCS), claiming that the $3.50 monthly charge collected by the Friend of the Court (FOC) from child and spousal support payments pursuant to MCL 600.2538(1) constitutes an unconstitutional taking and violates substantive due process. Plaintiff appeals as of right the May 30, 2014 opinion and order of the Court of Claims, granting defendants' motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim). We affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has paid child support through the Oakland County FOC since September 2005. The DHHS, through the OCS, oversees and administers Michigan's child support program. In accordance with the requirement of 42 USC 654b, which mandates that each state create a centralized state disbursement unit to collect and distribute child support payments, the SDU collects and distributes child support and spousal support payments in Michigan. Plaintiff asserted that 74% of the support payments are made through income withholding from a payer's paycheck, similar to the way in which taxes and insurance premiums are deducted from an employee's paycheck.

Plaintiff filed this class action complaint under MCR 3.501 on behalf of all persons who (1) "were subject to an income withholding order for child or spousal support" and (2) "had or will have the Fees imposed under [MCL 600.2538(1)] withdrawn from their salaries, wages or other source of income in the year proceeding [sic] the filing of this suit and/or during the pendency of this suit." Specifically, plaintiff challenged the $3.50 monthly charge collected by the FOC from all persons who make payments of child and spousal support through the FOC system. Plaintiff asserted that the monthly fee was not a fair approximation of the costs incurred by defendants in providing services to the payers. Thus, plaintiff alleged that the monthly fees constituted an unconstitutional taking of private property without just compensation (Count I) and violated substantive due process (Count II). Plaintiff sought in part to stop collection of the fees, to have MCL 600.2538 declared unconstitutional, and to have the purportedly im-

proper fees placed in a common fund for the benefit of plaintiff and those similarly situated.

Defendants filed a motion for summary disposition under MCR 2.116(C)(8), arguing that the fees charged under MCL 600.2538 were not an unconstitutional taking because they were user fees and did not violate due process. Plaintiff filed a brief in opposition. The Court of Claims granted defendants' motion for summary disposition, concluding that the fee did not violate the Takings Clause or substantive due process. With regard to the Takings Clause, the Court of Claims reasoned that (1) "there is no factual development that would lead to the conclusion that the $3.50 monthly fee at issue . . . is so excessive that it is not a user fee," (2) it was not material whether payers were forced to use the system, (3) even if plaintiff does not use the available services that a portion of the fees fund, he "benefits from the existence of the Friend of the Court system and the availability of services it provides should he need them," and (4) the distinction between a user fee versus a taking does not depend on where the money is applied. Accordingly, the Court of Claims concluded that the Legislature's decision in MCL 600.2538 to disburse part of the monthly fee to the Attorney General and the State Treasurer for the state court fund did not warrant judicial intervention. In rejecting plaintiff's substantive-due-process claim, the Court of Claims reasoned:

> The Legislature has determined that it is appropriate to collect fees from individuals who are part of the Friend of the Court system to provide financial support for services that are not reimbursable under Title IV-D. As previously explained, individuals, such as plaintiff, benefit from the existence of the system and the availability of its services should they be needed. The legislation is rationally related to a legitimate government interest in sup-

> porting the services. There is no factual development that could possibly result in a determination that [the] Legislature's judgment to collect the $3.50 a month fee is so arbitrary that it fails the rational basis test.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of summary disposition. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone." *Wilson v King*, 298 Mich App 378, 381; 827 NW2d 203 (2012). The motion should be granted if the party opposing the motion failed to state a claim on which relief can be granted. *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 391; 864 NW2d 598 (2014). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the plaintiff." *Wilson*, 298 Mich App at 381. A motion under MCR 2.116(C)(8) may only be granted if "the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks and citation omitted).

"This Court reviews de novo a challenge to the constitutionality of a statute." *IME v DBS*, 306 Mich App 426, 433; 857 NW2d 667 (2014). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014) (quotation marks and citation omitted). "The party challenging the constitutionality of legislation bears the burden of proof." *Mich Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 401; 522 NW2d 643 (1994).

B. FRIEND OF THE COURT SERVICES AND FUNDING

The federal government appropriates money "[f]or the purpose of enforcing the support obligations owed by noncustodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children . . . for whom such assistance is requested . . . ." 42 USC 651. In turn, the federal government requires state governments to establish state programs and reporting procedures related to child support and the establishment of paternity. 42 USC 651 to 42 USC 669b (Title IV-D).[1] Once a state fulfills these requirements, the federal government will reimburse the state for 66% of the expenses related to child support enforcement services required under Title IV-D. 42 USC 655(a)(1) and (a)(2)(C).

In Michigan, the OCS is the state agency authorized to administer Title IV-D services. MCL 400.232; MCL 400.233. The OCS coordinates the provision of Title IV-D services through the FOC. MCL 400.233(o). Child support services provided in Michigan as required by Title IV-D include (1) establishing paternity, (2) establishing, modifying, or enforcing child support obligations, (3) locating parents, and (4) cooperating with other states to enforce support orders when one parent lives outside the state. 42 USC 654. See also MCL 400.233 (listing the duties of the OCS).

[1] Although the relevant statutes, 42 USC 651 to 42 USC 669b, also known as the Child Support Enforcement Act, are located in Title 42 of the United States Code, they are also in Title IV, Part D of the Social Security Act and are commonly referred to as Title IV-D. See MCL 400.231(m). We use that shorthand in this opinion.

The Friend of the Court Act, MCL 552.501 *et seq*., "describe[s] the powers and duties of the [FOC] . . . ." MCL 552.501(2). The FOC also provides services that are not required or reimbursable under Title IV-D. For instance, the FOC provides services related to parenting time and custody in domestic relations matters, including investigating and issuing reports regarding child custody or parenting time, MCL 552.505(1)(g), and enforcing domestic relations orders when a written complaint is received regarding the violation of an order, MCL 552.511b.

Under MCL 600.2538(1), persons who are required to make support payments through the FOC system pay a monthly charge of $3.50 for child support collection. MCL 600.2538 states as follows:

> (1) *For services provided that are not reimbursable under the provisions of part D of title IV of the social security act, 42 USC 651 to 669b*, every person required to make payments of support or maintenance to be collected by the friend of the court or the state disbursement unit shall pay a fee of $3.50 per month for every month or portion of a month that support or maintenance is required to be paid. The fee shall be paid monthly, quarterly, or semiannually as required by the friend of the court. The friend of the court shall provide notice of the fee required by this section to the person ordered to pay the support and that the fee shall be paid monthly or as otherwise determined by the friend of the court. The friend of the court or SDU shall transmit each fee collected under this section as follows:
>
> (a) Two dollars and twenty-five cents to the appropriate county treasurer for deposit into the general fund of the county to be used to fund the provision of services by the friend of the court that are not reimbursable under part D of title IV of the social security act, 42 USC 651 to 669b.
>
> (b) For fees assessed on or after October 1, 2003, 25 cents to the state treasurer for deposit in the fund created in subsection (4).

(c) One dollar to the state treasurer for deposit in the state court fund created in [MCL 600.151a].[2]

(2) A court may hold a person who fails or refuses to pay a service fee ordered under subsection (1) in contempt.

(3) The SDU is responsible for the centralized receipt and disbursement of support. An office of the friend of the court may continue to receive support and fees.

(4) An attorney general's operations fund is created within the state treasury. The state treasurer may receive money or other assets from any source for deposit into the fund. The state treasurer shall direct the investment of the fund. The state treasurer shall credit to the fund interest and earnings from fund investments. Money in the fund at the close of the fiscal year shall remain in the fund and shall not lapse to the general fund. *The department of attorney general shall expend money from the fund, upon appropriation, for operational purposes.*

(5) As used in this section, "state disbursement unit" or "SDU" means the entity established in section 6 of the office of child support act, 1971 PA 174, MCL 400.236. [Emphasis added.]

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[2] The State Court Fund exists to fund trial court operations across the state. The $1 charge imposed under MCL 600.2538(1)(c) is one of several sources of revenue for the fund. See MCL 600.151a(2). MCL 600.151a(7) provides that money deposited into the State Court Fund shall be distributed as follows:

(a) To the state court administrator for the operational expenses of trial courts as provided in [MCL 600.151b], $1,600,000.00 with the balance of the fund being distributed according to subdivisions (b) to (d).

(b) To the state court administrator for the operational expenses of trial courts as provided in [MCL 600.151b], 76% of the balance of the fund.

(c) For indigent civil legal assistance to be distributed under [MCL 600.1485], 23% of the balance of the fund.

(d) To the state court administrator for oversight, data collection, and court management assistance by the state court administrative office, 1% of the balance of the fund.

Thus, under MCL 600.2538(1), the $3.50 monthly charge is designed to fund only services that are not reimbursable under Title IV-D.[3] Of the $3.50 collected by the FOC, $2.25 is sent to local counties to fund FOC services that are not reimbursable under Title IV-D, MCL 600.2538(1)(a); $.25 is sent to the State Treasurer for deposit into the Attorney General's Operations Fund, MCL 600.2538(1)(b) and (4); and $1 is sent to the State Treasurer for deposit into the State Court Fund, MCL 600.2538(1)(c).

Generally, the FOC must "open and maintain a friend of the court case for a domestic relations matter." MCL 552.505a(1). In limited circumstances when the statutory provisions of MCL 552.505a(2) are met, the parties to a domestic relations matter may request that the FOC not open a file on their case. Specifically, MCL 552.505a(2) provides the following:

> The parties to a domestic relations matter are not required to have a friend of the court case opened or maintained for their domestic relations matter. With their initial pleadings, the parties to a domestic relations matter may file a motion for the court to order the office of the friend of the court not to open a friend of the court case for the domestic relations matter. If the parties to a domestic relations matter file a motion under this subsection, the court shall issue that order unless the court determines 1 or more of the following:

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[3] The Attorney General contends that the funds raised by the monthly fee can be used to defray the state's share of Title IV-D services. This position is at odds with the language of MCL 600.2538(1), which provides that the fee is to cover services "that are not reimbursable" under Title IV-D. If a service is reimbursable (i.e., capable of being reimbursed), regardless of the rate of reimbursement from the federal government, the fee is not available to pay for that service. Rather, under the plain language of the statute, the fee may be used only for services that are not reimbursable under Title IV-D.

> (a) A party to the domestic relations matter is eligible for title IV-D services because of the party's current or past receipt of public assistance.
>
> (b) A party to the domestic relations matter applies for title IV-D services.
>
> (c) A party to the domestic relations matter requests that the office of the friend of the court open and maintain a friend of the court case for the domestic relations matter, even though the party may not be eligible for title IV-D services because the domestic relations matter involves, by way of example and not limitation, only spousal support, child custody, parenting time, or child custody and parenting time.
>
> (d) There exists in the domestic relations matter evidence of domestic violence or uneven bargaining positions and evidence that a party to the domestic relations matter has chosen not to apply for title IV-D services against the best interest of either the party or the party's child.
>
> (e) The parties have not filed with the court a document, signed by each party, that includes a list of the friend of the court services and an acknowledgment that the parties are choosing to do without those services.

Similar requirements govern a party's request to close an FOC case after it is opened. MCL 552.505a(4)(a) through (g). If an FOC case is not open on a domestic relations matter, the payer is not subject to the monthly charge set forth in MCL 600.2538(1).

C. USER FEES

Plaintiff first argues that the monthly $3.50 charge under MCL 600.2538(1) is not a valid user fee, and so constitutes an unconstitutional taking of private property for public use. The United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 10, § 2, both "prohibit the taking of private property for public use without just compensation."

Chelsea Investment Group LLC v Chelsea, 288 Mich App 239, 261; 792 NW2d 781 (2010). "The term 'taking' can encompass governmental interference with rights to both tangible and intangible property." *AFT Mich v Michigan*, 497 Mich 197, 218; 866 NW2d 782 (2015). However, "[i]t is beyond dispute that taxes and user fees . . . are not takings." *Koontz v St Johns River Water Mgt Dist*, 570 US ___, ___; 133 S Ct 2586, 2600; 186 L Ed 2d 697 (2013) (quotation marks and citation omitted).

In *United States v Sperry Corp*, 493 US 52, 54; 110 S Ct 387; 107 L Ed 2d 290 (1989), the Supreme Court addressed a federal statute that required "the Federal Reserve Bank of New York to deduct and pay into the United States Treasury a percentage of any award made by the Iran-United States Claims Tribunal in favor of an American claimant before remitting the award to the claimant." Sperry and the Iranian government reached a settlement without the tribunal's involvement, but they filed an application to have the $2.8 million settlement entered as an award of the tribunal because it allowed Sperry to get paid from Iranian assets held at the Federal Reserve Bank. *Id*. at 56-57. The federal statute required a deduction from tribunal awards of 1.5% of the first $5 million and 1% of any awarded amount over $1 million, paid to the United States Treasury. *Id*. at 57-58. Sperry argued that the charge constituted an unconstitutional taking. *Id*.at 58.

The Supreme Court held that the charge was a valid user fee and therefore did not violate the Takings Clause. *Id*. at 63-64. The Court noted that a user fee must be a "fair approximation of the cost of benefits supplied," but it need not be "precisely calibrated to the use that a party makes of Government services." *Id*. at

60 (quotation marks and citation omitted). In reaching its conclusion, the Court recognized that when the government "applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system . . . ." *Id*. at 61. Yet, as long as the fee was not "clearly excessive," no constitutional violation occurred. *Id*. at 62.

Sperry complained that the statute forced it to pay for procedures that it would have preferred to avoid, but the Court concluded that "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *Id*. at 63. Despite the fact that Sperry's award was more the result of private negotiations than tribunal procedures, the Court held that Sperry could be "required to pay a charge for the availability of the Tribunal even if it never actually used the Tribunal" because Sperry received a benefit in the sense that the tribunal's services were available for its use. *Id*.

Michigan courts have applied similar reasoning when identifying the nature of monetary exactions by government authorities, particularly when drawing distinctions between fees and taxes. "Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' " *Bolt v Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998), quoting *Saginaw Co v John Sexton Corp of Mich*, 232 Mich App 202, 210; 591 NW2d 52 (1998). "A 'tax,' on the other hand, is designed to raise revenue." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (quotation marks and citation omitted). Fees charged by a government entity must be reasonably proportionate to the direct and indirect costs of providing the

services for which the fee is charged. *Kircher v Ypsilanti*, 269 Mich App 224, 231-232; 712 NW2d 738 (2005). A fee is presumed reasonable unless it is facially or evidently so " 'wholly out of proportion to the expense involved' " that it " 'must be held to be a mere guise or subterfuge to obtain the increased revenue.' " *Merrelli v St Clair Shores*, 355 Mich 575, 584; 96 NW2d 144 (1959), quoting *Vernor v Secretary of State*, 179 Mich 157, 168, 170; 146 NW 338 (1914).

A fee confers a benefit on the particular persons who pay the fee, while a "tax is designed to raise revenue for general public purposes." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). To prove a monetary exaction is a tax, it is insufficient to show that the charge is larger than the costs it would defray. *Dearborn v State Tax Comm*, 368 Mich 460, 472; 118 NW2d 296 (1962). Rather,

> what is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case. It will be presumed that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence. [*Id*. (quotation marks and citation omitted).]

The Court of Claims did not clearly err by concluding that the $2.25 portion of the monthly charge sent to local counties to fund FOC services that are not reimbursable under Title IV-D, MCL 600.2538(1)(a), and the $1 sent to the State Treasurer for deposit into the State Court Fund, MCL 600.2538(1)(c), are valid user fees associated with plaintiff's use of the circuit court and the FOC system to collect child support payments. Plaintiff cannot plausibly deny that he benefits directly from the existence of the FOC and its associated services. Moreover, the FOC is an integral part of the

circuit court in the judicial circuit it serves. MCL 552.503; see also *Morrison v Richerson*, 198 Mich App 202, 212; 497 NW2d 506 (1993). It is simply not the case that the government arbitrarily and without warning found plaintiff and began to exact $3.50 from his monthly wages. Rather, he pays this amount solely because he has an open FOC case in one of the circuit courts of this state. Plaintiff imposes costs on this system that he should reasonably bear, rather than the public at large, in return for the services that the court and the FOC provide to the users of that system, including plaintiff. Plaintiff and his dependents benefit from the existence, and his use of, this carefully crafted system.

The fact that plaintiff does not use every service offered by the FOC is not dispositive, *Sperry Corp*, 493 US at 63, and we are not convinced that the portion of the $3.50 charge disbursed under MCL 600.2538(1)(a) and (c) is unreasonable or disproportionate to the direct and indirect costs of the government services plaintiff and others with open FOC cases receive.

In contrast, we fail to see any relationship between the benefits plaintiff receives through his participation in the FOC system and the 25-cent portion of the monthly charge going toward the Attorney General's Operations Fund. MCL 600.2538(1)(b) and (4). Rather, it is evident from the face of MCL 600.2538 that the 25-cent charge is designed to raise revenue for the general operating expenses of an unrelated government office. To the extent the Attorney General's office claims affiliation through its enforcement of support orders, those services are reimbursable under Title IV-D, 42 USC 654, and are therefore explicitly excluded from the purpose of the monetary exaction

in MCL 600.2538.[4] See MCL 600.2538(1) (stating that the $3.50 charge is designed to pay for services "that are not reimbursable under the provisions of part D of title IV of the social security act, 42 USC 651 to 669b"). In any event, the portion of the fee paid to the Attorney General is not restricted to use in the child support arena, but can be used for general operating expenses of the Attorney General's office as the Legislature may see fit in the annual appropriations process.

It is therefore facially apparent from MCL 600.2538 that the 25-cent charge going to the attorney general's operations fund is a revenue raising measure that bears no relationship to plaintiff's use of the FOC system. In light of its predominant revenue raising function, we conclude that the 25-cent charge under MCL 600.2538(1)(b) and (4) is a tax. See *Wheeler*, 265 Mich App at 665; see also *Merrelli*, 355 Mich at 584. Although plaintiff argues that imposition of the $3.50 charge constitutes an unconstitutional taking, "[i]t is beyond dispute that taxes and user fees . . . are not takings." *Koontz*, 570 US at___; 133 S Ct at 2600 (quotation marks and citation omitted).

On appeal, plaintiff suggests that a conclusion that any portion of the fee under MCL 600.2538 is actually a tax would raise problems under the Title-Object Clause, Const 1963, art 4, § 24, and the Distinct-Statement Clause, Const 1963, art 4, § 32, of the Michigan Constitution. Neither the parties nor the Court of Claims addressed these issues below. Therefore, we believe a remand is necessary to provide the

[4] Indeed, accompanying his response to defendants' motion for summary disposition, plaintiff attached an excerpt of the Michigan IV-D Child Support Manual from DHHS stating that the 25-cent charge "is considered a IV-D expense," which "is used to reimburse the Michigan Attorney General for services provided that are reimbursable under Part D of Title IV of the Social Security Act, [42 USC 651 to 669b]."

parties with a sufficient opportunity to develop a record on the constitutionality of the 25-cent tax imposed under MCL 600.2538(1)(b).

D. DUE PROCESS

Plaintiff also argues that the $3.50 charge provided under MCL 600.2538 violates substantive due process. The Due Process Clauses of the United States and Michigan Constitutions provide that no one may be deprived of property without due process of law. US Const, Am XIV, § 1; Const 1963, art 1, § 17. The party challenging the facial constitutionality of an act "must establish that no set of circumstances exists under which the act would be valid." *Bonner v Brighton*, 495 Mich 209, 223 n 26; 848 NW2d 380 (2014) (quotation marks and citation omitted). "[T]he substantive component [of due process] protects against the arbitrary exercise of governmental power . . . ." *Id*. at 224. The general test for determining a substantive due process claim challenging legislation is whether the legislation bears a reasonable relation to a permissible legislative objective. *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership (On Remand)*, 300 Mich App 361, 380; 835 NW2d 593 (2013). "[I]f a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny." *Id*. at 381 (quotation marks and citation omitted). In addition, "a rational basis review does not test the wisdom, need, or appropriateness of the statute." *Cadle Co v Kentwood*, 285 Mich App 240, 257; 776 NW2d 145 (2009).

The Court of Claims did not clearly err by concluding that the $3.50 monthly charge satisfied substantive due process standards. MCL 600.2538 imposes a charge for a legitimate government purpose: to fund

the FOC and court systems and raise revenue for the attorney general's operations. The class of persons subject to the charge consists of every person who is required to make payments of support or maintenance through the FOC or the SDU. MCL 600.2538(1). It is reasonable for the FOC service participants, who impose specific costs on the government and society, to pay for the availability of services from the FOC, the trial court, and the attorney general. See *Dawson v Secretary of State*, 274 Mich App 723, 739; 739 NW2d 339 (2007) (opinion by WILDER, P.J.) (concluding that a classification scheme for assessing driver responsibility fees on persons convicted of certain offenses was "rationally related to the legitimate governmental purpose of generating revenue from individuals who impose costs on the government and society"). Therefore, we conclude that imposition of the user fees and tax under MCL 600.2538 was not so arbitrary as to violate substantive due process.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

HOEKSTRA and M. J. KELLY, JJ., concurred with GADOLA, P.J.

In re APPLICATION OF CONSUMERS ENERGY COMPANY FOR APPROVAL OF A GAS COST RECOVERY PLAN

In re APPLICATION OF MICHIGAN GAS UTILITIES CORPORATION FOR APPROVAL OF A GAS COST RECOVERY PLAN

In re APPLICATION OF DTE GAS COMPANY FOR APPROVAL OF A GAS COST RECOVERY PLAN

Docket Nos. 322031, 322571, and 324321. Submitted November 3, 2015, at Lansing. Decided November 17, 2015, at 9:00 a.m.

Consumers Energy Company applied to the Public Service Commission (PSC) in December 2013 for approval of its 2014-2015 gas cost recovery (GCR) plan and authorization of its proposed GCR factors (PSC Case No. U-17334). It sought approval of a base GCR factor per thousand cubic feet of gas for recovery of costs associated with providing gas to customers and the authority to adjust that factor on the basis of a contingency mechanism. The administrative law judge (ALJ) granted the petitions for intervention of the Attorney General and the Residential Ratepayers Consortium (RRC). In February 2014, Consumers amended its application to seek approval of a higher base GCR factor for its 2014-2015 plan, asserting that it needed the higher factor because of increases in the demand for natural gas caused in part by colder-than-normal temperatures in Michigan and other parts of the United States. Consumers and the PSC's staff jointly moved for a temporary order approving the requested factor, noting that Consumers had calculated an underrecovery of $98 million in gas costs for the period covered by its 2013-2014 plan, that if the factor originally requested in this case became effective for the period covered by the 2014-2015 plan, Consumers' cumulative underrecovery of gas costs would be approximately $185 million, and that a delay in implementing the increased factor would economically burden Consumers' customers by moving additional costs to later in the 2014-2015 plan year. The Attorney General argued that the PSC did not have the authority to approve the increased GCR factor on a temporary basis and should not approve Consumers' request to roll the projected underrecovery from the period covered by the 2013-2014 plan into the GCR plan for the 2014-2015 plan year. The RRC joined the Attorney General's opposition to the motion.

The PSC granted Consumers' request in May 2014 and issued a temporary order approving an increased GCR factor, concluding that to leave the factor at the rate originally proposed would result in a significant underrecovery of costs and that it was in the public interest to match market prices to the GCR factor as closely as possible during a plan period so that market fluctuations would generally be reflected in the gas price charged to customers. The PSC did not, however, address the Attorney General's argument that it was improper to roll in an underrecovery from one plan to the next. The Attorney General appealed in Docket No. 322031.

Michigan Gas Utilities Corporation applied separately to the PSC in December 2013 for approval of its 2014-2015 GCR plan and authorization of its proposed GCR factors (PSC Case No. U-17331), and the Attorney General and the RRC intervened. In March 2014, Michigan Gas amended its application to request a higher base GCR factor, similarly arguing that the market price for natural gas had significantly increased and resulted in a significant underrecovery for the 2013-2014 plan year. It further moved for entry of a temporary order approving the higher factor. The PSC entered an order in June 2014 approving Michigan Gas's request, noting that the utility was currently self-implementing the GCR factors sought in its original application and that those factors would likely result in a significant underrecovery. The PSC again declined to address the argument that it could not properly roll in an underrecovery from one plan period to the next, and the Attorney General appealed in Docket No. 322571.

DTE Gas Company applied separately to the PSC in December 2013 for approval of its 2014-2015 GCR plan and authorization of its proposed GCR factors (PSC Case No. U-17332). The Attorney General and the RRC intervened. DTE filed amended applications in February and April 2014, requesting a higher base GCR factor in anticipation of an underrecovery for its 2013-2014 plan year. DTE indicated that it intended to self-implement the higher factor under MCL 460.6h(9). The RRC sought an order requiring DTE to cease self-implementing the increased GCR factor, arguing that MCL 460.6h(9) did not authorize the utility to self-implement a factor that had been filed less than three months before the commencement of the plan year. The ALJ agreed with the RRC's interpretation of MCL 460.6h(9), but concluded that she did not have the authority to enter the order. The PSC granted the Attorney General and the RRC leave to appeal the ALJ's decision, but declined to order DTE to cease self-implementing the GCR factor, ruling that DTE had the authority

to amend a prior estimated GCR factor and self-implement the resulting increase. The PSC noted that while MCL 460.6h(3) required a utility to file a complete GCR plan three months before the commencement of the period covered by the plan, nothing in the statute required that the plan remain unaltered throughout the course of the GCR plan review process. The PSC further stated that MCL 460.6h(9) did not prohibit a utility from amending its GCR plan. Finally, the PSC determined that DTE did not have to seek a temporary order under MCL 460.6h(8) because MCL 460.6h(9) authorized DTE to act as it had. The Attorney General appealed, and the Court of Appeals consolidated all three appeals.

The Court of Appeals *held*:

1. MCL 460.6h(2) authorizes the PSC to incorporate a gas cost recovery clause in the rates or rate schedules of a gas utility and provides specific procedures for implementing that GCR clause. MCL 460.6h(3) requires a utility to file a complete GCR plan no later than three months before the beginning of the plan year, and the utility must request a specific GCR factor for each month. Under MCL 460.6h(1)(c), a GCR factor is the element of the rates charged for gas service to reflect gas costs incurred by the utility. MCL 460.6h(5) requires the PSC to subsequently conduct a gas supply and cost recovery review to evaluate the reasonableness and prudence of the utility's plan and establish the GCR factors necessary to implement the GCR clause. The review is conducted as a contested case under the Administrative Procedures Act, MCL 24.201 *et seq*. After the conclusion of the contested-case proceeding, MCL 460.6h(6) requires the PSC to enter a final order approving, disapproving, or amending the GCR plan, and it must specifically approve, reject, or amend the 12 monthly GCR factors requested by the utility. When evaluating a plan, the PSC must consider the volume, cost, and reliability of the major alternative gas supplies available to the utility; the cost of alternative fuels available to some or all of the utility's customers; the availability of gas in storage; the ability of the utility to reduce or to eliminate any sales to out-of-state customers; whether the utility has taken all appropriate legal and regulatory actions to minimize the cost of purchased gas; and other relevant factors. Accordingly, the PSC has broad authority to both evaluate the reasonableness of a proposed GCR plan and amend the plan as warranted by the underlying circumstances.

2. The Attorney General did not establish that the PSC's temporary orders were unlawful or unreasonable to the extent that the orders authorized the utilities to include revised or

amended GCR factors in their rates pending resolution of the reviews and subject to future reconciliation proceedings. The Attorney General argued that the PSC could only exercise its authority to amend a utility's proposed GCR plan or factors in a final order or in a proceeding to revise a plan after it entered a final order under MCL 460.6h(10). While MCL 460.6h(10) allows a utility to file a revised GCR plan after the PSC entered a final order, however, the statute does not require the utility to wait until the PSC enters a final order before submitting a revised plan or proposing changes to a plan that is under review. It only requires that the utility file the revised plan not less than 3 months before the beginning of the third quarter of the 12-month period covered by the plan. Additionally, the reference to a revised plan does not require the utility to begin anew. A revised plan can be a previously submitted plan with specific proposed revisions. Therefore, a utility can propose changes or revisions to an application before the PSC approves, disapproves, or amends the plan in a final order. As long as the initial plan was a complete GCR plan within the meaning of MCL 460.6h(3) when the utility first applied for approval, the plan is properly before the PSC for review even though the utility subsequently requested revisions to or amendments of the plan. Under MCL 460.6h(8), the PSC may enter a temporary order granting approval or partial approval of a GCR plan in a gas supply and cost recovery review on its own motion or the motion of any party if it affords the parties a reasonable opportunity for a full and complete hearing. Therefore, the PSC may allow a utility to implement a GCR plan in whole or in part at any point in the contested-case proceeding. It may enter a temporary order before entry of a final order, and it may enter a temporary order after a proposed revision to the plan. The PSC had the power to authorize revised GCR factors in the temporary orders to the same extent that it could ultimately choose to amend the factors in its final order.

3. MCL 460.6h(9) provides that if the PSC has not made a final or temporary order within three months of the submission of a complete GCR plan or by the beginning of the period covered in the plan, whichever comes later, or if a temporary order has expired without being extended or replaced, then pending the final order that determines the GCR factors, a gas utility may adjust its rates each month to incorporate all or a part of the GCR factors requested in its plan. Any amounts collected under a self-implemented plan before entry of the final order are subject to prompt refund with interest if the PSC later determines that the GCR factors were not reasonable and prudent. The statute does not expressly limit the utility's authority to self-implement

the GCR factors to those factors specifically requested in the original application. Because a utility can amend or revise its plan before the conclusion of the PSC's review, the utility can also self-implement a revised GCR factor.

4. The PSC is not precluded from considering whether the utility has incurred an underrecovery or will incur an underrecovery when determining the appropriate GCR factors. The PSC has broad authority to set rates and is not required to use any particular method when setting them. MCL 460.6h(6) allows the PSC to consider other relevant factors when determining whether a proposed GCR plan and GCR factors are reasonable and prudent. Nor does the fact that MCL 460.6h(12) requires the PSC to conduct a gas cost reconciliation proceeding to reconcile the utility's revenues using the authorized GCR factors against its actual expenses preclude the PSC from considering the potential for over- or underrecoveries during the review proceeding.

5. The PSC's roll-in method was lawful. MCL 460.6h(13) and (14) give the PSC discretion in establishing how a refund for an overrecovery is to be distributed or a surcharge for an underrecovery is to be collected in gas-cost-reconciliation proceedings.

Affirmed.

1. PUBLIC UTILITIES — GAS UTILITIES — GAS COST RECOVERY PLAN AND FACTORS — PUBLIC SERVICE COMMISSION — TEMPORARY ORDERS.

MCL 460.6h(2) authorizes the Public Service Commission (PSC) to incorporate a gas cost recovery (GCR) clause in the rates or rate schedules of a gas utility; MCL 460.6h(3) requires a gas utility to file a complete GCR plan no later than three months before the beginning of the plan year, and the utility must request a specific GCR factor for each month; under MCL 460.6h(1)(c), a GCR factor is the element of the rates charged for gas service to reflect gas costs incurred by the utility; MCL 460.6h(5) requires the PSC to subsequently conduct a gas supply and cost review to evaluate the reasonableness and prudence of the utility's plan and establish those GCR factors necessary to implement the GCR clause; finally, MCL 460.6h(6) requires the PSC to enter a final order approving, disapproving, or amending the GCR plan, and it must specifically approve, reject, or amend the 12 monthly GCR factors requested by the utility; the utility need not wait until the PSC enters a final order before submitting a revised plan or proposing changes to a plan that is under review, however; the utility can propose changes or revisions to its application before the PSC approves, disapproves, or amends the plan in a final order; under MCL 460.6h(8), the PSC may enter a temporary order granting

approval or partial approval of a GCR plan in a gas supply and cost recovery review on its own motion or the motion of any party if it affords the parties a reasonable opportunity for a full and complete hearing; the PSC may allow the utility to implement a GCR plan in whole or in part at any point in the contested-case proceeding and may enter a temporary order before entry of a final order or after a proposed revision to the plan.

2. PUBLIC UTILITIES — GAS UTILITIES — GAS COST RECOVERY PLAN AND FACTORS — PUBLIC SERVICE COMMISSION — ROLL-IN METHOD FOR GAS COST RECOVERY PROCEEDINGS.

MCL 460.6h(5) and (6) require the Public Service Commission to conduct a gas supply and cost recovery review to evaluate the reasonableness and prudence of a gas utility's gas cost recovery (GCR) plan and establish the GCR factors necessary to implement the gas cost recovery clause in the utility's rates; the commission must enter a final order approving, disapproving, or amending the utility's GCR plan and specifically approve, reject, or amend the 12 monthly GCR factors requested; during the proceeding, the commission and utility may use a method that rolls a projected underrecovery of gas costs from the period covered by one GCR plan into the GCR plan for the next year; MCL 460.6h(13) and (14) give the commission discretion in establishing how a refund for an overrecovery of gas costs is to be distributed or a surcharge for an underrecovery is to be collected in gas-cost-reconciliation proceedings.

H. Richard Chambers, *Bret A. Totoraitis*, and *Kelly M. Hall* for Consumers Energy Company.

Miller, Canfield, Paddock and Stone, PLC (by *Sherri A. Wellman* and *Paul M. Collins*), for Michigan Gas Utilities Corporation.

Richard P. Middleton, *David S. Maquera*, and *Fahey Schultz Burzych Rhodes PLC* (by *William K. Fahey* and *Stephen J. Rhodes*) for DTE Gas Company.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *John A. Janiszewski*, Assistant Attorney General, and *Donald E. Erickson*, Spe-

cial Assistant Attorney General, for the Attorney General in Docket Nos. 322031 and 322571.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael E. Moody*, Assistant Attorney General, and *Donald E. Erickson*, Special Assistant Attorney General, for the Attorney General in Docket No. 324321.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Steven D. Hughey* and *Bryan A Brandenburg*, Assistant Attorneys General, for the Public Service Commission in Docket Nos. 322031 and 322571.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Steven D. Hughey* and *Spencer A. Sattler*, Assistant Attorneys General, for the Public Service Commission in Docket No. 324321.

Before: GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM. In these consolidated appeals involving the setting of rates for gas utilities, the Attorney General appeals by right three orders issued by the Michigan Public Service Commission (the Commission) in three separate contested cases. In Docket No. 322031, the Attorney General appeals the Commission's order granting the application by petitioner, Consumers Energy Company, for a temporary order approving a gas cost recovery plan (recovery plan) and gas cost recovery factors (recovery factors) for the 12-month period ending in March 2015. In Docket No. 322571, the Attorney General appeals the Commission's order granting the application by petitioner, Michigan Gas Utilities Corporation, for a temporary

order approving a recovery plan and recovery factors for the same 12-month period. And in Docket No. 324321, the Attorney General appeals the Commission's order denying his request for an order compelling petitioner, DTE Gas Company, to cease self-implementing the recovery factors requested in its amended application. Because we conclude that the Attorney General failed to show by clear and satisfactory evidence that the orders were unlawful or unreasonable, we affirm.

I. BASIC FACTS

A. CONSUMERS ENERGY

In December 2013, Consumers Energy applied to the Commission for approval of its recovery plan and the authorization of its proposed recovery factors for the 12-month period ending in March 2015. It sought approval of a base recovery factor of $4.3962 per thousand cubic feet of gas, with authority to adjust the recovery factor on the basis of a contingency mechanism.

The administrative law judge held a prehearing conference in February 2014, and granted the petitions for intervention by the Attorney General and the Residential Ratepayers Consortium (Ratepayers Consortium). The Commission's staff also participated in the case. Later that same month, Consumers Energy filed an amended application for approval of a base recovery factor of $5.575 per thousand cubic feet. Consumers Energy asserted that it needed the higher recovery factor as a result of increases in the demand for natural gas, which were caused in part by colder-than-normal temperatures in Michigan and other parts of the United States.

In March 2014, Consumers Energy and the Commission's staff jointly moved for a temporary order approving Consumers Energy's requested recovery factor. They noted that Consumers Energy had calculated that its underrecovery for the period covered by the 2013-2014 plan would be approximately $98 million and, if the recovery factor of $4.3962 became effective for the period covered by the 2014-2015 plan, Consumers Energy's cumulative underrecovery would be approximately $185 million. A delay in the implementation of the increased recovery factor would, they maintained, "economically burden Consumers Energy's customers by moving additional costs . . . until later in the 2014-2015 [recovery] year."

In response, the Attorney General argued that the Commission did not have the authority to approve the increased recovery factor on a temporary basis, and should not approve Consumers Energy's request to roll the projected underrecovery from the period covered by the 2013-2014 plan into the recovery plan for the 2014-2015 plan year. Ratepayers Consortium joined the Attorney General's opposition to the motion.

In May 2014, the Commission granted Consumers Energy's request and issued a temporary order approving an increased recovery factor. The Commission stated that the record supported a finding that natural gas prices had risen significantly since Consumers Energy filed its initial application and that to leave the recovery factor at the rate proposed in the initial application would result in a significant underrecovery for Consumers Energy. Because it "is in the public interest to match market prices to the [recovery] factor as closely as possible during a [recovery] plan period such that market fluctuations are generally reflected in the gas price charged to . . . customers," the Com-

mission authorized Consumers Energy to raise its recovery factor to $5.575 per thousand cubic feet starting the first full billing month following the order and continuing until entry of a final order. The Commission, however, declined to address the Attorney General's argument that it was improper to roll in an underrecovery from one plan to the next.

B. MICHIGAN GAS

Michigan Gas also filed an application in December 2013 for approval of its recovery plan and factors for the 12-month period ending in March 2015. It requested approval of a base recovery factor of $4.7776 per thousand cubic feet of gas, with authority to adjust on the basis of a contingency mechanism. The Attorney General and Ratepayers Consortium also intervened in this case.

In March 2014, Michigan Gas amended its application to request a proposed recovery factor of $5.9122 per thousand cubic feet. Michigan Gas argued that the increased recovery factor was necessary because the market price for natural gas had significantly increased as a result of unanticipated and prolonged cold weather. It noted that the increased price of natural gas had caused it to have an underrecovery of $6.6 million for the 2013-2014 year. It further moved for entry of a temporary order approving the higher recovery factor.

In June 2014, the Commission issued an order approving Michigan Gas's request. The Commission recognized that Michigan Gas was currently self-implementing the recovery factors stated in the original application. Because the recovery factors proposed in the initial application would likely result in a significant underrecovery, the Commission authorized

Michigan Gas to raise its base recovery factor to $5.7471 per thousand cubic feet beginning with the first full billing month following the issuance of the order and continuing until entry of a final order. The Commission again declined to address the argument that it could not properly roll in an underrecovery from one plan period to the next.

C. DTE

In December 2013, DTE applied for approval of its recovery plan for the period ending in March 2015. It sought approval for a base recovery factor of $4.42 per thousand cubic feet of gas. In February 2014, it amended its application to request a base recovery factor of $4.47 per thousand cubic feet. The Attorney General and Ratepayers Consortium again intervened.

DTE filed a second amended application in April 2014. In this application, it requested a base recovery factor of $4.97 per thousand cubic feet. As with the other utilities, DTE argued that the colder-than-normal temperatures had significantly affected the market price of natural gas and it anticipated that it would have an underrecovery for the 2013-2014 plan year. DTE stated that it intended to self-implement the proposed recovery factor under MCL 460.6h(9).

In July 2014, Ratepayers Consortium asked the Commission to order DTE to cease self-implementing the increased recovery factor. It argued that MCL 460.6h(9) did not authorize DTE to self-implement a recovery factor that was filed less than three months before the commencement of the plan year. The administrative law judge held a hearing on the motion later that same month. The judge agreed with Ratepayers Consortium's interpretation of MCL 460.6h(9), but

stated that she did not have the authority to issue the requested order.

The Attorney General and the Ratepayers Consortium sought leave from the Commission to appeal the administrative law judge's decision. The Commission granted the appeal, but declined to issue an order compelling DTE to cease self-implementing the recovery factor. The Commission explained that DTE had the authority "to amend a prior estimated [recovery] factor and self-implement the resulting increase." The Commission noted that MCL 460.6h(3) required a utility to file a complete recovery plan three months before the commencement of the period covered by the plan, but stated that nothing in the statute required that the plan "remain unaltered throughout the course of the [recovery] plan review process." The Commission further stated that MCL 460.6h(9) did not prohibit a utility from amending its recovery plan, and in fact anticipated that such amendments would be filed. Finally, the Commission determined that DTE also did not have to seek a temporary order under MCL 460.6h(8), because MCL 460.6h(9) authorized DTE to act as it had.

The Attorney General then appealed the Commission's decisions in each case to this Court. This Court ordered the consolidation of the appeals in August 2015.[1]

II. THE TEMPORARY ORDERS

A. STANDARDS OF REVIEW

The Attorney General argues that the Commission erred when it determined that it could approve an

[1] See *In re Application of Consumers Energy for Approval of Gas Cost*, unpublished order of the Court of Appeals, entered August 26, 2015 (Docket Nos. 322031, 322571, and 324321).

amended recovery plan or recovery factor through a temporary order. He maintains that a utility may file a revised recovery plan during the period covered by the plan, but, if it does so, it must follow the procedures applicable to a request to amend the recovery plan before implementing the revised recovery plan. He similarly contends that underrecoveries from a previous plan year must be handled in a reconciliation proceeding and cannot be rolled into a current recovery plan.

This Court reviews the Commission's orders to determine whether the appellant has shown "by clear and satisfactory evidence" that the Commission's order was "unlawful or unreasonable." MCL 462.26(8); see also *Great Lakes Steel Div of Nat'l Steel Corp v Pub Serv Comm*, 416 Mich 166, 182-183; 330 NW2d 380 (1982). An order is unlawful if the Commission failed to follow some mandatory provision of the statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). This Court reviews de novo whether the Commission properly selected, interpreted, and applied the relevant statutes. See *New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, 308 Mich App 638, 644; 866 NW2d 850 (2014).

B. ANALYSIS

The Commission possesses only that authority that the Legislature has granted to it in clear and unmistakable language. *Mich Electric Coop Ass'n v Pub Serv Comm*, 267 Mich App 608, 616; 705 NW2d 709 (2005). Further, an administrative agency, such as the Commission, cannot expand its authority beyond that provided by statute under the guise of its rulemaking authority. *York v Detroit (After Remand)*, 438 Mich 744,

767; 475 NW2d 346 (1991). With MCL 460.6h(2), the Legislature authorized the Commission to incorporate a gas cost recovery clause in the rates or rate schedules of a gas utility. It then provided specific procedures for implementing a gas cost recovery clause.

A gas utility must first file a "complete gas cost recovery plan" no later than three months before the beginning of the plan year, and it must request "a specific gas cost recovery factor" for each month in the plan year. MCL 460.6h(3). A recovery factor is "that element of the rates to be charged for gas service to reflect gas costs incurred by a gas utility and made pursuant to a gas cost recovery clause incorporated in the rates or rate schedules of a gas utility." MCL 460.6h(1)(c). The Commission thereafter must conduct "a proceeding, to be known as a gas supply and cost review, for the purpose of evaluating the reasonableness and prudence of the plan, and establishing the gas cost recovery factors to implement" the gas cost recovery clause stated in the utility's plan. MCL 460.6h(5). This review is to be conducted as a contested case under the Administrative Procedures Act, MCL 24.201 *et seq*. *Id*.

After the conclusion of the contested-case proceeding, the Commission must enter a final order in which it approves, disapproves, or amends the recovery plan. MCL 460.6h(6). In evaluating the utility's recovery plan, the Commission may consider a variety of factors:

> [T]he commission shall consider the volume, cost, and reliability of the major alternative gas supplies available to the utility; the cost of alternative fuels available to some or all of the utility's customers; the availability of gas in storage; the ability of the utility to reduce or to eliminate any sales to out-of-state customers; whether the utility

> has taken all appropriate legal and regulatory actions to minimize the cost of purchased gas; and other relevant factors. [*Id*.]

The Legislature also provided that the Commission must specifically "approve, reject, or amend the 12 monthly gas cost recovery factors requested by the utility in its gas cost recovery plan." *Id*. When these provisions are read together, it is plain that the Legislature gave the Commission broad authority both to evaluate the reasonableness of a proposed plan and to amend the plan as warranted by the underlying circumstances.

1. TEMPORARY ORDERS

On appeal, the Attorney General essentially argues that the Commission's authority to amend a utility's proposed recovery plan or recovery factor can only be exercised in a final order or in a proceeding under MCL 460.6h(10) to revise a plan after a final order. Although the Legislature apparently contemplated the possibility that a utility might file a "revised gas cost recovery plan" after the Commission entered a final order in the contested case, it did not require the utility to wait until the Commission enters a final order before submitting a revised plan or proposing changes to a plan that is under review; it only required the utility to file the revised plan "[n]ot less than 3 months before the beginning of the third quarter of the 12-month period" covered by the plan. MCL 460.6h(10). In addition, the reference to a revised plan does not require the utility to begin anew; a revised plan can be a previously submitted plan with specific proposed revisions. Therefore, a utility can propose changes or revisions to an application before the Commission approves, disapproves, or amends the plan in a final order. As long as the initial

plan was "a complete gas cost recovery plan" when the utility first applied for approval, the plan is properly before the Commission for review even though the utility has since requested revisions or amendments to the plan. MCL 460.6h(3).

Under MCL 460.6h(8), the Legislature authorized the Commission to "make a finding and enter a temporary order granting approval or partial approval of a gas cost recovery plan in a gas supply and cost recovery review" on its own motion or the motion of any party if it affords the parties a reasonable opportunity for a full and complete hearing. By specifically authorizing a "temporary order granting approval or partial approval" of a recovery plan in a "gas supply and cost recovery review," *id*., the Legislature empowered the Commission to allow a utility to implement a recovery plan, in whole or in part, at any point in the contested-case proceeding; it may enter a temporary order before entry of a final order, and it may enter a temporary order after a proposed revision to the plan.

The Attorney General makes much of the fact that, in MCL 460.6h(8), the Legislature did not authorize the Commission to enter a temporary order approving or partially approving an "amended" recovery plan, but instead only authorized the Commission to approve or partially approve a recovery plan; more specifically, the Attorney General maintains that the reference to a "gas cost recovery plan in a gas supply and cost recovery review" must be understood to limit the Commission's authority to approving the recovery factors originally proposed in the recovery plan. A commonsense reading of the statutory language demonstrates that the Legislature intended to identify the plan under review as the one that the Commission may approve or partially approve on a temporary basis. That is, the reference merely clarifies that the Commission's authority to

issue temporary orders extends only to cases involving plans that are under review (as opposed to cases subject to a final order). It does not follow, however, that the Legislature also intended to limit the Commission's authority to approve a plan on a temporary basis to include only those provisions that were stated in the original plan; if it had intended to do so, it would have expressly referred to the original recovery factors. See *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298-299; 565 NW2d 650 (1997). This is also consistent with the Commission's authority to amend the plan in its final order. See MCL 460.6h(6).[2] Moreover, when MCL 460.6h(8) is read in conjunction with MCL 460.6h(9), it is beyond reasonable dispute that the Legislature contemplated that the Commission would routinely use temporary orders to authorize a utility to collect a recovery factor before the entry of a final order in the gas supply and cost recovery review and that it had the power to authorize revised recovery factors in the temporary orders to the same extent that it could ultimately choose to amend the recovery factors in its final order.

MCL 460.6h(9) provides that for any period covered by a temporary order, a gas utility may "incorporate" the recovery factors permitted by the order into "its rates." In the event that the Commission has not timely entered a final or temporary order permitting the utility to implement its plan, the Legislature determined that a utility should be allowed to self-implement its plan:

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[2] Contrary to the Attorney General's argument on appeal, the Commission does not "amend" a plan when it issues a temporary order under MCL 460.6h(8), even when it approves or partially approves a proposed recovery factor that the utility has revised. The temporary order merely permits the utility to include the proposed recovery factor in its rates, as revised, until the Commission issues its final order; it is the final order that actually implements any amendments of the original plan.

> If the commission has not made a final or temporary order within 3 months of the submission of a complete gas cost recovery plan, or by the beginning of the period covered in the plan, whichever comes later, or if a temporary order has expired without being extended or replaced, then pending an order which determines the gas cost recovery factors, a gas utility may each month adjust its rates to incorporate all or a part of the gas cost recovery factors requested in its plan. [*Id*.]

Of course, "[a]ny amounts collected" under a self-implemented plan before the Commission makes its final order are subject to "prompt refund with interest" if the Commission later determines that the recovery factors were not reasonable and prudent. *Id*.

The Legislature plainly recognized that a gas supply and cost recovery review might proceed into the period covered by the plan under review. To address that issue, the Legislature first empowered the Commission to issue temporary orders implementing the proposed plan in whole or in part. MCL 460.6h(8). It then provided that, in the event that the Commission fails to issue a temporary order for the relevant period, the utility may include its proposed recovery factors in its rates. Notably, the Legislature did not expressly limit the utility's authority to self-implement the recovery factors to those specifically requested in the original application, but instead referred generally to the "recovery factors requested in its plan." See MCL 460.6h(9). Because a utility can amend or revise its plan before the conclusion of the review, it follows that the utility can self-implement a revised recovery factor as being a recovery factor "requested in its plan." *Id*. The provisions for self-implementation also strongly suggest that the Legislature wanted to encourage the Commission to issue timely temporary orders governing the implementation of recovery factors during the

pendency of the review, which would include the authority to issue temporary orders governing a utility's plan as revised or amended.

Finally, nothing within the statutory provisions can be read to preclude the Commission from considering whether the utility has incurred an underrecovery or will incur an underrecovery when determining the appropriate recovery factors. The Commission has broad authority to set rates, *Attorney General v Pub Serv Comm*, 231 Mich App 76, 79; 585 NW2d 310 (1998), and is not required to use any particular method when setting rates, *Attorney General v Pub Serv Comm*, 189 Mich App 138, 147-148; 472 NW2d 53 (1991) (rejecting the contention that the Commission is bound to consider any single formula or combination of formulas when setting rates and holding instead that the Commission may make pragmatic adjustments warranted under the circumstances). Moreover, the Legislature has specifically stated that the Commission has the authority to consider "other relevant factors" when determining whether a proposed recovery plan and recovery factors are reasonable and prudent. MCL 460.6h(6). And the fact that the Commission must conduct a "gas cost reconciliation" proceeding to reconcile the utility's revenues using the authorized recovery factors against its actual expenses does not preclude the Commission from considering the potential for over- or underrecoveries during the review proceeding. MCL 460.6h(12). The various sections of MCL 460.6h do not directly conflict and, as construed by the Commission, are a harmonious whole. See *House Speaker v State Admin Bd*, 441 Mich 547, 568-569; 495 NW2d 539 (1993). Consequently, the Attorney General has not established that the Commission's temporary orders were unlawful or unreasonable to the extent that the orders authorized the

utilities to include revised or amended recovery factors in their rates pending resolution of the reviews and subject to future reconciliation proceedings.

2. ROLL-IN SYSTEM

Before it developed its roll-in system, the Commission used a system "under which it refunded or surcharged customers on the basis of their actual historical consumption." See *Attorney General v Pub Serv Comm*, 215 Mich App 356, 361; 546 NW2d 266 (1996). Subsequently, the Commission approved the use of the roll-in method for collecting projected underrecoveries from prior plan periods. *Id*. at 361-363. And this Court has recognized that the Commission's roll-in method is a lawful alternative to the prior practice:

> The [Commission's] decision is not unlawful because MCL 460.6h(13) and (14) give the [Commission] discretion in fashioning refund and surcharge procedures. These provisions authorize, but do not require, the historical system that distinguished between classes of ratepayers. For example, subsection 13 provides that the [Commission] "may, in appropriate circumstances, order refunds or credits in proportion to the excess amounts actually collected from each such customer during the period covered." This language clearly gives the [Commission] power to order a refund procedure that operates in the manner of the historical refund procedure, but, just as clearly, does not require the [Commission] to do so. [*Id*. at 369 (citation omitted).]

In *Attorney General v Pub Serv Comm*, 235 Mich App 308, 315; 597 NW2d 264 (1999) (opinion by SAWYER, J.), this Court similarly rejected the Attorney General's argument that the Commission's decision to authorize use of the roll-in method was "inconsistent with the language and purposes of [MCL 460.6h]." This Court noted that the inclusion of a projected underre-

covery in a recovery factor for a future plan year would still be subject to review in the later annual reconciliation proceeding. *Id*. This Court further concluded that the Legislature had explicitly authorized the Commission to include a surcharge for an underrecovery:

> Furthermore, we note that subsections 6h(13) and (14) of the statute grant broad discretion to the [Commission] in establishing how a refund for an overrecovery is to be distributed or a surcharge for an underrecovery is to be collected. In both cases, subsections 6h(13) and (14) direct that it shall be by "utilizing procedures that the commission determines to be reasonable." The [Commission] determined the procedure employed here to be reasonable. Therefore, it is explicitly authorized by statute. [*Id*. at 316.]

In Docket No. 322031, the Commission explained that its approval of a temporary factor would not "affect the review required in the reconciliation proceeding, which will control the amount of any underrecovery ultimately collected by the utility." Similarly, in Docket No. 322571, the Commission stated that neither the case plan nor the temporary order would "result in the adoption of an actual over- or underrecovery amount or a decision that that amount must be rolled-in to a particular [recovery] year, because these decisions are made in the final order of a reconciliation case." The Commission correctly recognized that its decision to authorize a recovery factor that included charges for prior underrecoveries did not impair either the consumers' or the utilities' right to a full reconciliation proceeding, which would ultimately determine whether there should be a refund or surcharge to reflect actual costs.

This Court is not at liberty to ignore binding published authority. See MCR 7.215(J)(1). Therefore, we must conclude that the Commission's roll-in method is lawful.

III. CONCLUSION

The Attorney General has not shown by clear and satisfactory evidence that the Commission's orders were unlawful or unreasonable. Accordingly, we affirm in each docket number.

Affirmed.

GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ., concurred.

TERAN v RITTLEY

Docket No. 322016. Submitted October 8, 2015, at Petoskey. Decided November 17, 2015, at 9:05 a.m. Leave to appeal denied 500 Mich 877.

Plaintiff Susana E. Narvaez Teran gave birth to a child in Ecuador in 2006. Defendant Michael R. Rittley is the child's father. Shortly after the child's birth, defendant left Ecuador and did not leave plaintiff any contact information. In July 2007, in Virginia, plaintiff sued defendant for child support. Defendant submitted a Michigan driver's license to the Virginia court and asserted that his official residence was in Johannesburg, Michigan, in Otsego County. The Virginia court dismissed the case in 2008 for lack of jurisdiction. In September 2010, plaintiff filed the instant paternity action in the Otsego Circuit Court to determine custody, parental responsibility, and child support. Defendant, through counsel, filed an appearance. In April 2011, paternity testing confirmed that defendant was the child's father, the parties stipulated to entry of an order of filiation, and the matter was referred to the Friend of the Court (FOC) for child support. The FOC recommended setting defendant's child support obligation at $1,211 a month. In March 2012, defendant moved to dismiss the case on the basis that the circuit court did not have subject-matter jurisdiction, and the court, Michael K. Cooper, J., denied defendant's motion. In September 2013, four months after a two-day trial, the court issued a written opinion and order setting defendant's child support obligation at the amount recommended by the FOC—$1,211 a month. Plaintiff filed motions to make the child support retroactive and require defendant to pay plaintiff's attorney fees. The court ruled from the bench that child support was to be retroactive to February 7, 2008, the date the case was dismissed in Virginia. The court also ordered defendant to pay directly to plaintiff's attorney a sum of $23,000 for plaintiff's attorney fees. Defendant appealed.

The Court of Appeals *held*:

1. The circuit court properly exercised jurisdiction in this case. The circuit court has subject-matter jurisdiction over paternity actions, child custody, and child support. Defendant argued that under MCL 722.714(1), the circuit court lacked subject-matter

jurisdiction because none of the parties lived in Michigan. However, the statute defendant relied on governs venue, not jurisdiction, and it instructs a party on the proper place to file a lawsuit concerning paternity, custody, and child support. According to MCL 722.714(1), whenever neither the child nor the mother live in Michigan, the lawsuit is to be filed in the county where the putative father is "found." Even if the statute were jurisdictional, defendant produced no evidence that he was not "found" in Otsego County despite that he was not living there. Defendant received notice of the proceedings, and he voluntarily entered his appearance in the action. Moreover, defendant waived any issue regarding personal jurisdiction when he failed to raise it in his first responsive pleading.

2. The circuit court did not abuse its discretion when it awarded plaintiff $23,000 in attorney fees, payable directly to plaintiff's Michigan attorney, part of which was to pay for plaintiff's attorney in Florida. Plaintiff first hired Florida attorney Paul Finizio, who did not file an appearance in the case. Finizio found Michigan attorney Jodi Doak to represent plaintiff in the proceedings in Michigan. In general, attorney fees are not recoverable. However, there are exceptions. MCR 3.206(C)(2) permits a court to award attorney fees in domestic relations actions when the party requesting the fees alleges facts sufficient to show that he or she is unable to bear the cost of an attorney, and that the other party is able to pay. In this case, $23,000 was proper, as was the requirement that Doak pay a portion of the fees to Finizio because Finizio was necessary to the case. Attorney fees should compensate an attorney for the expenses he or she incurred, including overhead and the cost of other staff. Attorney fees should not be withheld from an out-of-state attorney who did not file an appearance in the matter, when the attorney was necessary to the case.

3. The circuit court did not abuse its discretion when it ordered that the child support begin in 2008, the time at which the case in Virginia was dismissed. A child support obligation may be retroactive to the date the complaint was filed when a defendant avoids service of process or otherwise delays the imposition of process. In this case, defendant appeared in the Virginia court and successfully obtained dismissal of the case, and defendant attempted to do the same here in Michigan. The circuit court properly ordered that child support should begin at the time plaintiff first sought it.

4. The circuit court did not clearly err or abuse its discretion by refusing to deviate from the amount of child support recom-

mended by the FOC. Differences between the costs of living in the areas in which the parties reside are not to be considered when establishing the appropriate amount of child support. That is, the fact that the cost of living in the area where the child resides is lower than the cost of living in the area where the payer parent resides does not mean that the payer parent's obligation should be reduced. Deviation is permissible when the amount of child support is unjust or inappropriate under the circumstances.

Affirmed.

1. DOMESTIC RELATIONS — CHILD SUPPORT — CALCULATING AMOUNT — DIFFERENT COSTS OF LIVING.

As long as a child support amount is not unjust or inappropriate, a trial court must order child support as recommended under Michigan's child support formula (MCSF); a trial court generally may not deviate, on the basis of any differences between the costs of living in the area where the child resides and the area where the payer parent resides, from the amount of child support recommended; that is, the payer parent's child support obligation should not be reduced when the cost of living in the area where the child resides is lower than the cost of living in the area where the payer parent resides; the MCSF is founded on the needs of the child and the actual resources of each parent.

2. DOMESTIC RELATIONS — PATERNITY AND CHILD SUPPORT — JURISDICTION — CIRCUIT COURT.

A circuit court has subject-matter jurisdiction over paternity proceedings and proceedings involving child custody and child support; when the mother or the child does not live within the state, venue is proper in the county where the putative father may be found; venue may be proper in Michigan even when none of the parties live in Michigan; in the absence of evidence to the contrary; a putative father who receives notice of an action and who enters an appearance in the matter has been "found," for purposes of MCL 722.714(1).

Jodi J. Doak, PC (by *Jodi J. Doak*), for plaintiff.

Bailey Smith & Bailey, PC (by *John J. Smith*), for defendant.

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

PER CURIAM. In this paternity case, defendant appeals by right the trial court's September 24, 2013 order setting defendant's child support obligation at $1,211 a month. Defendant also appeals by right the trial court's May 14, 2014 order awarding attorney fees to plaintiff. We conclude that the trial court possessed subject-matter jurisdiction, and that it did not abuse its discretion by establishing the amount of child support, by making it retroactive, or by awarding attorney fees. Accordingly, we affirm.

I. SUMMARY OF FACTS AND PROCEEDINGS

In 2006, while defendant was in the military and stationed abroad in Ecuador, he fathered a child with plaintiff. The child was born on November 18, 2006, in Quito, Ecuador. Defendant left Ecuador shortly after the child was born and did not leave plaintiff any contact information.

In July 2007, plaintiff sued defendant for child support in the commonwealth of Virginia. Defendant, represented by counsel, submitted to the Virginia court a Michigan driver's license and asserted that his official residence was in Johannesburg, Michigan, in Otsego County, where he had paid taxes since 1982. The Virginia court dismissed the complaint for lack of jurisdiction on February 7, 2008.

On September 30, 2010, plaintiff filed the instant paternity action to determine custody, parental responsibility, and child support. Defendant, through counsel, filed an appearance on December 23, 2010. The trial court permitted both parties to appear telephonically at scheduled hearings. A stipulated order for paternity testing was entered on April 25, 2011. DNA testing was performed on samples from the parties and the child.

The results of the DNA testing were that defendant could not be excluded as the child's father. The probability that defendant was, in fact, the child's father was 99.99%. On August 26, 2011, the parties stipulated to the entry of an order of filiation, and the matter was referred to the Friend of the Court (FOC) for an investigation regarding child support. Using $22,892 for plaintiff's gross income, and $109,774 for defendant's gross income, the FOC recommended setting defendant's child support obligation at $1,211 a month.

On March 29, 2012, defendant filed a motion to dismiss, asserting that the trial court lacked subject-matter jurisdiction pursuant to MCL 722.714 because neither of the parties nor the child resided in Michigan. In an affidavit, defendant asserted that he had resided in Washington, D.C., from May to September 2007; in Bolivia, from September 2007 to July 2009; in Washington, D.C., from July to September 2009; in Frankfort, Germany, from September 2009 to June 2011; in Virginia, from June 2011 to present; and that he never intended to reside in Michigan after 2007. The trial court held a hearing on the motion on April 16, 2012.

On May 22, 2012, the trial court issued an opinion and order denying defendant's motion to dismiss. The trial court ruled that it possessed subject-matter jurisdiction over an action to identify the father of a child born out of wedlock, reasoning that the language in MCL 722.714(1) (governing paternity actions) was similar to the language in MCL 722.26(2) (governing child custody actions), and that because MCL 722.26 concerns venue, not jurisdiction, MCL 722.714 likewise concerns venue, not jurisdiction. Specifically, the court noted that MCL 722.714 "provides that an action for paternity shall be filed in the county where the mother or child resides. If both the mother and child reside

outside of this state, then the complaint shall be filed in the county where the putative father resides or is found." *Id*. The court further observed that "[t]he fact that the child was conceived or born outside of this state is not a bar to entering a complaint against the putative father." MCL 722.714(1). The trial court, citing *Altman v Nelson*, 197 Mich App 467; 495 NW2d 826 (1992), ruled that the Paternity Act conferred subject-matter jurisdiction on the circuit court to identify the father of a child born out of wedlock. See *id*. at 473-474. Citing *Morrison v Richerson*, 198 Mich App 202, 208; 497 NW2d 506 (1993), the court also ruled that even if venue were improper, it would not defeat the court's subject-matter jurisdiction.

In May 2013, the court conducted a two-day trial regarding child support at which both plaintiff and defendant testified via telephone. The main issues were the amount of child support and whether the court should deviate from the child support formula because plaintiff and the child lived in Ecuador. Defendant presented the testimony of Stan Smith, Ph.D. (University of Chicago), whom the trial court recognized as an expert in economics. Dr. Smith testified that he examined the cost of living in Quito, Ecuador, and Washington, D.C., and converted the costs of living in those cities to the cost of living in Detroit, Michigan. According to Dr. Smith, plaintiff's income of $22,900 in Quito equated to $36,914 of purchasing power in Michigan, and defendant's income of $127,000 in Washington, D.C., equated to $89,557 of purchasing power in Michigan. Using this determination of the parties' respective purchasing power in Michigan dollars ($36,914 and $89,557), Dr. Smith calculated that the amount of child support should be $1,021 per month. Dr. Smith further testified that in order to achieve the equivalent of $1,021 purchasing power in

Michigan, a person in Ecuador would need only $634.00 (as of January 2012) or $567.00 (as of May 2013).

On September 24, 2013, the trial court issued a written opinion and order setting the amount of child support at $1,211 a month, as the FOC had recommended. The trial court rejected defendant's argument that it would not be a deviation to reduce the formula-recommended child support to an amount consistent with Dr. Smith's testimony regarding the relative purchasing power in the different locales. The trial court also rejected defendant's substantive arguments that a deviation from the child support formula was warranted. The court found that defendant's arguments partially failed for lack of proof because defendant had not presented any evidence of the difference between the costs of living in Ecuador and El Salvador, where defendant then resided. The trial court next discussed whether it would deviate from the child support formula for the time period between July 2011 and July 2012, when defendant was living in Washington, D.C. The court reviewed caselaw from other jurisdictions, finding the reasoning of a Maryland decision, *Gladis v Gladisova*, 382 Md 654; 856 A2d 703 (2004), the most persuasive. The court also noted that our Supreme Court in *Verbeke v Verbeke*, 352 Mich 632; 90 NW2d 489 (1958), which was decided before the current statutory scheme of the child support formula, had rejected international variations in the costs of living as reasons for modifying child support.

The trial court first reasoned that defendant's proposal would be administratively unworkable, require expert testimony in many cases, place undue burdens on litigants and the judicial system, and delay entry of support orders. Second, the court reasoned that child

support should not depend on the parents' choice of residences, but on the economic ability of the child's parents to provide support. The court also noted that the cost of living corresponding to a specific geographic location had not been made an explicit factor that could justify a deviation from the child support formula. The trial court therefore ruled that it would not consider the variation in the costs of living at different locales as a factor in establishing child support.[1]

Subsequently, plaintiff moved the court to make the support order retroactive and for an order requiring defendant to pay plaintiff's attorney fees. The trial court held a hearing on the motions on March 7, 2014. As to retroactivity, the court ruled from the bench that it was appropriate under MCL 722.717(2)(a) or (c) to start payment of child support from the time of the Virginia case. The trial court's order of May 14, 2014, made child support retroactive to February 7, 2008, the day the Virginia case was dismissed. The trial court also awarded to plaintiff $23,000 in attorney fees, payable to plaintiff's Michigan attorney, which included part of the expense of a Florida attorney who assisted in prosecuting the case. The trial court's May 14, 2014 order requires defendant to pay plaintiff's Michigan lawyer $23,000, less whatever defendant had already paid under earlier orders of the court.

As noted, defendant appeals by right, contending that the trial court lacked subject-matter jurisdiction, and if it did have subject-matter jurisdiction, that it abused its discretion by ordering the amount of child

[1] In a footnote, the court also indicated that "[i]n the event that the Court did consider the geographical cost of living as a factor . . . , the Court would not find it necessary to stray from the child support formula because the amount of support is neither unjust nor inappropriate."

support recommended by the FOC, by making the child support retroactive, and by awarding $23,000 in attorney fees.

II. SUBJECT-MATTER JURISDICTION

A. STANDARD OF REVIEW

Whether a court has subject-matter jurisdiction is a question of law that this Court reviews de novo. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 98; 693 NW2d 170 (2005). A jurisdictional defect may be raised at any time. *Id*. at 97.

B. DISCUSSION

We find defendant's argument that the circuit court lacked subject-matter jurisdiction over plaintiff's paternity action to be without merit. Nothing in MCL 722.714 expressly limits the circuit court's subject-matter jurisdiction. Indeed, the Paternity Act patently grants the circuit court subject-matter jurisdiction to determine the paternity of a child born out of wedlock and to order child support. *LME v ARS*, 261 Mich App 273, 278-279; 680 NW2d 902 (2004); see also *Altman*, 197 Mich App at 473-474, and *Morrison*, 198 Mich App at 206.

Subject-matter jurisdiction "is the right of the court to exercise judicial power over a class of cases, not the particular case before it." *Grebner v Oakland Co Clerk*, 220 Mich App 513, 516; 560 NW2d 351 (1996). "It is the abstract power to try a case of the kind or character of the one pending, but not to determine whether the particular case is one that presents a cause of action or, under the particular facts, is triable before the court in which it is pending." *Id*. The Legislature has conferred subject-matter jurisdiction on circuit courts as follows:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. [MCL 600.605.]

Thus, the circuit court is presumed to have subject-matter jurisdiction over a civil action unless Michigan's Constitution or a statute expressly prohibits it from exercising jurisdiction or gives to another court exclusive jurisdiction over the subject matter of the suit. *Id.*; *In re Petition by Wayne Co Treasurer*, 265 Mich App 285, 291; 698 NW2d 879 (2005).

Nevertheless, defendant argues that the circuit court does not have subject-matter jurisdiction to identify the father of a child born out of wedlock and to award child support when the father, mother, and child all reside outside of Michigan. In support of his argument, defendant asserts that MCL 722.714(1) sets jurisdictional requirements that are not met when neither the father, nor the mother, nor the child reside in Michigan. Defendant relies on the part of MCL 722.714(1) that states: "A complaint shall be filed in the county where the mother or child resides. If both the mother and child reside outside of this state, then the complaint shall be filed in the county where the putative father resides or is found." Like the trial court, we find this argument unavailing.

MCL 722.714(1) does not expressly limit the circuit court's subject-matter jurisdiction. Rather, MCL 722.714(1) concerns venue and indicates where a paternity action should be filed. As the trial court noted, the language in MCL 722.714(1) is very similar to that in MCL 722.26(2) concerning child custody, which states:

> Except as otherwise provided in section 6b or 6e, if the circuit court of this state does not have prior continuing jurisdiction over a child, the action shall be submitted to the circuit court of the county where the child resides or may be found by complaint or complaint and motion for order to show cause.

This Court has held that MCL 722.26(2) addresses venue, not jurisdiction. See *McDonald v McDonald*, 74 Mich App 119, 123 n 1; 253 NW2d 678 (1977), and *Kubiak v Steen*, 51 Mich App 408, 411; 215 NW2d 195 (1974).

Defendant asserts that MCL 722.714(1) is analogous to MCL 552.9(1), which is jurisdictional with respect to an action for divorce. In *Stamadianos v Stamadianos*, 425 Mich 1, 7-8; 385 NW2d 604 (1986), our Supreme Court held that the 180- and 10-day residency requirements of MCL 552.9(1) were jurisdictional.[2]

Defendant's argument is without merit. The language used in MCL 552.9(1) is very different from the language used in MCL 722.714(1). MCL 552.9(1) uses restrictive language, informing a trial court that it *shall not* grant a judgment of divorce unless the residency requirements are met. This is an express prohibition. In contrast, MCL 722.714(1) contains no such express prohibition on the circuit court. Rather, it merely instructs the plaintiff where to properly file a complaint depending on where the parties live.

Moreover, defendant's argument is premised on his not residing in Michigan, but the statute on which he

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[2] MCL 552.9(1) states in pertinent part that "[a] judgment of divorce shall not be granted by a court in this state in an action for divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint and . . . the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint."

relies also states that a paternity complaint is properly filed "in the county where the putative father resides or is found." MCL 722.714(1). Thus, even if defendant were correct that the statute was jurisdictional, and even if defendant did not "reside" in Otsego County, his argument would still fail because he has not presented any argument that he was not "found" in Otsego County. Indeed, defendant was, in fact, "found" in Otsego County, and he voluntarily entered his appearance in this action, thereby submitting to the personal jurisdiction of the circuit court, which possessed subject-matter jurisdiction over the issues raised in the lawsuit. *LME*, 261 Mich App at 278-279. Defendant waived any challenge to the court's personal jurisdiction over him when he failed to raise it in his first responsive pleading. MCR 2.116(D)(1).

III. ATTORNEY FEES

A. STANDARD OF REVIEW

We review a trial court's "decision whether to award attorney fees and the determination of the reasonableness of the fees for an abuse of discretion." *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). We review a trial court's findings of fact underlying the award of attorney fees for clear error, and we review any underlying issues of law de novo. *Id*. A trial court abuses its discretion when it selects "an outcome outside the range of reasonable and principled outcomes." *Id*.

B. DISCUSSION

Plaintiff initially hired Paul Finizio, a Spanish-speaking attorney with an office in Ft. Lauderdale, Florida, to help her obtain child support from defen-

dant. Finizio found Jodi Doak, the attorney of record in the instant case, to represent plaintiff in Michigan. Finizio did not file an appearance in the case. On August 16, 2011, plaintiff moved for a temporary award of attorney fees, attaching statements for services from Finizio and Doak. On January 3, 2012, the trial court ordered defendant to pay $13,800 in plaintiff's attorney fees and costs, less $2,500 defendant had already paid, with the balance payable at a rate of $750 a month. This order also required defendant to pay $4,000 for an expert witness.

Following trial, Doak again moved the court for payment of attorney fees. Doak asserted the total amount due for her and Finizio's services was $35,000, of which $14,000 had been paid. Plaintiff provided the court with detailed billing statements for Doak and Finizio. According to Finizio's statement, he had billed approximately $19,500 and was owed approximately $11,500.[3] According to Doak's statement, she had billed approximately $15,300 and was owed approximately $9,600.[4] The trial court ordered defendant to pay plaintiff $23,000 in attorney fees less any payments defendant had already made.

Defendant's primary argument is that the court abused its discretion when it ordered defendant to pay attorney fees of $23,000 because Doak's fee was only $15,326, Finizio was not entitled to attorney fees because he never appeared in this case, and there is no evidence that Finizio was necessary. Additionally, de-

[3] Plaintiff herself had paid Finizio approximately $8,000.

[4] At the time of the hearing, defendant had paid Doak at least $2,500. Additionally, plaintiff's expert witness fee was only $2,000, but defendant had been ordered to pay $4,000 to help plaintiff hire an expert. Doak applied the $2,000 unspent expert witness fee to the balance of her fees. Thus, defendant had paid at least $4,500 of Doak's fees at the time of the hearing.

fendant argues that an individual with plaintiff's income is not entitled to 100% reimbursement for all of her attorney fees. We disagree.

Generally, under the "American rule," attorney fees are not recoverable in the absence of a statute, court rule, or common-law exception that provides to the contrary. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). MCR 3.206(C)(2) permits a court to award attorney fees in a domestic relations action when the party requesting the fees alleges "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[.]" "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007).

In this case, plaintiff testified that she earned $23,000 a year ($1,916 a month) and that her monthly expenses included $400 for her daughter's school, $400 for rent, $600 for food, and $450 for child care. In contrast, defendant testified that he made approximately $127,000 a year, and that he owned a house in Washington, D.C., that he rented out. The government paid defendant's housing and other expenses in El Salvador. Under these circumstances, we conclude that the trial court did not clearly err by finding that plaintiff was unable to bear the expense of the action and that defendant had the ability to pay. MCR 3.206(C)(2).

We also conclude that the trial court did not abuse its discretion by including in a reasonable attorney fee payable to Doak the partial reimbursement of expenses plaintiff incurred using Finizio's services. We note that "there exists no precise formula by which a court may assess the reasonableness of an attorney fee," and that the court must consider "the expense[s] incurred" when establishing a reasonable attorney fee.

Temple Marital Trust, 278 Mich App at 138. Thus, the expenses of staff and other overhead are included in the determination of what constitutes a reasonable attorney fee, as this Court has observed:

> "Clearly, attorney fees are not meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney that necessarily includes support staff. The rule allowing an award of attorney fees has traditionally anticipated the allowance of a fee sufficient to cover the office overhead of an attorney together with a reasonable profit. The inclusion of factor 5, *the expenses incurred*, reflects the traditional understanding that attorney fees should be sufficient to recoup at least a portion of overhead costs. . . . Thus, until a statute or a court rule specifies otherwise, the attorney fees must take into account the work not only of attorneys, but also of secretaries, messengers, *paralegals*, and others whose labor contributes to the work product for which an attorney bills a client, and it must also take account of other expenses and profit." [*Allard v State Farm Ins Co*, 271 Mich App 394, 404-405; 722 NW2d 268 (2006), quoting *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 181-182; 568 NW2d 365 (1997) (citation omitted).]

We conclude that the trial court did not clearly err by finding that plaintiff's retention of Finizio was a necessary expense. Indeed, it appears highly probable, given the complexity of a case involving both international and language barriers, that this action might never have come to fruition without Finizio's involvement. Finizio successfully found an attorney to represent plaintiff in Michigan, and the record supports that a Spanish-speaking attorney was necessary in order to successfully communicate legal issues to plaintiff. Accordingly, the trial court did not abuse its discretion by awarding attorney fees in an amount that at least partially included the expense of utilizing Finizio's services.

We specifically reject defendant's argument that the trial court erred because Finizio did not enter an appearance in this case. As already noted, the trial court did not order defendant to pay Finizio's fee directly to him. The court only used the expenses plaintiff incurred by retaining Finizio as part of its determination of a reasonable attorney fee award payable to Doak. Moreover, in *Escanaba & L S R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 815-816; 402 NW2d 505 (1986), this Court rejected a per se rule prohibiting an award of fees to an out-of-state attorney who does not file an appearance in a case, explaining as follows:

> The question is not whether the law firm retained is in-state or out-of-state; the question is whether retention of the firm is necessary. It is the trial court's duty to determine whether retention of the firm was necessary. Absent an abuse of discretion, the decision of the trial court should not be reversed. Just because the firm employed is out-of-state does not make retention unnecessary. Accordingly, we decline to rule that it is prima facie unreasonable to award attorney fees to out-of-state counsel.

In sum, we conclude that the trial court did not clearly err by finding that plaintiff's retention of Finizio was a necessary expense, and it did not abuse its discretion in awarding Doak attorney fees in an amount that at least partially included the cost of Finizio's services.

IV. RETROACTIVE CHILD SUPPORT

A. STANDARD OF REVIEW

We review child support orders to determine whether the trial court abused its discretion. *Holmes v Holmes*, 281 Mich App 575, 586; 760 NW2d 300 (2008).

The trial court abuses its discretion when it "selects an outcome that is outside the range of reasonable and principled outcomes." *Ewald v Ewald*, 292 Mich App 706, 715; 810 NW2d 396 (2011). While we review any of the trial court's findings of fact for clear error, *id*. at 714, we review de novo the trial court's ruling to the extent that it involves statutory construction. *Holmes*, 281 Mich App at 587.

B. DISCUSSION

The trial court did not abuse its discretion by commencing defendant's child support obligation as of the date the Virginia support action was dismissed—February 7, 2008. The retroactive child support order was permitted by MCL 722.717(2), which states, in pertinent part:

> A child support obligation is only retroactive to the date that the paternity complaint was filed unless any of the following circumstances exist:
>
> (a) The defendant was avoiding service of process.
>
> (b) The defendant threatened or coerced through domestic violence or other means the complainant not to file a proceeding under this act.
>
> (c) The defendant otherwise delayed the imposition of a support obligation.

In this case, the trial court determined that both Subsection (a) and Subsection (c) applied. We find it unnecessary to determine whether the trial court clearly erred by finding that defendant was avoiding service of process because the record supports the trial court's conclusion that "defendant otherwise delayed the imposition of a support obligation," MCL 722.717(2)(c), by seeking and obtaining dismissal of the Virginia child support action. Accordingly, the trial

court did not abuse its discretion by ordering that defendant's child support obligation commenced as of February 7, 2008, the date the Virginia child support action was dismissed.

V. DEVIATION FROM THE CHILD SUPPORT FORMULA

A. STANDARD OF REVIEW

"A trial court must presumptively follow the MCSF [Michigan Child Support Formula] when determining the child support obligation of parents." *Ewald*, 292 Mich App at 714. "This Court reviews de novo as a question of law whether the trial court has properly applied the MCSF." *Id*. Any factual findings of the trial court underlying its determination regarding child support are reviewed for clear error, and any discretionary rulings that a statute or the MCSF permits are reviewed for an abuse of that discretion. *Id*. at 714-715.

B. DISCUSSION

Defendant asserts that the trial court erred by not deviating from the MCSF-recommended child support on the basis of the costs of living relative to where the child resides and where defendant, the support payer, resides. As an issue of first impression, we hold that the trial court may not, as a general rule, deviate from the MCSF-recommended child support on the basis of any differences between the general costs of living where the parents and the child reside. We also conclude that the trial court did not abuse its discretion by finding that the MCSF-recommended child support was not "unjust or inappropriate" as required by MCL 552.605(2) to support a deviation.

In setting the amount of child support, the Legislature has required that a trial court must generally follow the formula developed by the state Friend of the Court Bureau:

> Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an order that deviates from the formula *if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate* and sets forth in writing or on the record all of the following:
>
> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case. [MCL 552.605(2) (emphasis added).]

As the trial court recognized, other jurisdictions are split on the issue whether differences in costs of living based on geographic location should factor into determining child support. In *Gladis*, 382 Md at 657, the father lived in the United States, and the mother and child lived in the Slovak Republic. The trial court concluded that applying the Maryland child support guidelines was "inappropriate when there is a wide disparity in the cost of living," and therefore reduced the amount of the monthly award from $497 to $225. *Id*. at 660.[5] The mother filed a motion to amend that

[5] In Maryland, as in Michigan, the amount of child support resulting from the application of the child support guidelines is presumed to be

decision, and a different judge ordered the father to pay $497 per month in accordance with the guidelines. *Id*. at 661. Maryland's highest appellate court, the Maryland Court of Appeals, issued a writ of certiorari before any action was taken by the Court of Special Appeals, Maryland's intermediate appellate court. *Id*.

In *Gladis*, 382 Md at 665-668, after recognizing the conflicting views among state courts that have addressed the issue, the Maryland Court of Appeals held "that the better position is to prohibit courts from deviating from the Guidelines based on the standards of living in different areas." *Id*. at 668.[6] The court reasoned that the Maryland legislature did not explicitly make the standards of living in relevant geographic areas part of the child support formula, that the child should enjoy the standard of living that he or she would have enjoyed if the child's parents had stayed together, and that there is nothing wrong with a child support award that would allow a child to enjoy an above-average standard of living that corresponds

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correct, but may be rebutted by evidence demonstrating that the result under the guidelines would "be unjust or inappropriate in a particular case." *Gladis*, 382 Md at 664 (quotation marks and citations omitted). If the guidelines establish an unjust or inappropriate child support amount and the trial court awards an amount of child support that departs from the guidelines, the court is required to "make a written finding or specific finding on the record stating the reasons for departing from the guidelines." (Quotation marks and citation omitted.) At a minimum, "the findings must state what the award would have been under the [g]uidelines, how the award varies from the guidelines, and how the finding serves the best interest of the child." *Id*. at 664-665.

[6] The Maryland court sometimes used the phrase, "standards of living," when it discussed the variation in the "costs of living" in different geographic locations. The court stated early in its opinion that the lower court did not abuse its discretion by ordering the guidelines-recommended amount of child support because "a lower cost of living in the child's locality is not a proper basis for deviating" from Maryland's child support guidelines. *Gladis*, 382 Md at 662.

with the economic circumstances of the child's parent. *Id*. at 668-670. The court also recognized that permitting the trial court to consider the costs of living on a case-by-case basis would create more frequent deviations from the child support guidelines and would frustrate the purposes of requiring courts to use the guidelines—to ensure that child support awards meet the needs of children, to improve the consistency and equity of awards, and to improve the efficiency of adjudicating child support issues. *Id*.

In contrast, other jurisdictions have allowed differences in costs of living to be a proper factor in determining whether to deviate from child support guidelines. In *People ex rel AK*, 72 P3d 402, 404 (Colo App, 2003), the court found that the trial court erred by not considering whether the difference between living expenses in Colorado and Russia would render applying the guidelines "inequitable, unjust, or inappropriate." *Id*. at 405 (quotation marks and citation omitted). Similarly, in *Booth v Booth*, 44 Ohio St 3d 142, 144; 541 NE2d 1028 (1989), the Supreme Court of Ohio addressed whether the trial court erred by deviating from the child support guidelines because of the "substantial difference" between the parents' costs of living in New York and Ohio. The court found that the trial court did not abuse its discretion in deviating from the guidelines. *Id*. According to the court, after "a careful review of the facts and circumstances of this cause, we find that the child support order herein was proper in all respects, and was neither unreasonable, arbitrary nor unconscionable." *Id*.

Like the trial court, we agree that the reasoning of the Maryland Court of Appeals in *Gladis* is persuasive. But, more importantly, principles of statutory construction dictate that we affirm the trial court. This

Court has summarized the pertinent principles of statutory construction:

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. [*Polkton Twp*, 265 Mich App at 101-102 (citations omitted).]

Neither the Legislature, in MCL 552.605(2), nor the Friend of the Court Bureau, which is tasked with developing the MCSF "based upon the needs of the child and the actual resources of each parent," MCL 552.519(3)(a)(*vi*), has specifically included geographic variations in the costs of living as a factor that may justify deviation from the MCSF-recommended child support amount. See 2013 MCSF 1.04(D); *Ewald*, 292 Mich App at 715-718. The statute is clear: "*Except as otherwise provided in this section*, the court *shall* order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519." MCL 552.605(2) (emphasis added). Nothing in the plain language of the statute or the MCSF manifests an intent to permit geographic variations in the costs of living to justify deviating from the MCSF-recommended child support amount. See *Polkton Twp*, 265 Mich App at 102.

Both our Supreme Court and this Court have repeatedly held that the provisions of the MCSF are mandatory and that any deviation must be justified by strict compliance with the procedures of MCL 552.605(2). See, e.g., *Diez v Davey*, 307 Mich App 366,

376; 861 NW2d 323 (2014) ("[E]xcepting those factual instances in which application of the MCSF would be unjust or inappropriate, a parent's child support contribution is determined by use of the MCSF."); *Ewald*, 292 Mich App at 715-716 ("[T]he [statutory] criteria for deviating from the MCSF are mandatory."); *Ghidotti v Barber*, 459 Mich 189, 200; 586 NW2d 883 (1998) ("In the absence of circumstances that make a determination 'unjust or inappropriate,' the court may not deviate from the formula."); *Burba v Burba (After Remand)*, 461 Mich 637, 644; 610 NW2d 873 (2000) ("[T]he criteria for deviating from the formula are mandatory."). In this case, the trial court, after conducting an evidentiary hearing, determined that the MCSF-recommended child support was not "unjust or inappropriate." MCL 552.605(2). We are not left with a definite and firm conviction that the trial court made a mistake, and thus, we cannot conclude that the trial court clearly erred. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007).

Our conclusion is also consistent with caselaw predating the MCSF-enabling legislation.[7] In *Verbeke*, the trial court ordered the defendant to pay the plaintiff $40 a week in child support. *Verbeke*, 352 Mich at 633. The plaintiff then moved to Germany, and the trial court modified the support order by reducing the payments from $40 a week to $10 a week. *Id*. at 633-634. On appeal, our Supreme Court set aside the modified support order, reasoning that the defendant "did not contend that his financial condition had changed, but called attention to the fact that plaintiff could purchase more per dollar in Europe than she

[7] See *Ghidotti*, 459 Mich at 194-197, and *Burba*, 461 Mich at 642-644, for a historical perspective on legislation authorizing the MCSF.

could purchase per dollar in the United States. This fact did not justify the court's order of modification." *Id*. at 635.

Accordingly, because a difference between the cost of living at the payer parent's location and the cost of living at the child's location is not a proper basis for deviating from the child support formula, the trial court's application of the child support formula was not "unjust or inappropriate" under these circumstances, MCL 552.605(2), and therefore, the trial court did not abuse its discretion by establishing child support in the amount recommended by the MCSF.

We affirm. Plaintiff, as the prevailing party, may tax costs under MCR 7.219.

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

PEOPLE v SHANK

Docket No. 321534. Submitted September 2, 2015, at Lansing. Decided November 17, 2015, at 9:10 a.m. Leave to appeal sought.

Allan Wayne Shank pleaded guilty in the Presque Isle Circuit Court to being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court, Scott L. Pavlich, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 12 to 25 years in prison for the felon-in-possession conviction and to a consecutive two years in prison for the felony-firearm conviction. Defendant's minimum sentence exceeded the applicable sentencing guidelines range. Defendant filed a delayed application for leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

In accordance with *People v Lockridge*, 498 Mich 358 (2015), and *People v Steanhouse*, 313 Mich App 1 (2015), departure sentences must be reviewed for reasonableness. When determining the reasonableness of a sentence, an appellate court must determine whether the sentence violates the principle of proportionality, under which the sentence imposed must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. If there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even when some departure appears to be appropriate, the extent of the departure, rather than the fact of the departure itself, may embody a violation of the principle of proportionality. In this case, the trial court's sentencing departure centered on the substantial-and-compelling-reason standard that was later overturned by *Lockridge*. Accordingly, in conformity with *Steanhouse*, the case had to be remanded to the

trial court for a hearing to determine what effect *Lockridge* would have had on defendant's sentence so that it could be determined whether any prejudice resulted from the erroneous use of the substantial-and-compelling-reason standard. Because defendant could be sentenced to a more severe sentence on remand, he could elect to forgo resentencing by providing the trial court with prompt notice of his intention to do so.

Remanded for further proceedings.

O'CONNELL, J., dissenting, would have affirmed. Defendant was not entitled to resentencing under *Lockridge*. If, as in this case, a defendant does not challenge the scoring of his or her offense variables at sentencing on the basis of *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), review is for plain error affecting the defendant's substantial rights. To be entitled to relief under plain-error review, a defendant must show that the error affected the outcome of the lower court proceedings. Under *Lockridge*, when a defendant does not preserve an *Alleyne* challenge and the trial court departs upward, the defendant cannot show prejudice from any error in scoring the offense variables in violation of *Alleyne*. It would defy logic to conclude that the trial court would have imposed a lesser sentence had it been aware that the guidelines were merely advisory when the court, in fact, departed from the guidelines to impose a higher sentence. The decision in *Steanhouse* was contrary to the precepts of stare decisis, and this Court must follow the decision in *Lockridge* even though *Steanhouse* decided the issue differently. The *Lockridge* court stated that no prejudice could result from the type of error involved in this case. Defendant could not show plain error; therefore, he was not entitled to relief. Defendant's due process and proportionality claims were also unavailing.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *Richard K. Steiger*, Prosecuting Attorney, and *Anica Letica* and *Linus Banghart-Linn*, Assistant Attorneys General, for the people.

Laurel Kelly Young for defendant.

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

BORRELLO, P.J. Defendant, Allan Wayne Shank, appeals by delayed leave granted[1] his sentence following his guilty pleas to being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm) MCL 750.227b. The trial court sentenced him as a fourth-offense habitual offender,[2] MCL 769.12, to 12 to 25 years' imprisonment for his felon in possession conviction and a consecutive term of two years' imprisonment for his felony-firearm conviction. In consideration of our recent ruling in *People v Steanhouse*, 313 Mich App 1; 880 NW2d 297 (2015), we remand the matter to the trial court.

I. FACTS

Police officers received disturbing information that Jerry Hilliard, a prison inmate, had sent an eight-year-old child a gift and card through Shank, who had been in prison with Hilliard and who has previous convictions of accosting minors for immoral purposes. During the investigation, officers discovered that Hilliard had requested that Shank take a photograph of the child posing in only a necklace. While executing a warrant, officers found a Winchester pump .22 caliber rifle in Shank's hall closet. Officers also found evidence that Shank had sent Hilliard a photograph of what appeared to be a pregnant seven-year-old child and discovered in Shank's photo album a photograph of a 5-year-old girl exposing her vaginal area. Shank denied that the photograph belonged to him.

Shank pleaded guilty to felon-in-possession and felony-firearm, and the prosecution dropped a charge

[1] *People v Shank*, unpublished order of the Court of Appeals, entered June 12, 2014 (Docket No. 321534).

[2] This status increased Shank's possible maximum term of imprisonment to life imprisonment. MCL 769.12(1)(b); MCL 750.227b(1).

of possession of child sexually abusive material, MCL 750.145c(4). The sentencing guidelines recommended a minimum sentence of 7 to 46 months' imprisonment for Shank's felon in possession conviction. The trial court decided to depart upward, instead sentencing Shank to 12 to 25 years' imprisonment. It gave several reasons for its departure, including that Shank did not have much rehabilitative potential given that he had been frequently incarcerated for reoffending, had violated probation and parole, and had received misconduct citations in prison. The trial court also relied on the concerning nature of Shank's noncriminal behavior. The trial court explained that Shank was "assisting his prison mates in making contact with young children outside the prison system. He's starting to groom children in spite of having served these long sentences . . . . There's been just no rehabilitation at all."

II. STANDARDS OF REVIEW

This Court, in *Steanhouse*, considered the effect of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), on departure sentences. *Steanhouse* holds that under *Lockridge*, this Court must review a defendant's sentence for reasonableness. *Steanhouse*, 313 Mich App at 42, citing *Lockridge*, 498 Mich at 365, 392, which cited *United States v Booker*, 543 US 220, 261, 264; 125 S Ct 738; 160 L Ed 2d 621 (2005). Hence, when the trial court departs from the applicable sentencing guidelines range, this Court will review that sentence for reasonableness. *Lockridge*, 498 Mich at 392. However, as stated in *Steanhouse*, "The appropriate procedure for considering the reasonableness of a departure sentence is not set forth in *Lockridge*." *Steanhouse*, 313 Mich App at 42. After discussion of the approaches Michigan appellate courts should employ

when determining the reasonableness of a sentence, this Court adopted the standard set forth by our Supreme Court in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Steanhouse*, 313 Mich App at 42-48.

III. PRINCIPLE OF PROPORTIONALITY

Under *Milbourn*, "a given sentence [could] be said to constitute an abuse of discretion if that sentence violate[d] the principle of proportionality, which require[d] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636; see also *Steanhouse*, 313 Mich App at 44-45. In accordance with this principle of proportionality, trial courts were required to impose a sentence that took "into account the nature of the offense and the background of the offender." *Milbourn*, 435 Mich at 651. As stated in *Milbourn*:

> Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. [*Id.* at 659-660.]

As set forth in *Steanhouse*, "[f]actors previously considered by Michigan courts under the proportionality standard included, among others, (1) the seriousness of the offense; (2) factors that were inadequately

considered by the guidelines; and (3) factors not considered by the guidelines . . . ." *Steanhouse*, 313 Mich App at 46 (citations omitted).

In this case, the trial court did not have the benefit of our Supreme Court's decision in *Lockridge* or this Court's decision in *Steanhouse*. Rather, the trial court's sentencing departure centered on the substantial-and-compelling-reason standard that was later overturned by *Lockridge*. Accordingly, in conformity with this Court's decision in *Steanhouse*, we must remand this matter to the trial court for a *Crosby*[3] hearing. "[T]he purpose of a *Crosby* remand is to determine what effect *Lockridge* would have on the defendant's sentence so that it may be determined whether any prejudice resulted from the error." *People v Stokes*, 312 Mich App 181, 200-201; 877 NW2d 752 (2015). Also, under *Stokes*, the defendant is provided with an opportunity to avoid resentencing by promptly notifying the trial judge that resentencing will not be sought. *Id*. at 201, quoting *Lockridge*, 498 Mich at 398.

We remand this case to the trial court to follow the *Crosby* procedure outlined in *Lockridge*. Because defendant may be sentenced to a more severe sentence, defendant "may elect to forgo resentencing by providing the trial court with prompt notice of his intention to do so. If notification is not received in a timely manner, the trial court shall continue with the *Crosby* remand procedure as explained in *Lockridge*" and *Steanhouse*. *Stokes*, 312 Mich App at 203 (citations and quotation marks omitted).

We remand the matter for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[3] See *Lockridge*, 498 Mich at 395-399, citing *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

HOEKSTRA, J., concurred with BORRELLO, P.J.

O'CONNELL, J. (*dissenting*). Defendant, Allan Wayne Shank, is a serial sexual offender with eight felony convictions. After Shank engaged in a disturbing photograph exchange with an inmate, police searched his home and found firearms. His most recent convictions are felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The sentencing guidelines recommended a minimum sentence of 7 to 46 months' imprisonment. The trial court departed upward from this recommendation, sentencing Shank to 12 to 25 years' imprisonment for his felon in possession conviction and a consecutive term of two years' imprisonment for his felony-firearm conviction. Because I conclude that this Court need look no further than *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), to resolve this case, I would affirm.

I. STANDARD OF REVIEW

In *Lockridge*, the Michigan Supreme Court stated that this Court should review a trial court's sentence for reasonableness. *Id*. at 392.[1] The "reasonableness" review "merely asks whether the trial court abused its discretion . . . ." *Rita v United States*, 551 US 338, 351; 127 S Ct 2456; 168 L Ed 2d 203 (2007); see also *People v Steanhouse*, 313 Mich App 1, 44-48; 880 NW2d 297 (stating that a sentence may constitute an abuse of discretion if it violates principles of proportionality). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled out-

[1] The *Lockridge* Court adopted the reasonableness standard from *United States v Booker*, 543 US 220, 261; 125 S Ct 738; 160 L Ed 2d 621 (2005). *Lockridge*, 498 Mich at 392.

comes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

II. APPLICATION OF *LOCKRIDGE*

The *Lockridge* question in this case is whether Shank is entitled to resentencing. Shank contends on appeal that the trial court engaged in improper judicial fact-finding under *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).[2] The answer to this question hinges on whether Shank, who failed to preserve an *Alleyne* claim in the trial court, has shown plain error. I conclude that *Lockridge* addresses the question in this case perfectly and answers it in the negative. Shank is not entitled to resentencing.

If a defendant does not challenge the scoring of his or her offense variables (OVs) at sentencing on *Alleyne* grounds, our review is for plain error affecting that defendant's substantial rights. *Lockridge*, 498 Mich at 392. In this case, Shank did not challenge the scoring of his OV scores on *Alleyne* grounds. Our review is for plain error.

To be entitled to relief under plain-error review, a defendant must show that the error affected the outcome of the lower court proceedings. *Id*. at 393. The *Lockridge* court aptly stated the application of the plain error doctrine in cases—like Shank's—in which the defendant did not preserve an *Alleyne* challenge below and the trial court departed upward:

> Because [the defendant] received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the

[2] In *Alleyne*, the United States Supreme Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne*, 570 US at ___; 133 S Ct at 2155.

> trial court necessarily had to state on the record its reasons for departing from that range), *the defendant cannot show prejudice from any error* in scoring the OVs in violation of *Alleyne*. [*Id*. at 394 (emphasis altered).]

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

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

I would follow *Lockridge* without declaring a conflict panel. The reason is simple—this Court need not convene a conflict panel to follow a rule articulated by the Supreme Court, even if a decision of this Court conflicts with the Supreme Court's decision. *Charles A Murray Trust v Futrell*, 303 Mich App 28, 49; 840 NW2d 775 (2013). Until the Supreme Court's decision is overruled by the Supreme Court itself, the rules of stare decisis require this Court to follow the Supreme Court's decision. *Paige v Sterling Hts*, 476 Mich 495, 524; 720

NW2d 219 (2006). This Court simply "does not have the authority to recant the Supreme Court's positions." *Murray Trust*, 303 Mich App at 49. Under the rule of stare decisis, this Court must follow a decision of the Supreme Court even if another panel of this Court decided the same issue in a contrary fashion. *Id*. Because *Steanhouse* ignored the clear directives of the Michigan Supreme Court, it is against the rules of stare decisis to follow the procedures in that case. I cannot in good conscience violate the rules articulated in *Lockridge*.

A remand under *United States v Crosby*, 397 F3d 103 (CA 2, 2005), is used to determine whether prejudice resulted from an error. *People v Stokes*, 312 Mich App 181, 200-201; 877 NW2d 752 (2015). The *Lockridge* court stated that no prejudice could result from the type of "error" involved in this case.[3] Shank cannot show plain error; therefore, he is not entitled to relief. I conclude that a *Crosby* remand is not appropriate or necessary in this case.

III. DUE PROCESS

Shank also raises a due process issue, contending that the trial court may not consider his conduct of sending photographs of a young child to Jerry Hilliard, an inmate and sex offender, because the prosecution dropped the charge for possession of child sexually abusive material (child pornography).[4] The majority does not reach this issue because it concludes that remand is appropriate. Because I would not remand, I will address this issue.

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[3] I am concerned about questions of judicial economy implicit in blindly affording *Crosby* remands to every sentencing question that is raised before this Court post-*Lockridge*, particularly when challenges to those sentences are unpreserved.

[4] See MCL 750.145c(4).

It is fundamentally unfair for the prosecution to drop a charge while engaging in plea negotiations, only to "resurrect it at sentencing in another form." *People v McGraw*, 484 Mich 120, 134; 771 NW2d 655 (2009). That is not what happened in this case.

In this case, the prosecution dropped a charge for possessing child sexually abusive material. In sentencing defendant, the trial court did not rely on defendant's possession of the sexually abusive photograph, but instead focused on how Shank's conduct—grooming an acquaintance's child and sending photographs of that child and an ostensibly pregnant seven-year-old to Hilliard, who was incarcerated for molesting children—showed that he had very little rehabilitative potential and posed a danger to the community. I conclude that the trial court did not violate Shank's due process rights.

IV. PROPORTIONALITY

Shank also raises a proportionality question unrelated to the application of *Lockridge* and *Alleyne*—he contends that the trial court's lengthy sentence was not proportional because it was not justified by the circumstances of his crime. Again, I disagree.

Even when the sentencing guidelines were mandatory, the "key test" of a sentence was whether it was proportionate to the seriousness of the matter, rather than whether it strictly adhered to a guidelines range. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). "[P]unishment should be made to fit the crime and the criminal." *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003). One purpose of the sentencing guidelines is to facilitate proportional sentences. See *People v Smith*, 482 Mich 292, 320-321; 754 NW2d 284 (2008) (MARKMAN, J., concurring).

The trial court stated extensive reasons for why Shank's sentence was proportional. It gave these reasons under the now-defunct label of "substantial and compelling reasons,"[5] but the fact that the sentencing guidelines are no longer mandatory does not negate that the trial court in this case did in fact consider the proportionality of its sentence. The trial court considered Shank's criminal history, his conduct leading to the charges in this case, and his failure to rehabilitate. Specifically, it found that Shank lacked rehabilitative potential. He was previously incarcerated for accosting minors, but his uncharged conduct raised serious concerns that he would continue to engage in that behavior. Shank violated his probation and parole, including by possessing firearms, and while he was imprisoned he engaged in poor behavior. And Shank continued to pose a danger to children and the community because he could not or would not be rehabilitated. Under these facts, I conclude that the trial court's sentence fell within the range of principled outcomes.

I would affirm.

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[5] The trial court need no longer articulate substantial and compelling reasons to justify a departure from the sentencing guidelines. *Lockridge*, 498 Mich at 364-365. However, the trial court should still articulate reasons for why its sentence is more proportionate than a sentence within the guidelines range, even though these reasons need not be substantial and compelling. See *Rita*, 551 US at 356-357 (stating that when determining the reasonableness of a sentence, courts should consider the sentencing court's reasons for departing from the guidelines); *Gall v United States*, 552 US 38, 50; 128 S Ct 586; 169 L Ed 2d 445 (2007) (stating that a more significant departure will require more justification to be upheld as proportional than a minor departure).

STANKEVICH v MILLIRON (ON REMAND)

Docket No. 310710. Submitted October 5, 2015, at Lansing. Decided November 19, 2015, at 9:00 a.m.

Jennifer Stankevich brought an action in the Dickinson Circuit Court, seeking to dissolve her Canadian marriage to Leanne Milliron, to affirm that plaintiff was the legal parent of defendant's biological child, and to establish custody, parenting time, and child support. Defendant moved for summary disposition under MCR 2.116(C)(8) on the ground that plaintiff did not have standing to petition for custody of the child, who was allegedly born during the parties' marriage. The court, Richard J. Celello, J., granted defendant's motion, and plaintiff appealed. The Court of Appeals, RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ., affirmed in an unpublished opinion per curiam issued October 17, 2013 (Docket No. 310710), holding that plaintiff was not a "parent" as that term was defined in the Child Custody Act, MCL 722.21 *et seq*., and declining to apply the equitable-parent doctrine on the ground that recognizing the parties' same-sex union as a marriage would have been contrary to Michigan law. Plaintiff sought leave to appeal in the Michigan Supreme Court, which entered an order holding the application in abeyance in light of *DeBoer v Snyder*, 973 F Supp 2d 757 (ED Mich, 2014), an appeal of which was then pending in the United States Court of Appeals for the Sixth Circuit. After the Sixth Circuit decision reversing *DeBoer* was itself reversed by the United States Supreme Court under the name *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), requiring the states to recognize same-sex marriages, the Michigan Supreme Court vacated the Court of Appeals judgment in this case and remanded the case to the Court of Appeals for reconsideration. 498 Mich 877 (2015).

On remand, the Court of Appeals *held*:

Under the United States Supreme Court's opinion in *Obergefell*, plaintiff had standing to bring this action under the equitable-parent doctrine because Michigan was required to recognize the parties' same-sex marriage and plaintiff's complaint alleged facts that, if proved, were sufficient to establish equitable parenthood. The equitable-parent doctrine holds that a

spouse who is not the biological parent of a child born or conceived during the marriage may be considered the natural parent of that child if (1) the spouse and the child mutually acknowledge a relationship as parent and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the spouse desires to have the rights afforded to a parent, and (3) the spouse is willing to take on the responsibility of paying child support. In this case, if the parties' marriage was valid under Canadian, or applicable provincial, domestic relations law and other legal and contractual requirements, plaintiff alleged facts that would afford her standing to seek the status of an equitable parent. Therefore, the matter was remanded for an evidentiary hearing to determine whether plaintiff was entitled to be deemed an equitable parent.

Reversed and remanded for further proceedings.

PARENT AND CHILD — EQUITABLE-PARENT DOCTRINE — SAME-SEX MARRIAGES — MARRIAGES PERFORMED OUT OF STATE.

Under the equitable-parent doctrine, a spouse who is not the biological parent of a child born or conceived during the marriage may be considered the natural parent of that child if (1) the spouse and the child mutually acknowledge a relationship as parent and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the spouse desires to have the rights afforded to a parent, and (3) the spouse is willing to take on the responsibility of paying child support; a person who entered into a same-sex marriage and alleges facts that meet these requirements has standing to seek the status of an equitable parent if the marriage was valid under the laws of the nation, state, or province in which the marriage was performed and satisfied the applicable legal and contractual requirements.

Finch & Finch, PC (by *Nancy B. Finch* and *Andrea Mashak*), for plaintiff.

Michele Hebner, PC (by *Michele Hebner*), for defendant.

ON REMAND

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

PER CURIAM. Plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition for failing to state a claim under MCR 2.116(C)(8). Pursuant to the dictates of the United States Supreme Court in *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), we remand this matter for proceedings consistent with this opinion.

I. BACKGROUND

In our October 17, 2013 opinion in this matter, we summarized the factual background of the case:

> The parties entered into a same-sex marriage in Canada in July 2007. Before that date, defendant had been artificially inseminated, and later gave birth to a child. Defendant is the biological mother of the child.
>
> The parties' [sic] separated in March 2009. While they initially agreed to a visitation schedule, they subsequently found that they could not agree. Thus, plaintiff filed a verified complaint, asserting that she fully participated in the care and rearing of the minor child. She requested relief from the trial court, which included an order dissolving the marriage, an order affirming that she is the parent of the child, and orders regarding custody, parenting time, and child support.
>
> Defendant, however, filed a motion for summary disposition pursuant to MCR 2.116(C)(8). She asserted that plaintiff did not have standing to petition for custody of the child. The trial court granted defendant's motion. Plaintiff now appeals. [*Stankevich v Milliron*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2013 (Docket No. 310710), p 1, vacated and remanded 498 Mich 877 (2015).]

In our previous opinion, we upheld the grant of summary disposition to defendant because plaintiff lacked standing to bring this action. *Stankevich*, un-

pub op at 5. We noted that the Child Custody Act (CCA) defines "parent" as the " 'natural or adoptive parent of a child.' " *Id*. at 2, quoting MCL 722.22(h).[1] Plaintiff is not a parent under this definition because she is not an adoptive parent and because she is not related to the child by blood. *Id*., citing *Random House Webster's College Dictionary* (2005) (defining "natural" as, in part, "related by blood rather than by adoption: *one's natural parents*."). Likewise, we rejected plaintiff's request to apply the equitable-parent doctrine that was adopted in *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987). *Stankevich*, unpub op at 3-5. The basis of our conclusion was that applying the doctrine in this case would be contrary to *Van v Zahorik*, 460 Mich 320, 330-331; 597 NW2d 15 (1999), in which the Michigan Supreme Court declined to extend the equitable-parent doctrine outside the context of marriage, because recognizing plaintiff's same-sex union as a marriage under the equitable-parent doctrine would have violated the constitutional and statutory provisions defining marriage. *Stankevich*, unpub op at 3-5.

On November 25, 2013, plaintiff filed an application for leave to appeal in the Michigan Supreme Court. In light of the pending appeals from the decision in *DeBoer v Snyder*, 973 F Supp 2d 757 (ED Mich, 2014), rev'd 772 F3d 388 (CA 6, 2014), rev'd sub nom *Obergefell*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), on April 25, 2014, our Supreme Court entered an order holding the application in the instant matter in abeyance. *Stankevich v Milliron*, 844 NW2d 724 (Mich, 2014).

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[1] MCL 722.22(h) was subsequently amended by 2015 PA 51, effective September 7, 2015. The definition of "parent" remains the same, although it is now codified under MCL 722.22(i).

After the United States Supreme Court's decision in *Obergefell*, the Michigan Supreme Court vacated our judgment in this case and remanded it to us for reconsideration. *Stankevich v Milliron*, 498 Mich 877 (2015).

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review the grant of summary disposition de novo. *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," and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. at 119. Furthermore, the motion only should be granted when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks and citation omitted).

"Whether a party has legal standing to assert a claim constitutes a question of law that we review de novo." *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001).

B. ANALYSIS

As a result of the United States Supreme Court's opinion in *Obergefell*, plaintiff has standing under the equitable-parent doctrine because Michigan now is required to recognize the parties' same-sex marriage, and plaintiff's complaint alleges facts that, if proven, are sufficient to establish equitable parenthood.[2]

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[2] The remaining aspects of our previous opinion are unaffected by *Obergefell* because the opinion only affected our analysis of the

"Generally, a party has standing if it has some real interest in the cause of action, . . . or interest in the subject matter of the controversy." *In re Anjoski*, 283 Mich App 41, 50; 770 NW2d 1 (2009) (quotation marks and citation omitted; alteration in original). But "this concept is not given such a broad application in the context of child custody disputes involving third parties, or any individual other than a parent[.]" *Id*. (quotation marks and citation omitted; alteration in original).

However, this Court adopted the equitable-parent doctrine in *Atkinson*, 160 Mich App at 608-609, holding:

> [W]e adopt the do[c]trine of equitable parent and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

This Court stated that, given its recognition that "a person who is not the biological father of a child may be considered a parent against his will, and consequently burdened with the responsibility of the support for the child," such a person, in being treated as a parent, may also seek the rights of custody or parenting time. *Id*. at 610. This Court also has applied the equitable-parent doctrine in later cases. See, e.g., *York v Morofsky*, 225

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equitable-parent doctrine. Our application of the definition of "parent" under the CCA does not run afoul of *Obergefell* because now that definition applies equally to same-sex and opposite-sex married couples. See MCL 722.22(i) (previously MCL 722.22(h)).

Mich App 333, 335, 337; 571 NW2d 524 (1997); *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996). However, as mentioned earlier, our Supreme Court declined to extend the equitable-parent doctrine outside the context of marriage in *Van*, 460 Mich at 337.

In our previous opinion, we concluded that the equitable-parent doctrine should not be expanded to include same-sex couples, such as the parties in this case, because Michigan statutory and constitutional provisions precluded recognition of the parties' same-sex marriage, and *Van* limited the application of the equitable-parent doctrine to the confines of marriage. *Stankevich*, unpub op at 3-5. However, under *Obergefell*, Michigan now is required to recognize the parties' same-sex marriage.

In *Obergefell*, 576 US at ___; 135 S Ct at 2604-2605, the United States Supreme Court held:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex [sic] may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.

The Supreme Court therefore held invalid state laws—including Michigan's constitutional provision defining marriage as a union between one man and one woman, Const 1963, art 1, § 25, *Obergefell*, 576 US at ___; 135 S Ct at 2593—"to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," *id*. at ___; 135 S Ct at 2605.

The Court also addressed "whether the Constitution requires States to recognize same-sex marriages validly performed out of State" and concluded that "the

recognition bans inflict substantial and continuing harm on same-sex couples." *Id*. at ___; 135 S Ct at 2607. Accordingly, the Court held that "same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id*. at ___; 135 S Ct at 2607-2608. Thus, under *Obergefell*, the holding in *Van* limiting the equitable-parent doctrine to the confines of marriage is no longer a barrier to the application of that doctrine in this case, *Van*, 460 Mich at 337, and we are required to conclude that plaintiff is not barred from asserting the applicability of the equitable-parent doctrine.

Plaintiff's complaint alleges that the parties in the instant matter were married in Canada in 2007 and that defendant's biological child was born during the course of that marriage. As *Obergefell* requires that same-sex couples be permitted to exercise the fundamental right to marry on the same terms and conditions as opposite-sex couples, an application of a legal doctrine excluding same-sex married couples from the doctrine of equitable parenthood goes against the dictates of *Obergefell*, which we are bound to follow.

Should it be determined by the trial court that the parties' proffered marriage was valid under Canadian, or applicable provincial, domestic relations law and other legal and contractual requirements,[3] plaintiff

[3] Unlike marriages solemnized in sister states, which are generally recognized as valid in this state, Michigan has no statute requiring the recognition of marriages celebrated in foreign nations. Nonetheless, Michigan courts recognize marriages solemnized in foreign nations as a matter of comity. It is well settled that Michigan's law and public policy favor the institution of marriage, *Van*, 460 Mich at 332; *Boyce v*

alleges facts that afford her standing to seek the status of an equitable parent. As previously discussed, the parties claim that the child was born during the course of their Canadian marriage. Plaintiff alleges that the parties entered into an agreement to conceive and raise the child with the attendant parental rights and responsibilities. Plaintiff also claims that she assisted with the artificial insemination process through which the child was conceived, that she was present at the child's birth, and that she fully participated in the care and rearing of the child until defendant prevented her from doing so. Further, plaintiff alleges that, during the parties' relationship, they shared parental responsibilities and duties equally. She asserts that she always has maintained a strong parental role that included bonding with the child, providing for the child financially, attending the child's healthcare appointments, making medical decisions with defendant concerning the child's care, and providing a home for the child. Further, after going their separate ways in March 2009, the parties had a parenting-time schedule for a significant period of time. Plaintiff's complaint requests an order that affirms her parental status, an

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McKenna, 211 Mich 204, 214; 178 NW 701 (1920), and Michigan courts have long recognized the validity of marriages celebrated in foreign countries, provided that those marriages are valid in the nation of celebration, see, e.g., *Boyce*, 211 Mich at 215; *People v Imes*, 110 Mich 250, 251; 68 NW 157 (1896); *Hutchins v Kimmell*, 31 Mich 126, 130-131 (1875), and that they are not antithetical to Michigan's public policy. The rule in Michigan is that the validity of a foreign marriage must be determined by reference to the domestic relations law of the country of celebration. *Hutchins*, 31 Mich at 131; see also *Noble v Noble*, 299 Mich 565, 568; 300 NW 885 (1941); *In re Osborn Estate*, 273 Mich 589, 591; 263 NW 880 (1935); 16 Michigan Civil Jurisprudence, Marriage, § 4, p 561.

On remand, the trial court must determine the validity of the parties' Canadian marriage by applying the domestic relations law of the place in which the plaintiff alleges that she was married to the defendant.

order making custody and parenting-time determinations, and an order of child support.

As set forth, plaintiff's allegations would establish factually her standing to file this action seeking equitable parenthood. The facts alleged in the complaint, if proved, would support the elements of the equitable-parent doctrine as set forth in *Atkinson*, 160 Mich App at 608-609. Therefore, we remand this matter for an evidentiary hearing to determine whether plaintiff is entitled to be deemed an equitable parent.

III. CONCLUSION

The United States Supreme Court's decision in *Obergefell* requires Michigan to recognize same-sex marriages. Accordingly, we reverse the order granting summary disposition in favor of defendant and remand for an evidentiary hearing concerning the validity of the parties' alleged Canadian marriage and the applicability of the equitable-parent doctrine. We do not retain jurisdiction.

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

CONLIN v UPTON

Docket No. 322458. Submitted October 13, 2015, at Lansing. Decided November 24, 2015, at 9:00 a.m.

Philip F. Conlin and other developers of the Dixboro Farms residential subdivision brought an action in the Washtenaw Circuit Court against Tom Upton and other officers and directors of the Dixboro Farms Property Owners Association, as well as the association itself, seeking a declaration that the bylaws adopted by defendants—which required lot owners to submit plans for new construction or renovation to an architectural review committee—were not binding and amounted to slander of title. The parties all own or owned real property in Dixboro Farms, which was initially governed by a set of deed restrictions and protective covenants that were recorded in 2001. These documents gave Conlin the right to approve proposed plans for construction. In 2010, Conlin approved the construction of two homes that some owners did not believe were in harmony with the quality of the existing homes, and a majority of the homeowners voted to adopt the contested bylaws as a result. Plaintiffs moved for partial summary disposition under MCR 2.116(C)(10), which the court, Carol A. Kuhnke, J., denied after determining that there was a question of fact as to whether Conlin had assigned to the association his right to review proposed plans for development. Defendants also moved for partial summary disposition, arguing that plaintiffs' slander-of-title claim was untimely. Defendants individually moved for summary disposition of plaintiffs' claims on the grounds that plaintiffs had not validly stated claims against them as individuals and had not pleaded in avoidance of their immunity. The court entered orders dismissing plaintiffs' slander-of-title claim and their claims against the individual officers, and the remaining claim proceeded to trial. After the close of proofs, plaintiffs moved for a directed verdict, which the court, Archie C. Brown, J., denied. The parties submitted a special verdict form to the jury, asking the jury to decide whether the bylaws constituted restrictive covenants that ran with the land and whether the bylaws impaired the developers' rights by violating the 2001 covenants and restrictions. The jury answered "no" to both questions. Because they were told to skip

the next two questions if they answered "no" to the first two questions, the jury did not determine whether Conlin had assigned to the association his right to determine whether new developments were harmonious. The court entered a judgment of no cause of action and ordered plaintiffs to pay more than $58,000 in attorney fees to the association. Plaintiffs appealed by delayed leave granted.

The Court of Appeals *held*:

1. The trial court erred by entering a judgment against plaintiffs. The association's members had a common-law right to try to enhance the value of their property through contractual agreements concerning the use and development of their real property, and the association's articles of incorporation gave it the authority to promulgate bylaws. However, under Michigan's common law, any rules that imposed additional burdens on the members' properties had to be adopted unanimously. Because it was undisputed that the bylaws were not unanimously adopted, and because the 2001 covenants and restrictions did not expressly permit the association to burden the lots with new restrictions on its own initiative or allow the owners to alter or adopt restrictions with less than unanimous consent, the new restrictions were invalid. Consequently, the trial court should have determined that Article XII of the bylaws, which established the architectural review committee, was invalid under Michigan law, but only to the extent that it burdened the lots in Dixboro Farms with restrictions and covenants beyond those provided in the 2001 covenants and restrictions. Because the extent to which Article XII of the bylaws imposed additional burdens on the lots depended in part on the resolution of a question of fact, the case was remanded to the trial court.

2. The evidence indicated that there was a question of fact regarding whether Conlin had assigned to the association his right to approve new construction. Paragraph 11 of the covenants gave Conlin, as the developer, the right to assign his responsibilities and authority under the covenants to a third party with no limitations or conditions. Therefore, he could assign his right to the association expressly by oral or written agreement or impliedly through his representations and course of conduct. At trial, there was evidence that Conlin had signed and dated a letter from the homeowners asking him to indicate his acceptance and acknowledgment of the new bylaws and approval process, and there was evidence that Conlin later submitted proposed plans for development to the architectural review committee. Viewed in the light most favorable to the association, there was

evidence from which a reasonable jury could find that Conlin had assigned his right of approval to the association. Consequently, the trial court did not err when it denied the developers' motion for a directed verdict on that limited issue. Because the special verdict form instructed the jury to skip the question whether Conlin had assigned his rights if it found that the bylaws did not amount to restrictive covenants and did not violate the 2001 covenants and restrictions, this factual question was not resolved below. Although Article XII of the bylaws was invalid to the extent that it imposed new burdens on the lots at issue without the proper consent or authority, the full extent that Article XII would be invalid could not be determined without resolving this factual question. Consequently, the case was remanded to the trial court.

Reversed; judgment vacated and case remanded for further proceedings.

Bredell & Bredell (by *John H. Bredell*) for plaintiffs.

Soble Rowe Krichbaum LLP (by *Matthew E. Krichbaum*) for defendants.

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM. In this real property dispute, plaintiffs, Philip F. Conlin, Jerry L. Helmer, Ruthann Helmer, John D. McCullough, and David G. Helmer (collectively, the Developers), appeal by leave granted the trial court's final judgment and order, which the trial court entered after the jury returned a verdict in favor of defendants, Dixboro Farms Property Owners Association (the Association) and the Association's officers and directors, Tom Upton, Tim Haller, Chris Conlin, Barbara Haller, and David Baker (collectively, the Officers). The Developers and the Officers each own or owned real property in a residential development known as Dixboro Farms. Dixboro Farms had 34 total lots. During the events at issue, the Developers owned 11 undeveloped lots, which they hoped to sell to third

parties. The present dispute arose after the Association adopted bylaws that required the lot owners to submit plans to the Association's architectural review committee for approval before any new construction or renovation. The Developers sued, in part, to prevent the Officers and the Association from enforcing the bylaws in a way that restricts their right to develop their lots. For the reasons explained below, we reverse the jury's verdict, vacate the judgment, and remand for further proceedings.

I. BASIC FACTS

Philip Conlin testified that he and others purchased "just over ninety" acres of land in 1998 or 1999 and split the land into lots for development as Dixboro Farms. The land gently sloped down from north to south. The north end of the property had nicer features—it was hilly, wooded, and has a seasonal creek. The south end, however, abutted an easement with 200-foot-high towers for power lines. Accordingly, the northern lots were more expensive than those on the south end of the development.

Philip Conlin stated that he and his codevelopers established a set of restrictions and protective covenants for the development and recorded them in January 2001. The restrictions and covenants served as a "roadmap to any prospective purchaser" and helped define the "future use" of the land. He placed a restriction in the covenants that required a prospective purchaser to obtain his permission—in his role as the developer—before building on any parcel. He required the purchaser to provide him with plans, and had the right to determine whether the proposed home was harmonious with the development as a whole. Philip Conlin rejected more proposals with this development

than he had rejected in any of his previous developments; he was surprised by the number of people who wanted to buy a $200,000 lot and then build a $100,000 home. "I mean, I had more people that were just so off base with what they thought that I would allow there but still knew the high quality of the development and thought that paying for the land would raise up their value of the inferior structure that I wouldn't allow to be built."

The covenants included a provision for the formation of a property owners association, which Philip Conlin incorporated in 2007. The covenants provided that Philip Conlin would appoint the board of directors for the association after the sale and development of 50% of the lots. The members had the right to elect the board of directors after the sale of 90% of the lots.

William Farley testified at his deposition, which was read into the record at trial, that he was one of the first purchasers in Dixboro Farms. As one of the first to build, he felt he was setting "the standard for the development" and was "very concerned" about building a house that might not be "compatible with what was going to be built in the remaining lots." He did not want to build a high-end home only to have "mid-level tract homes" follow. The lots were priced at the high end—around $150,000 to $200,000—which suggested to him that the whole development would be high-end. Farley spoke with Philip Conlin about his concerns. He submitted plans to Philip Conlin for a home that was between 3400 and 3800 square feet in size, had a four-stall garage, and was four-sided brick. Philip Conlin told him that the plans reflected " 'precisely what we want the Dixboro Farms subdivision to be.' "

Philip Conlin confirmed on cross-examination that there were no new homes built in Dixboro Farms from

2006 through 2009 because the real estate market had taken a turn for the worse. However, he approved two new homes—referred to as the Guenther homes—for construction in 2010. After the completion of the homes later that year, Philip Conlin learned that many of the existing homeowners were upset about the new homes. They were dissatisfied with the homes and felt that they were not in harmony with the quality of the existing homes.

There was, according to Farley, "a lot of discussion among the neighbors" about the new homes; they had invested several hundred thousand dollars in their own homes and were worried that if the remaining lots were built with similar housing to the Guenther homes, it would dramatically alter the character of Dixboro Farms. Timothy Haller, who also owned a home in Dixboro Farms, explained that there was "a groundswell of dissatisfaction that these homes had been erected . . . ." Farley said the neighbors all thought the new homes were not in harmony with the previous 11 homes: they "were typical low-end, middle, medium-type tract homes, no brick and mortar, no architectural definition, lots of shingles, exposed roof lines, vinyl-sided." Farley felt that Philip Conlin had backed away from his earlier representation about the character of Dixboro Farms when he approved those homes. Haller similarly testified that the Guenther homes were "not even close" to the homes that were built over the "prior ten years." Because the neighbors now had "trust issues" with Philip Conlin, Farley stated that they met to consider how they might exercise some influence over future development.

In December 2010, Chris Conlin, who is Philip Conlin's cousin and a homeowner in Dixboro Farms, sent an e-mail to Philip Conlin requesting that he

appoint the board of directors for the Association and call a meeting of the homeowners. Chris Conlin wrote that it was "understood" that the new board would form an architectural committee at this first meeting and that the residents would "move to amend" the covenants to include " 'preferred three sides brick' in the language." Philip Conlin appointed the Association's first board of directors later that month.

The homeowners met in January 2011. All the homeowners in attendance at the meeting signed a letter with a summary of their position, which was sent to Philip Conlin. In the letter, which is misdated January 2010, they expressed their gratitude to Philip Conlin for establishing and developing Dixboro Farms. They noted that they had reached a consensus on "a number of issues" and were sending him the letter to "inform" him about their decisions and seek his "concurrence in the progress and basis of continuing cooperation." They wanted to elect their own board for the Association and they expected him to "concur" with this decision. The homeowners also "acted to appoint" an architectural control committee to "cooperate and assist in maintaining architectural harmony of the subdivision." They wrote that the committee's duties would be defined in cooperation with him. Finally, the homeowners stated that they intended to develop bylaws for the Association. The homeowners closed the letter with a request that he sign the letter to indicate his "acceptance and acknowledgement" of the newly formed Association.

Philip Conlin signed the letter and dated it January 14, 2011. He conceded at trial that he had signed the letter and acquiesced to the homeowners' decision to elect their own board of directors for the Association, notwithstanding his continued right to appoint the board.

Haller testified that the Association hired a lawyer, Walter Hamilton, to advise it on the adoption of bylaws. In June 2011, Haller hosted a meeting of the property owners to consider a proposed set of bylaws. Haller stated that the debate centered on the "purpose of the bylaws and protecting our property values moving forward . . . ." Philip Conlin and Jerry Helmer attended the meeting and actively opposed the adoption of the bylaws, but a majority approved them.

The Association's bylaws established an architectural review committee and, in relevant part, prohibited the Association's members from commencing, erecting, or maintaining on "any Lot" a "building, fence, wall, deck, swimming pool, out-building or other structure, original landscaping on new construction or exterior improvement" without first obtaining the committee's approval. Under § 3 of that same article, a lot owner had to submit a $2,000 fee with a set of required plans. Although the committee had the authority to deny a plan that violated the original covenants or restrictions, it could also deny the plan on the basis of "dissatisfaction with the effect of the proposed construction on the harmonious development" of Dixboro Farms. The bylaws included guidelines that the committee was to enforce "to insure that all construction in the subdivision is in harmony with the character of the subdivision" as it develops. The Association's lawyer recorded the bylaws in December 2011.

In December 2011, Philip Conlin submitted a proposed plan of development for a lot to the Association. In his cover letter, he stated that he was submitting the plans as part of the review that he was required to perform as the developer, but he invited the Association's comments and suggestions on the plan.

Haller responded to the letter by e-mail. He related that the committee had met about the proposed plan and offered some "preliminary feedback." The committee, he wrote, felt that the proposed home should have a 100-foot setback rather than a 60-foot setback and should be 100% stone or brick or a combination, but in any event "must" be brick or stone on the first floor. The committee also reminded him that his client would have to submit plans along with $2,000 for a comprehensive review, as required under the bylaws.

In August 2011, the Developers sued the Association's Officers. They alleged that the Officers caused the Association's bylaws to be recorded and that the bylaws contained invalid restrictions on the development of lots within Dixboro Farms. The recording of these restrictions, the Developers further stated, made it more difficult to sell their remaining lots. In their first count, the Developers asked the trial court to declare that the additional restrictions did not bind, and were not applicable to, the Developers' lots. They also alleged, in a second count, that the recording of the bylaws amounted to slander of title. In December 2012, the trial court entered an order allowing the Developers to amend their complaint to include the Association.

In April 2013, the Developers moved for partial summary disposition under MCR 2.116(C)(10). They maintained that the undisputed evidence showed that Philip Conlin did not assign to the Association his right to approve proposed plans for the development of lots. Because he did not assign that right, and it was undisputed that the original covenants and restrictions did not give the Association the right to add new restrictions, the Association could not—under the guise of enforcing the harmony of the development—establish new restrictions through the adoption of

bylaws. The Developers argued that they were entitled to a declaration that the new restrictions contained in the Association's bylaws did not apply to their lots.

The trial court held a hearing on the motion in June 2013. After hearing arguments, the trial court determined that there was a question of fact as to whether Philip Conlin assigned to the Association his right to review any proposed plans for development. For that reason, it denied the Developers' motion.

In October 2013, the Association moved for partial summary disposition. It argued that the Developers' slander-of-title claim was untimely and must be dismissed. The Officers also each individually moved for summary disposition of the Developers' claims against them on the grounds that the Developers did not validly state claims against them as individuals and did not plead in avoidance of their immunity. The trial court entered orders dismissing the Developers' slander-of-title claim and their claims against the individual Officers.

The case proceeded to trial in March 2014. After the close of proofs, the Developers moved for a directed verdict. They argued that the undisputed evidence showed that the bylaws burdened their properties with new or expanded restrictions, which were not permitted by the original covenants. They further argued that the evidence did not establish that Philip Conlin assigned to the Association his authority to approve proposed plans for development or that the Developers were estopped from challenging the new restrictions in the bylaws. The trial court determined that it was for the jury to decide whether the bylaws imposed restrictions beyond those permitted by the original covenants and whether Philip Conlin assigned to the Association his right to preapprove. Consequently, it denied the motion.

The parties submitted a special verdict form to the jury. They asked the jury to answer whether the bylaws constituted "restrictive covenants" that ran with the land and whether the bylaws impaired the Developers' rights by violating the 2001 covenants and restrictions. The jury answered "no" to both questions. Because they were told to skip the next two questions if they answered "no" to the first two questions, the jury did not find whether Philip Conlin assigned to the Association his right to determine whether new developments were harmonious.

In April 2014, the trial court entered a judgment of no cause of action against the Developers and ordered them to pay more than $58,000 in attorney fees to the Association.

The Developers now appeal in this Court.

II. DIRECTED VERDICT

A. STANDARD OF REVIEW

The Developers argue on appeal that the Association adopted bylaws that plainly imposed new building and use restrictions on the real property in Dixboro Farms. Because the covenants did not—as a matter of law—give the lot owners or the Association the authority to adopt new restrictions with less than majority consent, the new restrictions had to have been adopted by unanimous consent of the lot owners, which it is undisputed did not occur. Consequently, the Developers state, the trial court erred when it determined that there was a question of fact for the jury about the proper construction of the covenants and bylaws; instead, the trial court should have granted them judgment as a matter of law, a directed verdict in their favor, or judgment notwithstanding the verdict.

This Court reviews de novo a trial court's decision on a motion for a directed verdict. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). This Court also reviews de novo the proper construction of restrictive covenants involving real property. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008). The proper construction of a contractual agreement is likewise a question of law that this Court reviews de novo. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014). Finally, this Court reviews de novo whether the trial court properly applied this state's common law. *Roberts v Salmi*, 308 Mich App 605, 612; 866 NW2d 460 (2014).

B. ANALYSIS

In this case, there is no dispute that the deed restrictions and protective covenants for Dixboro Farms, which were recorded in January 2001, are valid and enforceable against the lots in Dixboro Farms. The dispute concerns whether the Association's bylaws include additional restrictions on the use and development of the lots within Dixboro Farms and, if so, whether the Association can validly enforce those restrictions against the lots owned by the Developers even though the Developers did not consent to the adoption of the bylaws.

1. ARTICLE XII UNAMBIGUOUSLY IMPOSES RESTRICTIONS ON THE LOTS

Operating agreements, such as a corporation's bylaws, are intended to govern the future conduct of the entity and its members. *People ex rel Pulford v Detroit Fire Dep't*, 31 Mich 458, 465 (1875). Generally, an entity's bylaws or membership agreement may provide

for the regulation and management of its affairs as long as the provision is not inconsistent with law or the articles authorizing the entity. See MCL 450.1231; MCL 450.4210. When validly promulgated, an entity's bylaws or similar governing instrument will constitute a binding contractual agreement between the entity and its members. See *Mayo v Great Lakes Greyhound Lines*, 333 Mich 205, 214; 52 NW2d 665 (1952) (providing that the members of a voluntary association are bound by the association's constitution and general laws); *Kauffman v Chicago Corp*, 187 Mich App 284, 287; 466 NW2d 726 (1991) (stating that the constitutions, rules, and bylaws of the entity at issue "constitute[d] a contract by all members" of the entity "with each other and with the [entity] itself"); *Allied Supermarkets, Inc v Grocer's Dairy Co*, 45 Mich App 310, 315; 206 NW2d 490 (1973) ("The bylaws of a corporation, so long as adopted in conformity with state law, constitute a binding contract between the corporation and its shareholders."). In this case, the parties do not dispute that the Association had the authority to adopt bylaws and that the bylaws were adopted by a majority of the Association's members. Thus, to the extent that they do not conflict with the Association's articles of incorporation or this state's law, the bylaws would constitute a binding contractual agreement between the Association and its various members.

The Association's members have a common-law right to try to enhance the value of their property through contractual agreements concerning the use and development of their real property. It is "well-grounded" in Michigan's common law "that property owners are free to attempt to enhance the value of their property in any lawful way, by physical improvement, psychological inducement, contract, or other-

wise." *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) (quotation marks, emphasis, and citation omitted). "A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a 'valuable property right.' " *Id*., quoting *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 525; 378 NW2d 402 (1985). However, although Michigan courts recognize that restrictions are a valuable property right, this right must be balanced against the equally well-settled principle that courts will not lightly restrict the free use of property. See *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341; 591 NW2d 216 (1999) (characterizing the protection of the free use of property as a fundamental principle). Courts sitting in equity "do not aid one man to restrict another in the use to which he may put his property unless the right to such aid is clear." *Eveleth v Best*, 322 Mich 637, 642; 34 NW2d 504 (1948) (quotation marks and citation omitted). Similarly, the provisions of a covenant "are to be strictly construed against the would-be enforcer . . . and doubts resolved in favor of the free use of property." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). When construing a restrictive covenant, courts may only give it a fair construction; courts may not broaden or limit the restriction. *Kelly v Carpenter*, 245 Mich 406, 409; 222 NW 714 (1929). To that end, courts will not infer the existence of a restriction—the restriction must be expressly provided in the controlling documents. *O'Connor*, 459 Mich at 341, citing *Margolis v Wilson Oil Corp*, 342 Mich 600, 603; 70 NW2d 811 (1955) ("The restrictions contain no express prohibition against a side entrance to defendant's lots from Robson avenue. None will be implied."). Courts will not enlarge or extend a restriction through interpretation, even to accomplish what it may be thought the parties would have desired had a situation that

later developed been foreseen by them at the time the restriction was written. *Sampson v Kaufman*, 345 Mich 48, 53; 75 NW2d 64 (1956).

The Association's members were not required to establish their covenants and restrictions through any particular type of instrument. See *Erichsen v Tapert*, 172 Mich 457, 463; 138 NW 330 (1912) ("The fact that the restriction is created in an instrument independent of the deed conveying title is of no consequence, as long as there is a valuable consideration moving to and from the signers."). Accordingly, they could adopt covenants concerning their real property through the adoption of bylaws, which would then be contractually binding on the members to the same extent that any other properly adopted covenant would be binding.

The Association's bylaws contain numerous provisions governing the Association's affairs that are not in dispute. The parties do not dispute the provisions establishing the Association's membership, governing meetings and voting, stating the qualifications and duties of officers and directors, or regulating finance and assessments. The dispute, rather, centers on Article XII of the bylaws, which establishes an architectural review committee.

The first section of that article prohibits the members from commencing, erecting, or maintaining any "building, fence, wall, deck, swimming pool, outbuilding or other structure, original landscaping on new construction or exterior improvement" or making an addition, change, or alteration to such an improvement without first submitting plans for the improvement to the committee and obtaining its approval. A member who submits his or her plans to the committee must pay $2,000 for the review and must deposit $5,000 to cover possible damages from the develop-

ment. The committee has broad authority to deny a proposed plan: it may disapprove the plan because the plan does not comply with the restrictions and covenants for the development, but it also may disapprove the proposed improvement because it is dissatisfied "with the effect of the proposed construction on the harmonious development" of Dixboro Farms. The latter ground for disapproval may be founded on the proposed "location of the structure . . . , the materials used, the color scheme, the finish, design, proportion, shape, height, style or appropriateness of the proposed improvement or alteration or because of any matter or thing which . . . would render the proposed improvement or alteration inharmonious . . . ."

The bylaws also provide rules—labelled "guidelines"—that regulate the committee's ability to exercise its discretion to approve proposed plans. The guidelines, for example, provide that no building or structure can exceed 35 feet in height and that all first-floor walls must be "stone or brick, or a combination of both." The guidelines also specifically prohibit the use of plywood siding, aluminum siding, or vinyl siding on any home. Although the bylaws refer to these requirements as guidelines, it is evident that the committee has a responsibility to reject as unharmonious a proposed development or alteration that does not meet these criteria.

Article XII is not reasonably susceptible to more than one construction and clearly imposes limits on the members' ability to develop and use their lots through the committee's review process—that is, the bylaws unambiguously establish rules governing the use and development of the land within Dixboro Farms. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). Accordingly, we must

determine whether the Association had the authority to regulate its members' use and development of their lots and, if the Association had that authority, whether it exceeded its scope.

2. THE ORIGINAL PROPERTY OWNERS DID NOT GIVE THE ASSOCIATION THE AUTHORITY TO REGULATE THE PROPERTIES THROUGH BYLAWS

The Association's articles of incorporation provide that the Association was formed to "manage and administer the affairs of and to maintain Dixboro Farms . . . ." It was also formed to "levy and collect assessments against and from the members," "to make reasonable rules and regulations governing the use and enjoyment" of the subdivision, and to "enforce the provisions" of the covenants, restrictions, articles of incorporation, bylaws, and rules and regulations that may be adopted. These provisions are also not ambiguous and give the Association broad authority to promulgate bylaws regulating the members' conduct within the Association itself and also as property owners in Dixboro Farms. Consequently, if the bylaws do not conflict with this State's law, they must—as with any other type of contract—be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

Under Michigan's common law, a property owner normally cannot be contractually bound by a covenant regulating the use of his or her real property without his or her agreement to the covenant. Therefore, a group of property owners cannot impose building and use restrictions on a neighboring property owner without his or her consent. See *Eveleth*, 322 Mich at 641-642 (holding that the restrictions did not apply to the lot at issue because the restrictions were not imposed by a common owner and were not agreed to by the current lot owners or by their grantors in the chain of title); *Hart v*

Kuhlman, 298 Mich 265, 267; 298 NW 527 (1941) ("The rights of defendant cannot be made to rest upon a mere neighborhood plan to which he was not a consenting party."); *Doxtator-Nash Civic Ass'n v Cherry Hill Prof Bldg, Inc*, 12 Mich App 468, 472; 163 NW2d 262 (1968) ("The fact that other lot owners in the subdivision who were strangers to the title to defendants' property may have agreed on a plan of restrictions governing their property could not result in restrictions binding upon defendants or their predecessors in title."). However, a party may be bound by a covenant to which he or she did not personally agree if that party's predecessor in interest established the restrictive covenant and the covenant appears in the owner's record title. See *Sanborn v McLean*, 233 Mich 227, 230; 206 NW 496 (1925).

A covenant affecting the use of real property may be personal or may run with the land, as determined by the parties' intent. See *Greenspan v Rehberg*, 56 Mich App 310, 320-321; 224 NW2d 67 (1974), citing, among other authorities, *Mueller v Bankers Trust Co*, 262 Mich 53, 56; 247 NW 103 (1933). A covenant affecting the use of real property runs with the land if, in relevant part, the parties express their intent to bind their successors and assigns. *Greenspan*, 56 Mich App at 320-321. If the covenants are structured to run with the land, a subsequent purchaser will be bound by the covenants if he or she purchases the land with actual or constructive notice of the covenants. *Phillips v Naff*, 332 Mich 389, 393; 52 NW2d 158 (1952). A subsequent purchaser is on constructive notice that his or her use of the property will be subject to the covenants when the covenants appear in the purchaser's chain of title. *Sanborn*, 233 Mich at 231-232.

There is no language within the bylaws to suggest that the members intended the provisions dealing with

the architectural committee to constitute a new set of covenants that would run with the land. In any event, the record evidence shows that the Developers did not agree to the adoption of the bylaws with the property restrictions contained under Article XII; accordingly, even if the drafter of the bylaws intended to establish new covenants or restrictions with the adoption of the bylaws, those covenants and restrictions would not be binding on the Developers or their successors or assigns. *Eveleth*, 322 Mich at 641-642. Moreover, Philip Conlin filed the Association's articles of incorporation in June 2007, which was after the first lots within Dixboro Farms had been sold. Because some lots had already been sold to third parties subject only to the covenants recorded in 2001, Philip Conlin could not use his role as the developer to impose new covenants or alter the existing covenants unilaterally by incorporating the Association and purporting to give it the power to establish new covenants or alter the existing covenants for the subdivision with less than unanimous approval. See *McQuade v Wilcox*, 215 Mich 302, 305-306; 183 NW 771 (1921) (stating that the original owner could not unilaterally alter the restrictive covenants applicable to the lots at issue because others had purchased the lots in reliance on the restrictions). If the Association had the authority to alter the existing covenants or adopt new covenants with less than unanimous consent, its authority must derive from the covenants and restrictions recorded in 2001.

3. THE COVENANTS DID NOT AUTHORIZE THE IMPOSITION OF NEW OR EXPANDED RESTRICTIONS WITH LESS THAN UNANIMOUS CONSENT

The parties to covenants that run with the land may agree that they or their successors or assigns can amend the covenants with less than unanimous agree-

ment. See *Ardmore Park Subdivision Ass'n, Inc v Simon*, 117 Mich App 57, 62; 323 NW2d 591 (1982). If the owners subsequently alter the covenants in compliance with the terms of the original covenants, the change will bind the owners of all the properties subject to the original covenants, even those owners who opposed the change. *Id*. Therefore, if the owners of the lots in Dixboro Farms or their predecessors in interest gave the Association the power to amend or establish restrictions on the use and development of the lots within Dixboro Farms with less than unanimous approval, and the bylaws were adopted in compliance with that grant of power, the restrictions contained in the bylaws would be valid and enforceable against the Developers and their successors even though they differ in nature and extent from those contained in the original covenants and even though the Developers did not agree to the adoption of the bylaws.

The original owners of Dixboro Farms recorded a series of deed restrictions and protective covenants in January 2001. Paragraph 1 of the covenants, for example, placed limits on the use of the lots and on the types of buildings that could be constructed on the lots; Paragraph 2 required the lot owners to maintain easements for utilities; Paragraph 3 required all utilities to be below ground; Paragraph 6 subjected the lots to an annual maintenance charge; Paragraph 10 imposed additional requirements and limitations on the development of lots; and Paragraph 14 limited the use of signs and billboards. The covenants also included Paragraph 5, which established the Association.

In Paragraph 5, the original landowners gave the Association the power to sue: "The Association shall have the right and power in its own name to take and

prosecute all suits, legal, equitable or otherwise which may be, in the opinion of the Association, necessary or advisable for any purpose deemed for the benefit of the Association members." The original landowners also expressly granted the Association certain other powers at various points in the covenants: under Paragraph 6, it has the power to adjust the amount of the annual maintenance fee, including the power to raise the fee beyond the maximum with the approval of a majority of the members; it has the power to spend the maintenance fund on various things under Paragraphs 6 and 8; it has the power to enforce a provision requiring property owners to repair damage that the owner might have caused to certain common areas under Paragraph 10; Paragraph 26 granted the Association the power to hire contractors to perform maintenance on neglected property and charge the owner; and it has the power to abate violations of the restrictions and covenants with notice to the property owner and charge the expense to the owner under Paragraph 29. Conspicuously absent from these provisions is any reference to the Association's power to amend the covenants, or to establish new restrictions or covenants. Indeed, the only reference to such a power in the covenants is in Paragraph 30, which expressly provides that two-thirds of the *owners* of the lots have the power to *release* certain "restrictions, conditions, covenants, charges and agreements" and then only after the passage of 15 years.

By reserving the power to amend the covenants by less than unanimous consent to the owners, and then limiting that power in extent (release of certain specified restrictions) and time (after 15 years), the original landowners plainly expressed their intent that the covenants and restrictions could not be altered by the Association acting on its own initiative, could not be

altered until 15 years after the recording of the covenants in January 2001, and could only be altered to "release" certain specified restrictions. The covenants are unambiguous and did not expressly provide the Association with the authority to alter the original covenants and restrictions on its own initiative and did not authorize the owners to add new restrictions or increase the burden of existing restrictions with less than unanimous consent. Accordingly, this Court must enforce the covenants as written. *Rory*, 473 Mich at 468. We conclude that the bylaws violate this state's common-law requirement that covenants and restrictions be unanimously approved by all the affected property owners to the extent that the bylaws impose burdens on the individual members' real property beyond those expressly provided in the covenants recorded in 2001.

4. ARTICLE XII IMPOSES NEW OR EXPANDED BURDENS ON THE LOTS

The original covenants granted certain powers to the Association. Because the Association's articles authorize it to "make reasonable rules and regulations governing the use and enjoyment" of the subdivision and to "enforce the provisions" of the covenants and restrictions, the Association could validly promulgate rules governing the manner of its exercise of the powers expressly granted to it. And, as long as the rules did not impose additional burdens on the members' properties, the adoption of the rules by less than all members would not violate this state's common-law unanimity requirement.

The covenants expressly granted the Association the authority to abate violations "of any condition or restriction or breach of any covenant" in Paragraph 29.

Because homeowners associations generally have standing to enforce restrictions on behalf of their members, *Civic Ass'n of Hammond Lake v Hammond Lake Estates*, 271 Mich App 130, 135; 721 NW2d 801 (2006), and the covenants expressly gave the Association the authority to abate violations, the Association could promulgate rules interpreting the covenants and restrictions and setting the procedures governing its own enforcement of those covenants and restrictions. For instance, Paragraph 20 of the covenants and restrictions provides that the lot owners may keep "common household pets" unless "they become an annoyance or nuisance to the neighborhood." The restriction does not define "common household pet" and does not define the conditions under which a common household pet will be deemed to be a nuisance. The Association could for that reason promulgate rules expressing its understanding of those terms and governing its procedure for enforcing that particular restriction. The Association could not, however, expand that restriction or impose a new burden on the lot owners with less than unanimous consent under the guise of interpreting the restriction. See *Golf View Improvement Ass'n v Uznis*, 342 Mich 128, 130-131; 68 NW2d 785 (1955) ("We do not accept this round-about interpretation of the restrictions to fix a minimum area when it could have been expressed directly in so many words. We conclude that it would have been so expressed had that been the intent of the subscribers."). It could not—by way of example—define "an annoyance or nuisance to the neighborhood" to mean the keeping of any animal over 5 pounds in weight because that requirement would categorically exclude numerous common household pets without a finding of actual nuisance—that is, the interpretive bylaw would in effect amount to an additional burden on the land; and

courts will not enforce restrictions that were not expressly stated in the covenants or permit the expansion of a restriction under the guise of interpretation. *O'Connor*, 459 Mich at 341; *Golf View*, 342 Mich at 130-131; *Kelly*, 245 Mich at 409.

On appeal, the Association and Officers argue that Article XII of the bylaws does not amount to a new set of restrictions on the properties; rather, in Article XII, the Association merely interpreted the existing restrictions and provided guidance for the Association's enforcement of the restrictions. In particular, the Association and officers maintain that the architectural review committee is just enforcing Paragraph 11 of the covenants and restrictions.

Paragraph 11 of the covenants and restrictions requires a property owner to obtain advance permission before constructing various improvements and states that permission may be denied if the proposed improvement is not in harmony with the development:

> 11. **BUILDING APPROVAL**. No dwelling, structure, swimming pool, fence, TV disc, permanent sports type outdoor court or facility, out building, or other development shall be permitted upon any parcel in the development, nor shall any grade in the development be changed or other construction work done, unless Developer's written approval is obtained in advance as follows: The proposed plot plan, construction plans and specifications shall be submitted in duplicate to the Developer, for approval and said written approval received prior to submission to Salem Township for a Zoning Compliance Permit or Building Permit. The plot plans shall show the finished grade, the plot, the location of the dwelling, mailbox post and all other buildings and structures. The construction plan and specifications shall show the size, square footage, type and materials of exterior construction together with the grade and elevation of all buildings and structures and shall provide other pertinent construction

> details. One copy of these plans and specifications shall be permanently retained by the Developer. Developer shall not give its approval to the proposal unless in its sole and absolute opinion such construction and development will comply in all respects with the building and use restrictions set forth in this document; nor shall Developer give its approval unless the external design, materials and location of the construction proposal shall be in harmony with the character of the development as it develops and with the topography and grade elevations both of the parcel upon which the proposed construction is to take place, and the neighboring parcels in the development. Developer shall have the right to assign his responsibilities and authority hereunder to a third party. If anyone begins any such construction without the above stated approval, he hereby agrees to forthwith completely remove such construction upon being informed by the Developer, regardless of the stage of completeness of such construction. If it is not appropriately removed, the Developer has the full right to enter upon such property and cause such construction to be removed; the cost of removal plus all appropriate legal expenses etc. shall be chargeable to the parcel owner and the Developer may place a lien upon the subject parcel for such charges plus applicable interest.

This restriction is poorly drafted and cluttered with legalese, but it does not give the Association the authority to require its members to seek the architectural review committee's approval before improving their lots or making changes to existing improvements on their lots. The first sentence awkwardly prohibits the "permitt[ing]" of certain structures and prohibits changes to the grade of a parcel or construction without written approval from the developer. The first sentence further provides that the developer's approval must be obtained in "advance as follows" and ends with a colon. By introducing the remaining portion of the paragraph in this way, the drafter indicated

that the remainder of the paragraph clarifies the procedures applicable to the developer's approval process. Moreover, the specific provisions in the remainder of the paragraph consistently state that the obligation and authority to review a proposed plan belongs to the developer. A person seeking approval must submit his or her plans to the *developer* and the *developer* must retain a copy. The *developer* must not give his approval if the proposal does not comply with the building and use restrictions or is not "in harmony with the character of the development as it develops . . . ." The *developer* has the right to assign his "responsibilities and authority" to approve proposed plans to a third party and it is the *developer* who has the right to remove any construction commenced without his approval.

Paragraph 11 is not reasonably susceptible to more than one meaning. *Farm Bureau Mut Ins*, 460 Mich at 566. Rather, it unambiguously states that the individual lot owners have an obligation to get their proposed improvements approved by the developer before commencing construction; the paragraph does not establish an obligation to submit a proposal to any other person, the Association, or a committee of the Association. And the covenants define the developer to be Philip Conlin. To the extent that the Association had the authority to enforce Paragraph 11, it had to enforce it by compelling property owners to submit their plans to the developer for approval and by requiring him to comply with the requirements imposed on his review of the proposed plans—specifically, by requiring him to review the plans for compliance with the restrictions and for harmony with the development as it has developed. Thus, the Association had the authority to enforce this restriction by ensuring that the developer acted reasonably and in good faith when reviewing whether the proposed plan was in harmony with the

development. See *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). But it could not unilaterally usurp that role for itself. Therefore, to the extent that Philip Conlin had not assigned his rights and duties as the developer, the trial court should have enforced this provision as written and concluded that—as a matter of law—the Association did not have the authority to establish its own independent approval process and require lot owners to submit to that process.

The Association and Officers, however, argue that the Association's power to abate a violation of the covenants and restrictions necessarily gives rise to a right to approve construction beforehand; specifically, they maintain that the Association "need not wait inefficiently for construction to occur and then seek to abate it. Rather, it can proactively approve of potential construction." The Association's argument is inapt; its bylaws do not provide that individual lot owners *may* submit their proposed plans to the architectural committee for approval so as to avoid any potential future dispute or abatement action. The bylaws *require* the lot owners to submit their plans to the architectural committee rather than the developer. The bylaws further *require* the lot owners to pay a $2,000 fee and make a $5,000 deposit, which were not required in the original covenants. The bylaws also deprive the lot owners of a case-by-case determination concerning whether their proposed plan is in harmony with the development as it has developed (and in light of any change in the character of the development over the years) by *requiring* the proposed plan to conform to a detailed set of criteria not contemplated in the original covenants. That is, the bylaws effectively circumscribe the discretion of the developer or his assign to fairly and reasonably determine whether a proposed plan

would be in harmony with the development as a whole. See *Ardmore Ass'n v Bankle*, 329 Mich 573, 578; 46 NW2d 378 (1951) (stating that a requirement that construction be preapproved is valid, but must be enforced in a fair and reasonable manner). These limits on the developer's discretion constitute an additional burden not contemplated by the original covenants and restrictions.

Relying on *Meadow Bridge Condo Ass'n v Bosca*, 187 Mich App 280; 466 NW2d 303 (1991), the Association argues that Article XII merely implements existing restrictions. The Association's reliance is, however, misplaced. In *Bosca*, the existing restrictions prohibited the maintenance of animals without the condo association's permission and broadly authorized the condo association to adopt any additional rules and regulations respecting animals that it may deem proper. *Id*. at 281. The condo association's authority to promulgate the new rule was, therefore, permitted by the existing rules. *Id*. at 282-283. In this case, the original covenants and restrictions did not authorize the Association to adopt new rules or regulations, and the provisions in Article XII plainly impose restrictions that are inconsistent with the original recorded restrictions.

The bylaws unambiguously impose new burdens on the lot owners through the architectural committee's review process. Because the lot owners did not unanimously approve the creation of these new burdens and the original covenants did not authorize the Association to establish these new burdens with less than unanimous consent, they are contrary to law and invalid. *Eveleth*, 322 Mich at 641-642; *Ardmore Park Subdivision Ass'n*, 117 Mich App at 62. If the Association, through its architectural review committee, has

any authority to require lot owners to submit their proposed plans to the committee for preapproval, that power must be derived from the assignment of the developer's authority to it. But, even if Philip Conlin assigned his right to preapprove proposed plans to the Association, the committee's power of approval would be subject to the same criteria and limits that were applicable to the developer under Paragraph 11; thus, the additional burdens stated in Article XII are still invalid.

The Association also cannot derive its authority to require property owners to submit their plans for preapproval from any other covenant. None of the other paragraphs expressly require an owner to submit a proposed change to his or her property to the other owners, the developer, or any entity. For example, Paragraph 1 of the covenants requires each lot to be used as a "single family residence" and further limits the types of improvements that may be made on the lot:

> No building or other structure shall be permitted on any lot other than a single family dwelling with an attached garage of not less than three car capacity; except that a swimming pool, tennis court, or similar facility, walls or other accessory buildings may be built in such manner and location deemed to be in harmony with the character of the development, and in conformance with these building and use restrictions . . . .

The harmony provision in this restriction applies to "a swimming pool, tennis court, or similar facility, walls or other accessory buildings" and not to the single family dwelling and its attached garage.

Similarly, the abatement provision stated under Paragraph 29 grants the Association (along with the developer) the authority to take action to redress a

purported violation of the covenants and restrictions, but that paragraph does not expressly grant the Association the authority to require preapproval for every improvement that might be the subject of an action to abate. It provides that the Association has, "in addition to all other remedies, the right to enter upon the land as to which such violation or breach exists, and summarily to abate and remove [the violation], at the expense of the owner . . . ." Nevertheless, the landowner may proceed at his or her own risk, and the Association's only recourse is to take legal action or abate the perceived noncompliance. The Association does not have the authority to compel the owner to submit a proposed change to the Association, does not have the authority to order the owner to pay a review fee, and does not have the authority to order the owner to pay a deposit. Rather, the Association must proceed to abate at its own expense (and risk), and, if the owner was in fact violating the covenants or restrictions, the Association may seek compensation for its expenses. Paragraph 29 expressly permits nothing more.

The instruments at issue in this appeal—the 2001 covenants and restrictions, along with the Association's articles of incorporation and bylaws—are not ambiguous. Further, with one exception to be discussed below, the application of the law to the provisions at issue did not involve a question of fact. Therefore, the jury should not have been asked to "find" whether the bylaws amounted to new restrictions and should not have been asked to "find" whether the bylaws conflicted with the covenants and restrictions recorded in 2001.

The bylaws imposed additional burdens on the lots in Dixboro Farms. Because it was undisputed that the bylaws were not unanimously adopted, and the 2001

covenants and restrictions did not expressly permit the Association to burden the lots with new restrictions on its own initiative or allow the owners to alter or adopt restrictions with less than unanimous consent, the new restrictions were invalid. *Eveleth*, 322 Mich at 641-642; *Ardmore Park Subdivision Ass'n*, 117 Mich App at 62. Consequently, the trial court should have determined that Article XII of the bylaws was invalid under Michigan law, but only to the extent that it burdened the lots in Dixboro Farms with restrictions and covenants beyond those provided in the 2001 covenants and restrictions. The extent to which Article XII of the bylaws imposed additional burdens on the lots, however, depended in part on the resolution of a question of fact.

C. ASSIGNMENT OF RIGHT TO APPROVE

Paragraph 11 of the covenants gave Philip Conlin—as the developer—the "right to assign his responsibilities and authority hereunder to a third party." The covenants do not include any limitations or conditions on his right to assign. Therefore, he could assign his right to the Association expressly by oral or written agreement or impliedly through his representations and course of conduct. *Burkhardt v Bailey*, 260 Mich App 636, 654-656; 680 NW2d 453 (2004) (discussing the elements necessary to establish an assignment and stating that the assignor must manifest a present intent to transfer and must not retain any control or any power of revocation); *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997) ("Where the parties do not explicitly manifest their intent to contract by words, their intent may be gathered by implication from their conduct, language, and other circumstances attending the transaction."); see also, e.g.,

Hooton v Hooton, 230 Mich 689, 692; 203 NW 475 (1925) (discussing whether the facts established that the husband made a parol assignment of the insurance policy at issue to his wife).

At trial, there was testimony that the owners of the lots in Dixboro Farms were upset by the quality of the Guenther homes and felt betrayed by Philip Conlin's approval of those homes. Philip Conlin testified that he became aware of the other owners' discontent shortly after the homes were completed. As a result of the owners' concern, Chris Conlin sent an e-mail to Philip Conlin in December 2010 requesting that he appoint the board of directors for the Association and call a meeting of the residents. Chris Conlin further wrote that it was "understood" that the new board would form an architectural committee at this first meeting. Thereafter, Philip Conlin appointed the Association's first board of directors.

There was testimony and documentary evidence that the homeowners met in January 2011 and signed a written summary of their position on the recent events, which they sent to Philip Conlin. In the letter, they stated that they had reached a consensus on "a number of issues" and were sending him the letter to "inform" him about their decisions and seek his "concurrence in the progress and basis of continuing cooperation." They told Philip Conlin that they wanted to elect their own board for the Association, notwithstanding that he had that right under the covenants, and wrote that they expected him to "concur" with this decision. The homeowners also "acted to appoint" an architectural control committee to "cooperate and assist in maintaining architectural harmony of the subdivision." Finally, the homeowners stated that they intended to develop bylaws for the Association and

asked him to indicate his "acceptance and acknowledgement" of the newly formed Association. The evidence showed that Philip Conlin signed and dated the letter. There was evidence that Philip Conlin later submitted proposed plans for development to the Association's newly formed architectural review committee, albeit for its comments and suggestions.

Although it was by no means overwhelming, when the totality of the evidence is viewed in the light most favorable to the Association, there is evidence from which a reasonable jury could find that Philip Conlin assigned his rights under Paragraph 11 of the covenants to the Association. See *Taylor*, 286 Mich App at 500. If the jury had found that Philip Conlin assigned his rights under that paragraph to the Association, the Association could properly form an architectural review committee to handle the approval process and could promulgate rules in its bylaws governing that process, as long as the rules did not impose burdens beyond those provided under Paragraph 11 of the covenants. Consequently, the trial court did not err when it denied the Developers' motion for a directed verdict on that limited issue.

Unfortunately, the special verdict form instructed the jury to skip that issue if it found that the bylaws did not amount to restrictive covenants and did not violate the 2001 covenants and restrictions, which it did. For that reason, this factual question was not resolved below. Although we conclude that Article XII of the bylaws was invalid to the extent that it imposed new burdens on the lots at issue without the proper consent or authority, we cannot determine the full extent that Article XII would be invalid without resolving this factual question. Consequently, we must remand this case for possible retrial of that question of fact.

III. CONCLUSION

We reverse the jury's verdict, vacate the judgment, and remand for further proceedings. On remand, the trial court shall enter an order granting partial summary disposition in favor of the Developers. Specifically, the trial court shall enter an order declaring that the 2001 covenants and restrictions did not give the Association the authority to burden the lots with additional restrictions and did not give it the authority to add restrictions with less than unanimous approval. The order should further declare that Article XII of the bylaws is invalid and does not apply to the Association's members to the extent that it includes burdens on their lots beyond those stated under the 2001 covenants and restrictions, as explained in this opinion. Finally, if necessary, the trial court shall hold a new trial to resolve whether Philip Conlin assigned his rights under Paragraph 11 of the covenants to the Association.

Reversed, vacated, and remanded for further proceedings consistent with this opinion. Because this appeal involved issues of importance to the general public, we order that none of the parties may tax their costs. MCR 7.219(A). We do not retain jurisdiction.

M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ., concurred.

KENNEDY v ROBERT LEE AUTO SALES

Docket No. 322523. Submitted November 9, 2015, at Lansing. Decided November 24, 2015, at 9:05 a.m.

Jennifer Jane Kennedy (plaintiff) filed a third-party complaint against Robert Lee Auto Sales (defendant) in the 54-A District Court. Plaintiff's complaint, in part, alleged violations of the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., related to a used vehicle plaintiff had purchased from defendant. The parties stipulated removal of the case to the Ingham Circuit Court. Plaintiff's third-party complaint arose after Consumer Portfolio Services, Inc. (CPSI) sued her for defaulting on a retail installment contract it had purchased from defendant. Plaintiff and CPSI reached a settlement agreement, the trial court dismissed CPSI's complaint against plaintiff, and the third-party action between plaintiff and defendant continued. Defendant filed a motion for summary disposition, and at the hearing on the motion, the trial court, William E. Collette, J., suggested that the parties attempt to settle the dispute. Defendant agreed to pay plaintiff the total amount of her down payment on the vehicle and the two installment payments she made before defaulting. The parties could not reach an agreement on the amount of attorney fees to award plaintiff's counsel, and the parties submitted the issue to the trial court's discretion. At the hearing on the matter, the trial court indicated that it believed the amount of attorney fees requested exceeded what was warranted by the "nickel and dime" case. The trial court refused to entertain further argument from plaintiff's counsel and ultimately ordered that defendant pay plaintiff $1,000 in costs and attorney fees. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court abused its discretion by failing to consider the factors outlined in *Smith v Khouri*, 481 Mich 519 (2008), when determining the proper amount of attorney fees to award plaintiff. The *Smith* factors apply to attorney fees awarded under fee-shifting statutes like the MCPA and the MMWA. The MCPA and the MMWA are remedial statutes aimed at affording a

consumer access to the legal redress of disputes involving meager monetary value when the consumer's financial status would otherwise prevent such a lawsuit. Application of the *Smith* factors to the award of attorney fees in fee-shifting statutes will increase the consistency among attorney-fee awards. In this case, the trial court awarded plaintiff a flat $1,000 in costs and attorney fees, indicating its disapproval of the amount of attorney fees being requested in light of the small amount of money recovered by plaintiff. Factors relevant to an award of reasonable attorney fees in a case without a large monetary return require the trial court to do more than consider the financial implications or ultimate result of the case.

2. The *Smith* framework requires the trial court to multiply a reasonable number of hours spent on the matter by the customary fee charged in the area for similar legal services to arrive at an amount representing the starting point for calculating a reasonable attorney fee. The trial court, by considering the *Smith* factors, had the discretion to make adjustments, downward or upward, to the amount reflected by the starting point value. The *Smith* framework consists of six factors, each of which may impact the amount calculated as the starting point. The factors are: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. Additional factors a trial court may consider to determine the proper amount of attorney fees to award are found in Michigan Rule of Professional Conduct (MRPC) 1.5(a).

Vacated and remanded.

1. STATUTORY ATTORNEY FEES — FEE-SHIFTING STATUTES — *SMITH* FACTORS.

A trial court must apply the factors outlined in *Smith v Khouri*, 481 Mich 519 (2008), to determine a reasonable attorney fee in cases involving fee-shifting statutes such as the Michigan Consumer Protection Act, MCL 445.901 *et seq*., and the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*.

2. ATTORNEY FEES — CALCULATING THE STARTING POINT — ADJUSTING THE FEE AMOUNT — *SMITH* FACTORS.

Under *Smith v Khouri*, 481 Mich 519 (2008), calculating the proper amount of attorney fees to award a party begins with calculation of the starting point; the starting point requires the court to multiply the reasonable number of hours spent on the

> case by the fee customarily charged in the locality for similar legal services; a trial court has the discretion to make downward or upward adjustments to the starting point amount after reviewing the amount in light of the *Smith* factors.

The Liblang Law Firm, PC (by *Dani Liblang* and *Michael L. Rowady*), for plaintiff.

Frank J. Nerat, Jr., for defendant.

Before: METER, P.J., and BORRELLO and BECKERING, JJ.

BECKERING, J. This case arises out of the sale of a car. Plaintiff Jennifer Jane Kennedy alleged, among other things, that defendant Robert Lee Auto Sales violated the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.[1] The parties reached a settlement agreement under which plaintiff received all of her money back and defendant agreed to pay plaintiff's statutory attorney fees and costs, which were ultimately determined by the trial court. Plaintiff appeals as of right the trial court's order awarding her $1,000 in attorney fees and costs. Plaintiff contends that the trial court abused its discretion by arbitrarily awarding $1,000 without considering the remedial purpose of the fee-shifting provisions of the MMWA and the MCPA, as well as other factors set forth by the Michigan Supreme Court in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.), when it calculated a reasonable attorney fee. We agree, and thus, we vacate and remand for further proceedings.

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[1] Robert Lee Auto Sales assigned its retail installment contract and security agreement with plaintiff to Consumer Portfolio Services, Inc. (CPSI). CPSI sued plaintiff in district court, after which plaintiff filed a counterclaim against CPSI and a third-party complaint against defendant. The case was eventually removed to the Ingham Circuit Court.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On August 31, 2012, plaintiff purchased a 2003 Chevrolet Impala from defendant. Plaintiff made a down payment of $2,200 and entered into a retail installment contract for the remaining balance. She also granted defendant a security interest in the car. Defendant subsequently assigned the retail installment contract and security agreement to Consumer Portfolio Services, Inc. (CPSI).

Plaintiff made only two payments on the retail installment contract before defaulting. On August 9, 2013, CPSI filed suit against plaintiff in district court, alleging breach of contract and seeking possession of the car. Plaintiff[2] responded to the complaint by filing an answer, a counterclaim, a third-party complaint, and a motion for removal to the Ingham Circuit Court. Plaintiff's third-party complaint raised several claims against defendant, including that defendant violated the MMWA and the MCPA.[3] In November 2013, the case was removed to the Ingham Circuit Court by stipulation of the parties.

CPSI and plaintiff reached a settlement agreement in which CPSI cancelled plaintiff's debt and deleted the matter from her credit history, and plaintiff promised to return the vehicle to CPSI after her claims against defendant were resolved. The trial court dismissed the

[2] For the sake of consistency, we will refer to plaintiff in this case as "plaintiff," regardless of her designation in the district court action. We will also apply the same protocol to defendant.

[3] In addition to other allegations of wrongdoing, plaintiff claimed that contrary to defendant's specific representations to her about who had previously owned the vehicle and the condition it was in when she purchased it, defendant knew or should have known that the vehicle had been involved in a serious collision resulting in damage so extensive that the vehicle was unsafe to operate on the public highways.

claims against CPSI, and the case continued between defendant and plaintiff.

On January 30, 2014, defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Noting that one of the counts in plaintiff's complaint sought rescission of the sales contract, defendant offered to refund plaintiff's down payment of $2,200 in exchange for the return of the vehicle.[4] Defendant also argued that plaintiff's remaining claims were meritless.

At a hearing on the motion for summary disposition, plaintiff's counsel stated that among other relief, plaintiff was seeking a refund of the down payment and the payments she made on the contract before defaulting. The trial court suggested that the parties attempt to reach a settlement in the case. After a short break in the proceedings, the parties agreed to settle the case for $2,675.18, which was the amount of plaintiff's down payment plus the two monthly installment payments she had made. In addition, with respect to the "statutory attorney fees" plaintiff sought under the MMWA and MCPA, the parties agreed to "allow the Court to make that decision." The trial court expressly asked Robert Lee, the owner of defendant company, whether he understood and agreed to the settlement, which would allow the court to decide the amount of fees to be awarded. Lee answered, "I think you can do a fair job, yes, sir." With regard to attorney fees, the parties stated that they would attempt to work out the amount of fees owed without the court's involvement, but if they could not, plaintiff would petition the court to determine the fee award. The trial court entered a

[4] It is unclear which party will end up with possession of the vehicle. CPSI is entitled to possession of the vehicle under the terms of plaintiff's settlement with CPSI. Defendant could ultimately take possession of the vehicle if CPSI relinquishes its possession of the vehicle.

written order memorializing the settlement and stating, with regard to attorney fees, that "in the event that the parties are unable to resolve the amount of statutory attorney fees and costs on their own, Plaintiff's counsel shall notify the Court so that a briefing and hearing schedule may issue[.]"

In the months that followed, the parties were unable to resolve the amount of attorney fees, causing plaintiff to file a "Petition for Assessment of Statutory Costs and Attorney Fees Pursuant to Settlement Agreement." Citing the factors set forth in *Smith*, plaintiff requested a total of $14,943.04—$14,267.50 in attorney fees and $675.54 in costs. Attached to the petition were several documents, including billing records for this case, the 2010 Economics of Law Practice Survey published by the State Bar of Michigan, and caselaw applying the MMWA.

Defendant responded that plaintiff's costs and fees should be limited to $891.72, which was 1/3 of plaintiff's recovery against defendant. Any other amount, according to defendant, "would be unfair and inequitable[.]" Defendant claimed that this is the amount that plaintiff "would have actually been charged" to defend defendant's motion for summary disposition. Implicit in this argument was the idea that defendant should not be liable for paying attorney fees plaintiff incurred in the proceedings involving CPSI.

After hearing brief arguments from the parties at a June 4, 2014 hearing, the trial court stated that it was awarding plaintiff $1,000 in costs and attorney fees:

> Okay. Let me just say, this kind of an attorney fee billing on a case as nickel and dime as this is far beyond what I would ever allow in a lawsuit, nor do I feel it's a fair amount at all. You are awarded a thousand dollars.

> I might also add, there is nothing in this settlement or agreement here that there was any violation of the Consumer Protection Act. The mere fact that you sue under an act is no determination by this Court [that] there was a violation, with all due respect. You get a thousand dollar attorney fee. Thank you.

The trial court subsequently entered a written order awarding plaintiff $1,000 in costs and attorney fees.[5] Plaintiff now appeals the order as of right.

II. ANALYSIS

We review the trial court's award of attorney fees for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. Plaintiff argues that the trial court's award of attorney fees was an abuse of discretion because (1) the trial court failed to apply the framework set forth by our Supreme Court in *Smith* and (2) the trial court failed to consider the remedial purpose of the fee-shifting provisions of the MMWA and the MCPA.

A. PLAINTIFF'S ENTITLEMENT TO ATTORNEY FEES

We begin our analysis by briefly touching on plaintiff's entitlement to attorney fees. Although the trial court awarded attorney fees to plaintiff, it appeared to doubt plaintiff's entitlement to such fees, noting that nothing in the settlement agreement established a violation of the MCPA, and that "[t]he mere fact that you sue under an act is no determination by this Court

[5] We note that the trial court's $1,000 award was for both costs and attorney fees. Plaintiff's petition stated that her costs in the action were $675.54. If true, this left an attorney-fee award of only $324.46.

[that] there was a violation . . . ." On appeal, defendant also appears to contest plaintiff's entitlement to attorney fees.

On this point, we agree with plaintiff that the facts of this case are substantially similar to the facts of *LaVene v Winnebago Indus*, 266 Mich App 470; 702 NW2d 652 (2005). In *LaVene*, the plaintiffs sued the defendants under the MCPA and the MMWA, both of which provide for an award of attorney fees and costs. *Id*. at 472, 477-478. See MCL 445.911(2) ("Except in a class action, a person who suffers loss as a result of a violation of [the MCPA] may bring an action to recover actual damages or $250.00, whichever is greater, *together with reasonable attorneys' fees*.") (emphasis added); 15 USC 2310(d)(2) (allowing the recovery of costs, expenses, and attorney fees in an action under the MMWA). The parties reached a settlement agreement in which the defendants agreed to pay the attorney fees and costs owed to the plaintiffs under statute or court rule. *LaVene*, 266 Mich App at 472. The settlement provided that if the parties could not agree on the amount of fees and costs, the trial court would decide the matter. *Id*. The parties could not agree on the appropriate amount of fees and costs. *Id*. The defendants argued that the court could not award attorney fees or costs because the plaintiffs were not a "prevailing party," given that there was a settlement between the parties, but no judgment against the defendants. *Id*. at 473. In rejecting that argument, this Court noted that MCR 2.625(H) recognized that taxation of costs could be reserved in a settlement. *LaVene*, 266 Mich App at 474. This Court also concluded that the defendants' argument was "a moot point, if not disingenuous" because the defendants agreed to pay the plaintiffs whatever costs to which they were entitled. *Id*.

The facts of the case at bar are essentially the same. Plaintiff sued defendant under the MCPA and the MMWA, and the parties reached a settlement in which they agreed that if they could not determine the amount of "statutory attorney fees and costs on their own," the trial court would decide the matter. Thus, any argument that plaintiff was not entitled to statutory attorney fees because there was no judgment against defendant is without merit. See *id*.

B. DETERMINING WHETHER *SMITH v KHOURI* APPLIES TO THIS CASE

We next turn our attention to whether the framework established by our Supreme Court in *Smith* applies to the award of attorney fees in this case. For the reasons discussed below, we hold that it does, and that the trial court's award of attorney fees, rendered with virtually no explanation or examination of the relevant factors, was an abuse of discretion. In doing so, we note our belief that the *Smith* framework applies to all fee-shifting statutes, even though other panels of this Court have disagreed with that position. However, given our conclusion that there is no binding authority to prevent *Smith* from applying in this particular case, we find it unnecessary to declare a conflict with those prior decisions.[6] Furthermore, even if the *Smith* framework did not apply, we would hold that the trial court's cursory explanation for the award of attorney fees in this case was an abuse of discretion.

1. OUR SUPREME COURT'S DECISION IN *SMITH v KHOURI*

In general, a party is not entitled to an award of

[6] Moreover, declaring a conflict is unnecessary because we are bound to follow our Supreme Court's decision in *Smith* rather than the conflicting decisions from this Court. See *Charles A Murray Trust v Futrell*, 303 Mich App 28, 48-49; 840 NW2d 775 (2013).

attorney fees and costs unless such an award is expressly authorized by statute or court rule. *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). At issue in *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.), was an award of attorney fees under MCR 2.403 as case-evaluation sanctions, and the factors to be applied in calculating such an award. The lead opinion[7] in *Smith* noted that the party seeking fees has the burden of establishing the reasonableness of the requested fees. *Id*. at 528-529. Next, the lead opinion explained that in assessing reasonableness, our courts traditionally considered the following six factors set forth in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982):

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Smith*, 481 Mich at 529 (opinion by TAYLOR, C.J.), quoting *Wood*, 413 Mich at 588.]

In addition, explained *Smith*, courts have traditionally considered the following eight factors found in Michigan Rule of Professional Conduct (MRPC) 1.5(a), some of which overlap the *Wood* factors:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

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[7] Chief Justice TAYLOR authored the lead opinion in *Smith* and was joined by now Chief Justice YOUNG. Justice CORRIGAN, joined by Justice MARKMAN, filed a concurring opinion which "concur[red] with the reasoning and result of the lead opinion, with one exception." *Smith*, 481 Mich at 538 (CORRIGAN, J., concurring). The "one exception" concerned the elimination of certain factors to consider when determining a reasonable attorney fee for case-evaluation sanctions; the exception is not pertinent to our discussion of the issues in this case. Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissented in *Smith*.

> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent." [*Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.), quoting MRPC 1.5(a).]

Citing *Wood*, 413 Mich at 588, the lead opinion in *Smith* also noted that "[t]he above factors have not been exclusive, and the trial courts should consider any additional relevant factors." *Smith* 530 (opinion by TAYLOR, C.J.).

After setting forth the factors in *Wood* and in MRPC 1.5(a), the lead opinion in *Smith* announced that "our current multifactor approach needs some fine-tuning." *Id*. As the initial step in determining the reasonableness of an attorney-fee award, the lead opinion concluded, "a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a)." *Id*. Next, the court should multiply the customary fee "by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*)." *Id*. at 531 (alteration in original). The product of these numbers "serve[s] as the starting

point for calculating a reasonable attorney fee." *Id*. This starting point, explained the lead opinion, was designed to "lead to greater consistency in [fee] awards." *Id*. After determining the appropriate starting point, the court "should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate." *Id*.

2. THE REACH OF *SMITH*'S FRAMEWORK AND THE "STARTING POINT" FOR ASSESSING REASONABLENESS

As noted, the Court in *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.), framed the issue to be decided in that case as one involving an award of case-evaluation sanctions under MCR 2.403(O). The opinion also noted that MCR 2.403(O)(6) defined "actual costs" as including " 'a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation . . . .' " *Smith*, 481 Mich at 527 (opinion by TAYLOR, C.J.), quoting MCR 2.403(O)(6).[8] In addition, the opinion discussed the purpose of imposing case-evaluation sanctions. *Smith*, 481 Mich at 527-528 (opinion by TAYLOR, C.J.). In particular, the opinion explained that MCR 2.403(O)(6) is a fee-shifting provision designed "to encourage the parties to seriously consider the evaluation and provide financial penalties to the party that, as it develops, 'should' have accepted [the case-evaluation award] but did not." *Id*. This type of "encouragement" helped to not only foster settlements, but "also [to] shift[] the financial burden of trial onto the party who imprudently rejected the case evaluation." *Id*. at 128.

[8] This "hours times rate" focus bears an unmistakable resemblance to the "starting point" created in *Smith*.

However, not all of the language in *Smith* was so limited to case-evaluation sanctions. For instance, the Court began its analysis in *Smith* by describing the multifactor approach commonly used by courts to determine the reasonableness of an attorney-fee award—an approach that applied to all attorney-fee awards—and admitted that the "current multifactor approach need[ed] some fine-tuning." *Id*. at 530. In announcing that such "fine-tuning" was needed, the opinion made virtually no mention of case-evaluation sanctions again, and it did not specify that this new approach was limited to cases involving attorney fees awarded as case-evaluation sanctions. In fact, after stating that this "fine-tuning" was expected to provide "greater consistency in awards," *Smith* did not specify that this "greater consistency" was only meant for attorney fees awarded as case-evaluation sanctions. And when the Court later summarized the new rule it had established, the lead opinion simply announced a rule that "a trial court" should use for "determining *a reasonable attorney fee*"; the lead opinion did not mention case-evaluation sanctions or state in any way that the new framework should only be applied to cases involving case-evaluation sanctions. *Id*. at 537 (emphasis added).

Moreover, in response to criticisms levied by the dissent in *Smith*, the lead opinion stated that it sought to provide a framework that could apply to Michigan's other fee-shifting statutes. *Id*. at 535-536. For instance, the lead opinion acknowledged that selecting a reasonable hourly rate to use in calculating an attorney-fee award was "not an exact science . . . ." *Id*. at 535. The lead opinion stated that it "merely aim[ed] to provide a workable, objective methodology for assessing reasonable attorney fees *that Michigan courts can apply consistently to our various fee-shifting rules*

and statutes." *Id*. (emphasis added). The lead opinion further stated that its discussion was intended as guidance on fee-shifting statutes in general. The lead opinion criticized the dissenting justices for offering "no rubric to guide Michigan courts," and it emphasized that "[u]nlike the dissent, we choose to provide the guidance that has been, and the dissent would allow to remain, sorely lacking for the many Michigan courts that are asked to *impose 'reasonable attorney fees' under our fee-shifting rules and statutes*." *Id*. at 536 (emphasis added).

Yet not all of the justices were convinced that the lead opinion was clear with regard to when the new framework set forth in *Smith* should apply. Among other concerns expressed in his dissenting opinion, Justice CAVANAGH took issue with the lead opinion for its lack of clarity in this regard:

> Does this now mean that the third factor of MRPC 1.5(a) is the starting point for all proceedings under that provision of our ethical code? Further, does this new rule apply to other fee-shifting provisions? For example, does the majority's test apply to the fee-shifting provisions of the Uniform Condemnation Procedures Act, MCL 213.66, and the Michigan Civil Rights Act, MCL 37.2802, each of which involves reasonable attorney fees? And if today's rule only applies to MCR 2.403, what is the basis for such a limited application of the new rule? [*Smith*, 481 Mich at 555 (CAVANAGH, J., dissenting).]

3. POST-*SMITH* DEVELOPMENTS

In two post-*Smith* orders, our Supreme Court applied the *Smith* framework to cases involving attorney fees awarded in Freedom of Information Act (FOIA) cases and Headlee Amendment cases. *Coblentz v Novi*, 485 Mich 961 (2009); *Adair v Michigan*, 494 Mich 852 (2013). The *Smith* analysis begins with multiplying a

reasonable number of hours by a reasonable hourly rate, and then making adjustments to that amount based on the *Wood*/MRPC factors. Notably, a few of the justices were critical of their colleagues in *Juarez v Holbrook*, 483 Mich 970 (2009), for failing to remand the case for reconsideration in light of *Smith*. In *Juarez*, the Supreme Court denied leave in a case involving an appeal from this Court's decision—issued one day before the Supreme Court issued its decision in *Smith*—affirming an award of case-evaluation sanctions. See *Juarez v Holbrook*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2008 (Docket Nos. 275040 and 276312). In separate dissents, Justice CORRIGAN and Justice MARKMAN would have vacated this Court's opinion affirming the fee award and remanded the case for reconsideration in light of the recently established *Smith* framework. See *Juarez*, 483 Mich at 970 (CORRIGAN, J., dissenting); *id*. (MARKMAN, J., dissenting).

This Court's application of the *Smith* framework to fee-shifting statutes and court rules other than MCR 2.403 has been a source of dissension. For instance, in *Adair v Michigan (On Third Remand)*, 298 Mich App 383, 390; 827 NW2d 740 (2012), overruled in part on other grounds 494 Mich 852 (2013), a panel of this Court applied the *Smith* framework to a Headlee Amendment case. In doing so, the panel noted that the "aim" of the *Smith* framework was " 'to provide a workable, objective methodology for assessing reasonable attorney fees that Michigan courts can apply consistently to our various fee-shifting rules and statutes.' " *Adair (On Third Remand)*, 298 Mich App at 390, quoting *Smith*, 481 Mich at 535. At issue in *Adair* was Const 1963, art 9, § 32, which governed the costs to be awarded to plaintiffs who brought actions to enforce provisions of the Headlee Amendment. *Adair*

(On Third Remand), 298 Mich App at 388. Recognizing that a fee-shifting provision was at issue in that case, the panel applied the *Smith* framework to assess the reasonableness of the attorney-fee award. *Id*. at 390. Although our Supreme Court later reversed the *Adair* panel's decision in part, the Court did not overrule the application of *Smith*, and in fact, cited *Smith* in its order. See *Adair*, 494 Mich 852.

In addition to *Adair*, other panels of this Court have applied the *Smith* framework to various fee-shifting statutes. For instance, in *Prins v Mich State Police*, 299 Mich App 634, 645; 831 NW2d 867 (2013), the panel applied the *Smith* framework to an award of attorney fees in a FOIA case. In addition, in *Silich v Rongers*, 302 Mich App 137, 149-150; 840 NW2d 1 (2013), the panel cited to *Smith* in a case involving an award of attorney fees under MCR 3.403(C), a court rule that pertains to the sale of premises and the division of proceeds as a substitute for partition. And, although it did so in dicta, the panel in *Augustine v Allstate Ins Co*, 292 Mich App 408, 429, 434-436; 807 NW2d 77 (2011), stated that the *Smith* framework applied to an award of attorney fees under MCL 500.3148(1) of the no-fault act when a plaintiff seeks recovery for attorney fees on an hourly (as compared to a contingent fee) basis.[9] Further, in several unpublished decisions, this Court has applied the *Smith* framework to other fee-shifting statutes and in other situations. See, e.g., *Demopolis v Jones*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2015 (Docket No. 320099) (applying the *Smith* framework when awarding attor-

[9] As will be discussed later in this opinion, another panel of this Court reached a contrary ruling in a published decision involving a contingent fee. See *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700; 760 NW2d 574 (2008).

ney fees on a quantum meruit theory); *Annis v Annis*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2015 (Docket No. 319577) (applying the *Smith* framework to an award of attorney fees as sanctions under MCR 2.114); *Barker v Marshall*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2014 (Docket Nos. 308990 and 311843) (applying *Smith* to an award of attorney fees under MCL 600.2919a(1)); *Dep't of Natural Resources & Environment v Rexair, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 26, 2013 (Docket No. 297663) (applying *Smith* to the assessment of attorney fees associated with the plaintiff's postjudgment motion following a consent judgment); *C & D Capital, LLC v Colonial Title Co*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2013 (Docket Nos. 306927 and 308262) (applying the *Smith* framework to an award of attorney fees under MCR 2.114 and MCL 600.2591).

However, other panels have declined to apply the *Smith* framework to an award of attorney fees under fee-shifting statutes or under court rules beyond the fee-shifting rule that was at issue in *Smith*, i.e., an award of fees under MCR 2.403. For instance, in *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700, 700 n 3; 760 NW2d 574 (2008), the panel held that the *Smith* framework applied to an award of attorney fees under MCR 2.403(O), the fee-shifting provision at issue in *Smith*, but not to an award of attorney fees under MCL 500.3148(1) of the no-fault act. More recently, in *Riemer v Johnson*, 311 Mich App 632, 656-657; 876 NW2d 279 (2015), this Court declined to apply *Smith* to an award of attorney fees under MCR 3.206(C)(2)(a), which concerns domestic relations actions. The panel explained that the *Smith* framework was limited to an award of attorney

fees under MCR 2.403(O), emphasizing that the issue in *Smith* concerned " 'a trial court's award of "reasonable" attorney fees *as part of case-evaluation sanctions under MCR 2.403(O) . . . .*' " *Id.* at 657, quoting *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.). In addition, several unpublished cases, including unpublished cases dealing with an award of attorney fees under the MCPA—one of the statutes at issue in this case—have declined to apply the *Smith* framework. See, e.g., *McNeal v Blue Bird Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2014 (Docket No. 308763) (declining to apply the *Smith* framework to an award of attorney fees under the MCPA); *Stariha v Chrysler Group, LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2012 (Docket No. 301238) (declining to apply the *Smith* framework to an award of attorney fees under the MCPA and the MMWA).

4. *SMITH* SHOULD APPLY TO THIS CASE

After considering all of the foregoing authorities, we hold that it is appropriate to apply the *Smith* framework to the award of attorney fees at issue in this case.[10] The Court's opinion in *Smith* indicated that the rule established there was to be applied to "our various fee-shifting rules and statutes" and was in-

[10] We note that plaintiff's entitlement to attorney fees in this case arises from the settlement's reference to "statutory attorney fees"—attorney fees authorized by the MCPA (state law) and the MMWA (federal law). In *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97-98; 537 NW2d 471 (1995), this Court remanded the case to determine the reasonableness of attorney fees under the MCPA and the MMWA using the factors in MRPC 1.5(a). See also *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 221; 457 NW2d 42 (1990) (applying state law—the *Wood* factors—to determine the reasonableness of attorney fees awarded under the MMWA). Thus, we see fit to apply state law to determine the reasonableness of attorney fees in this instance.

tended to provide guidance for "Michigan courts that are asked to impose 'reasonable attorney fees' under our fee-shifting rules and statutes." *Smith*, 481 Mich at 535-536 (opinion by TAYLOR, C.J.). In this regard, we find instructive the reasoning employed in *Adair (On Third Remand)*, 298 Mich App at 390, when applying the *Smith* framework to FOIA's fee-shifting provision. Notably, the panel in *Adair* recognized that in *Smith*, our Supreme Court stated that the "aim" of the new framework was " 'to provide a workable, objective methodology for assessing reasonable attorney fees that Michigan courts can apply consistently to our various fee-shifting rules and statutes.' " *Id*., quoting *Smith*, 481 Mich at 535 (opinion by TAYLOR, C.J.). Likewise, in this case, because both the MCPA and the MMWA contain fee-shifting provisions, we deem it appropriate to apply the *Smith* framework. See *Smith*, 481 Mich at 535 (opinion by TAYLOR, C.J.); *Adair (On Third Remand)*, 298 Mich App at 390.

In reaching the conclusion that the *Smith* framework should apply to this and other fee-shifting statutes and court rules, we are also swayed by the pronouncement of the lead opinion in *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.), that "our current multi[]factor analysis"—that is, the multifactor analysis of the *Wood* factors and the factors in MRPC 1.5(a) used to evaluate reasonableness in attorney-fee cases—"needs some fine-tuning." The lead opinion did not cite anything pertaining to an award of attorney fees under MCR 2.403—the court rule under which fees were authorized in *Smith*—when making this proclamation; rather, the opinion simply stated that the analysis currently used to evaluate the reasonableness of attorney fees "needs

some fine-tuning."[11] Given that no one disputes that the multifactor analysis applies to an award of attorney fees under the MCPA and the MMWA, we see fit to apply *Smith*'s "fine-tuning" to the instant case.[12]

More importantly, we have found no binding authority that would act as an impediment to applying *Smith* in the context of MCPA and MMWA actions.[13] Although defendant directs our attention to this Court's decision in *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292; 463 NW2d 261 (1990), a case that precedes *Smith* by 18 years, we do not agree that the decision in *Smolen* prevents us from applying the *Smith* framework to this case. In *Smolen*, the plaintiffs were awarded attorney fees under the fee-

[11] In this regard, we also note that the lead opinion proclaimed that this "fine-tuning" would lead to "greater consistency in awards." *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). If greater consistency were truly the goal, it would be reasonable to assume that the consistency sought was with regard to all attorney-fee awards, not just attorney fees awarded as case-evaluation sanctions. Indeed, what would be the point of announcing a rule that would lead to greater consistency in only one type of attorney-fee award, but would provide no guidance with regard to other attorney-fee awards?

[12] While we are of the opinion that the framework established in *Smith* should apply to our various fee-shifting statutes and court rules, we need not expressly decide this broader issue and we are careful not to wade too far into these murky waters, given that this Court has reached a contrary result in two published decisions. See *Riemer*, 311 Mich App at 657; *Univ Rehab Alliance*, 279 Mich App at 700. Instead, our holding in this regard is simply that the *Smith* framework applies in this particular type of case. In other words, regardless whether the *Smith* opinion was unambiguous about its application of the *Smith* framework and regardless of the analysis in *Adair (On Third Remand)*, we would still apply the *Smith* framework to the fee- shifting provisions in the MCPA and the MMWA.

[13] As noted, there exist two unpublished decisions in which this Court found that the *Smith* framework did not apply to an award of attorney fees under the MCPA. See *McNeal*, unpub op at 14-15; *Stariha*, unpub op at 6. However, we are not bound by these unpublished decisions. MCR 7.215(C)(1).

shifting provisions of the MCPA. *Id*. at 293-294. On appeal, the plaintiffs asked this Court to "set forth specific additional items which should be considered in determining attorney fees." *Id*. at 296. Among those "specific additional items," for which they advocated, the plaintiffs asked this Court to endorse a "starting point" for the award, which was to consist of a reasonable number of hours multiplied by a reasonable rate, and for this starting point to be "presumed to provide a reasonable fee." *Id*. at 296-297. The plaintiffs also asked this Court to hold that they were entitled to an upward adjustment in this amount "to reflect exceptional success." *Id*. at 297.

The panel in *Smolen* declined to adopt the plaintiffs' suggestions. As to the proposed starting point, the panel declined to adopt "any rigid formula . . . that fails to take into account the totality of the special circumstances applicable to the case at hand." *Id*. The panel also declined to find that a reasonable number of hours multiplied by a reasonable rate was a presumptively reasonable fee. *Id*. Further, the panel declined to find that the plaintiffs were entitled to certain upward adjustments; instead, the panel deferred to the discretion of the trial court. *Id*.

For several reasons, we decline to read *Smolen* as foreclosing our ability to use the *Smith* framework in this case. As an initial matter, even if *Smolen* could be read to prevent the application of the *Smith* framework in MCPA cases, we note that the attorney fees awarded in this case were awarded, from our review of the record, under *both* the MCPA *and* the MMWA. Indeed, the settlement in this case refers to "statutory attorney fees," and we can no sooner conclude that the fees were awarded under the MCPA, than we can conclude that they were awarded under the MMWA. Given the

differences in factual scenarios between this case and *Smolen*, and what the plaintiffs in *Smolen* were asking this Court to do, we find *Smolen* inapplicable. Moreover, as noted above, *Smolen* was decided almost 18 years before *Smith* was decided. We decline to find that the reasoning employed in *Smolen* could have somehow preempted the application of a case that was released nearly two decades later.[14]

In addition, we read *Smolen* as being compatible with the *Smith* framework. While *Smolen* purported to reject a "starting point" of reasonable hours multiplied by a reasonable hourly rate, it appears that the plaintiffs in *Smolen* wanted this starting point to be a much less flexible starting point than the starting point set forth in *Smith*. To that end, this Court rejected the proposed starting point as advocated by the plaintiffs in *Smolen*, because the plaintiffs pushed for a "rigid formula" that would have established a presumptively reasonable fee that "fail[ed] to take into account the totality of the special circumstances applicable to the case at hand." See *Smolen*, 186 Mich App at 297. Notably, in *Smith*, our Supreme Court emphasized that an attorney-fee award must take into account the particular circumstances of a case. In fact, *Smith* even cited *Smolen* for this very proposition. See *Smith*, 481 Mich at 529 (opinion by TAYLOR, C.J.), citing *Smolen*, 186 Mich App at 297. And *Smith* stands for the proposition that the trial court has discretion to adjust the starting point amount depending on pertinent factors; this is in stark contrast to the starting point at issue in *Smolen*, in which the plaintiffs asked this

[14] And to the extent that the holdings of the cases conflict, we would be bound to follow *Smith* rather than *Smolen*. See *Charles A Murray Trust v Futrell*, 303 Mich App 28, 48-49; 840 NW2d 775 (2013) (this Court is bound by the decisions of our Supreme Court).

Court to adopt a relatively inflexible and presumptively reasonable starting point, and to declare that they were entitled to certain adjustments, rather than leaving adjustments to the discretion of the trial court. In other words, we find that the starting point rejected in *Smolen* was much different than the starting point adopted in *Smith*. For this reason, we decline to read *Smolen* as prohibiting application of the *Smith* framework to cases involving an award of attorney fees under the MCPA.

In addition to finding no authority that would prevent the application of *Smith* to the instant case, we conclude that the purposes of the fee-shifting provisions in the MCPA and the MMWA are best served by applying the *Smith* framework to an award of attorney fees under those statutes. "One of the purposes behind both the [MMWA] and the MCPA is to provide, via an award of attorney fees, a means for consumers to protect their rights and obtain judgments where otherwise prohibited by monetary constraints." *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97-98; 537 NW2d 471 (1995). The MMWA and the MCPA are remedial in nature and must be liberally construed in order to achieve their intended goals. See *Price v Long Realty, Inc*, 199 Mich App 461, 471; 502 NW2d 337 (1993). We have recognized that fee-shifting provisions "are essential to legal redress in public interest or consumer cases in which the monetary value of the case is often meager." *LaVene*, 266 Mich App at 476. As explained in *Jordan*, 212 Mich App at 98-99:

> In consumer protection as this, the monetary value of the case is typically low. If courts focus only on the dollar value and the result of the case when awarding attorney fees, the remedial purposes of the statutes in question will be thwarted. Simply put, if attorney fee awards in these cases do not provide a reasonable return, it will be

> economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would indeed be ironic: it is precisely those with ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial acts are intended.

Still, that is not to say that in MCPA or MMWA cases, a court should award the full amount of requested fees. *Id*. at 99. Rather, a court is to consider "the usual factors," and "must also consider the special circumstances presented in this type of case." *Id*. In *Jordan*, this Court concluded that the trial court abused its discretion when it failed to consider the goals of the MCPA and the MMWA and limited the plaintiff's attorney fees based solely on "the result obtained and the low value of the case." *Id*. at 98.

The remedial nature of the MCPA and the MMWA, and the policy choices behind awarding attorney fees under those statutes, support our decision to impose the *Smith* framework in this case. As recognized by this Court in *Jordan*, 212 Mich App at 98, consumer protection cases require a "reasonable return" in order to assure that consumers can retain competent counsel to pursue claims that promise meager monetary returns. Failing to provide this reasonable return to "ordinary consumer complaints" effectively closes the courtroom door on the class of persons to whom the Legislature and Congress expressly sought to provide protection. See *id*. at 98-99. In order to honor the intent of the fee-shifting provisions found in the MCPA and the MMWA to assure a "reasonable return," we find it prudent to operate under the *Smith* framework, which begins with the product of a reasonable hourly fee and

a reasonable number of hours expended, and makes adjustments based on a number of factors. We believe this starting point helps frame the attorney-fee award in the proper context and helps avoid focusing too heavily on the results obtained or the low value of the case. This approach uses a reasonable number of hours—not the actual number of hours or a number that encourages a plaintiff's counsel to bill excessively based on the promise of an attorney-fee award—as the starting point for the fee analysis and helps shift the focus away from an attorney-fee award that is overly dependent on the outcome achieved. In other words, we believe that this approach best comports with the legislatively sanctioned goal of incentivizing competent counsel to litigate consumer protection cases. At the same time, this approach ensures that trial courts have appropriate control over the ultimate award of fees. And just as in *Smith*, we believe that using this approach will lead to more consistency in awards under the MCPA and the MMWA. See *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.) (having the trial court consider the amount of money calculated by multiplying a reasonable number of hours by the customary fee charged in the same area for similar legal services, will result in greater consistency in awards.). This is not to say, however, that a trial court should simply award the amount of fees requested by a party, without any critical examination. *Jordan*, 212 Mich App at 99. Rather, we find that the framework set forth in *Smith* is the most appropriate framework for honoring the remedial purpose of the MCPA and the MMWA, and for achieving the goal of awarding a reasonable fee in these types of cases.[15]

[15] In this regard, we note that as is the case with most fee-shifting statutes, there is a punitive nature to the award of attorney fees under

C. THE TRIAL COURT ABUSED ITS DISCRETION

Having determined that the *Smith* framework applies, we next turn our attention to the trial court's award of attorney fees in this case. After reviewing the trial court's award, we find that the court abused its discretion when it awarded $1,000 in costs and attorney fees to plaintiff's counsel. The court gave no consideration to the vast majority of the pertinent factors, and instead, appeared to focus myopically on the amount obtained by plaintiff, describing the case as a "nickel and dime" case.[16] This was inconsistent with the remedial goals of the MCPA and the MMWA. See *Jordan*, 212 Mich App at 98 (reversing and remanding for further proceedings when the trial court's only justifications for limiting the plaintiff's attorney fees were the result obtained and the low value of the case). See also *Smolen*, 186 Mich App at 296 (reversing the trial court's award of attorney fees because the trial court did not consider any of the *Wood* factors). In addition, the court chastised plaintiff's counsel at the end of the hearing for attempting to clarify the record

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the MCPA and the MMWA. Indeed, although the statutes are designed to protect consumers, the award of attorney fees acts, in some ways, as a penalty against those who have violated the respective acts. In *Smith*, 481 Mich at 527-528 (opinion by TAYLOR, C.J.), our Supreme Court noted that the "purpose" of the fee-shifting provision of MCR 2.403(O)(6) was to penalize parties who should have accepted a case-evaluation award, but did not. Therefore, to the extent that the punitive nature of case-evaluation sanctions was pertinent to our Supreme Court's imposition of the *Smith* framework, the attorney fees awarded in this case reflect the same punitive nature, drawing additional parallels to *Smith* and providing further support for our decision to apply *Smith* in this case.

[16] Because the court focused solely on the amount of the recovery, our decision—that the trial court abused its discretion—would be the same regardless whether we applied the *Smith* framework or the traditional multifactor analysis.

and for filing what it termed "pages and pages of stuff."[17] Further, as noted, the trial court appeared to express doubt about whether plaintiff was even entitled to attorney fees, which was incorrect. Accordingly, we are compelled to vacate the trial court's award of attorney fees and to remand the case to the trial court so that it may employ the proper procedures to its determination of the attorney-fee award.

III. CONCLUSION

In conclusion, we vacate the trial court's order awarding $1,000 in attorney fees and costs to plaintiff, and we direct the trial court, on remand, to follow the framework established in *Smith*. In this regard, the court

> should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood* and MRPC 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors. [*Smith*, 481 Mich at 537 (opinion by TAYLOR, C.J.).]

[17] While we make no comment on the reasonableness of the requested fees, we note that plaintiff, as the party requesting attorney fees, bore the burden of establishing that the requested fees were reasonable, i.e., she bore the burden of producing "pages and pages of stuff" to support the requested fees. See *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). And our review of the "pages and pages of stuff" reveals that plaintiff filed documents relating to the pertinent factors to be considered to determine a reasonable attorney fee, such as billing records, the Economics of the Law Practice Survey published by the State Bar of Michigan, as well as documents noting the experience and reputation of plaintiff's counsel.

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

METER, P.J., and BORRELLO, J., concurred with BECKERING, J.

SYLVAN TOWNSHIP v CITY OF CHELSEA

Docket No. 323663. Submitted November 4, 2015, at Lansing. Decided November 24, 2015, at 9:10 a.m.

Sylvan Township brought an action against the city of Chelsea and Washtenaw County in the Washtenaw Circuit Court, seeking declaratory relief. Sylvan had entered into development agreements in which it agreed to create a special assessment district for the construction of water and sewerage systems and later entered into agreements with Washtenaw County for the issuance of bonds covering the cost of the systems. The bonds were to be repaid through the special assessments, connection fees, and user charges. Around the same time, several qualified electors petitioned the State Boundary Commission for consideration of the incorporation of Chelsea, a village at the time, as a home rule city. Sylvan opposed the petition before the commission and in the Ingham Circuit Court. In October 2001, Chelsea, Sylvan, Lima Township, and a representative of the petitioners for incorporation entered into a joint settlement agreement, under which Chelsea agreed to annex less territory from Sylvan and Sylvan agreed to no longer oppose Chelsea's incorporation as a home rule city. The commission recommended approval of the petition, and, in March 2004, an election was held at which the new city charter was approved. The village of Chelsea and the specified areas from the adjacent townships became the city of Chelsea at that time. The developers with whom Sylvan had agreed to establish the special assessment districts subsequently sued Sylvan for breach of contract, and the court enjoined Sylvan from collecting the special assessments. Sylvan later brought this action, arguing that Chelsea assumed a portion of Sylvan's liabilities when it became a city, including a share of Sylvan's liability for repayment of the bond debt. Sylvan asked the court to declare that Chelsea must reimburse Sylvan for Chelsea's share of the debt already paid by Sylvan and to pay Chelsea's share of all future payments on the bonds as they come due. Chelsea moved for summary disposition. The court, Donald E. Shelton, J., granted the motion. Sylvan appealed.

The Court of Appeals *held*:

1. A second action will be barred under the doctrine of 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. In this case, the trial court determined that the doctrine of res judicata barred Sylvan's claim because the claim was or could have been resolved in the Ingham Circuit Court litigation involving the boundary dispute. The Legislature did not give the State Boundary Commission the general authority to resolve disputes concerning the succession to property or liabilities that might be occasioned by the incorporation of a new city. Because the parties could not have resolved the issues involved in this suit before the commission or in the related litigation concerning the commission's actions, the trial court erred as a matter of law when it applied res judicata to bar Sylvan's claim.

2. The trial court also determined that Sylvan's acts and representations equitably estopped it from claiming that Chelsea was partially liable on the bonds. In order to establish that Sylvan's claim was barred under the doctrine of equitable estoppel, Chelsea had to present evidence that Sylvan's acts or representations induced Chelsea to believe that Sylvan would not enforce its rights under MCL 117.14, that Chelsea relied on this belief, and that Chelsea was prejudiced as a result of its reliance. Chelsea, however, failed to present any evidence that Sylvan—either by representations or acts—induced Chelsea to believe that it would not assert its rights under MCL 117.14. Chelsea also did not present any evidence that it relied to its detriment on a belief that Sylvan would not assert its right to have Chelsea pay its share of the liabilities Sylvan incurred before Chelsea incorporated as a home rule city. Although a party may induce reliance through silence, equitable estoppel will only arise from silence in circumstances in which the party to be estopped ought to speak out in order to prevent prejudice to the party relying on the silence. Chelsea presented no evidence that Sylvan stood by and neglected its rights under MCL 117.14 while Chelsea changed its position in reliance on Sylvan's silence. In the absence of such evidence, the trial court should have denied Chelsea's motion for summary disposition to the extent that it argued that Sylvan's claim was barred by equitable estoppel.

3. In the boundary dispute settlement agreement, Sylvan and Chelsea stated that the agreement related to the boundaries of the area proposed to be incorporated as a home rule city by Chelsea. In consideration for the agreement, Sylvan waived its

objections to the legal sufficiency of the petition and agreed that it would not reassert any of the claims originally set forth in the complaint that Sylvan had filed in Ingham Circuit Court. Chelsea and Sylvan also agreed that neither party waived any claims, arguments, positions, or rights except with regard to the matters before the commission and the sufficiency of the petition and petition process. Sylvan did not voluntarily and intentionally abandon its right to enforce MCL 117.14 in this agreement. Because Sylvan did not waive its right to enforce MCL 117.14 in the settlement agreement, the trial court should have granted Sylvan's request for summary disposition with regard to Chelsea's assertion of waiver as a defense.

4. The Legislature did not provide any specific procedure for effecting the assumption of liabilities when a newly incorporated city annexes part of a township under MCL 117.14. The statute merely provides that, for a new city, the liabilities shall be assumed by the new city effective as of the date of filing the certified copy of the new city's charter and using the same ratio provided for cases in which a city annexes a portion of a township. Because the new city assumes its share of the township's liabilities by operation of law, the township has no obligation to take steps to formalize the assumption of liability by the newly formed city; the township may rely on MCL 117.14 and require the new city to meet its share of the township's obligations as those obligations come due. Chelsea filed its charter in March 2004, and it assumed by operation of law a proportional share of Sylvan's liabilities, as those liabilities existed on that date. Because no specific period of limitations encompasses an action to enforce MCL 117.14, the six-year period of limitations provided under MCL 600.5813 applied. Any claim that Sylvan had against Chelsea for an accounting of the debts and liabilities accrued when Chelsea first failed to pay its share of the assumed liability, without regard to whether Sylvan itself paid Chelsea's share. To the extent that Sylvan incurred new or additional liabilities related to the bonds after the date of Chelsea's incorporation (such as by increasing the obligations through misconduct), Chelsea did not assume any portion of the new or additional debt. In this case, the trial court did not grant Chelsea's motion for summary disposition on the ground that Sylvan's claim was time-barred, and the parties did not develop the record sufficiently to identify the applicable accrual date as a matter of law. It is unclear whether and when Chelsea might have become obligated to make a payment on the shared liability (assuming there to be a shared liability). It was also unclear whether laches might apply to bar Sylvan's claim. The primary inquiry when

applying the doctrine of laches is whether the plaintiff's failure to earlier assert his or her claim prejudiced the defendant. On this record, the Court of Appeals could not determine when it was practicable for Sylvan to assert its rights or whether Chelsea suffered prejudice warranting the application of laches. Accordingly, the trial court did not err to the extent that it refused to dismiss Chelsea's defenses premised on the period of limitations and the doctrine of laches.

5. Sylvan relied on MCL 117.14, which is part of the Home Rule City Act, MCL 117.1 *et seq*., for the proposition that Chelsea assumed a portion of its liability on the bonds at issue when it incorporated as a city. MCL 117.14 addresses the different ways in which territory might be transferred from one municipal entity to another and prescribes rules for the disposition of real property, personal property, and liabilities affected by the transfer. For purposes of calculating the division of personal property and liabilities between a village and a township when the village incorporates as a home rule city, the home rule city has effectively taken from the township that portion of the village's territory that was subject to taxation by the township. For purposes of dividing liabilities, however, the proportionate share of the liabilities must be determined separately for each liability and must be determined by calculating the assessed valuation of the property that could lawfully be taxed to pay the liability. That is, for purposes of calculating the proportion of a particular liability that a new city must assume when it incorporates, a township may not include the assessed valuation of taxable property from any village that was incorporated into the city if the township could not have lawfully levied a tax on that land to pay the liability at issue. Applying the law to the facts of this case, in accordance with MCL 123.742(2), under which a township cannot levy taxes on the taxable property in a village that it otherwise has the authority to tax in order to meet its obligations under a contract with a county for the acquisition, improvement, enlargement, or extension of a sewage disposal system, Sylvan could not lawfully levy a tax on the real property in the former village of Chelsea to pay its liabilities under the bonds at issue. Consequently, it could not include any part of the former village of Chelsea's territory in calculating the proportion of the liability on that debt, which Chelsea assumed when it incorporated.

Trial court decision reversed in part, order granting summary disposition vacated, and case remanded for further proceedings.

1. STATUTES — HOME RULE CITY ACT — ASSUMPTION OF LIABILITIES.

The Legislature did not provide any specific procedure for effecting the assumption of liabilities when a newly incorporated city annexes part of a township under MCL 117.14; because the new city assumes its share of the township's liabilities by operation of law, the township has no obligation to take steps to formalize the assumption of liability by the newly formed city; the township may rely on MCL 117.14 and require the new city to meet its share of the township's obligations as those obligations come due.

2. STATUTES — HOME RULE CITY ACT — ASSUMPTION OF LIABILITIES — PERIOD OF LIMITATIONS — ACCRUAL OF CLAIM.

The six-year period of limitations provided under MCL 600.5813 applies to an action seeking a declaration that a newly incorporated city has failed to pay its share of any liabilities assumed under MCL 117.14; the claim accrues when the newly incorporated city first fails to pay its share of the assumed liability.

3. STATUTES — HOME RULE CITY ACT — ASSUMPTION OF LIABILITIES — CALCULATION OF PROPORTIONATE SHARE.

For purposes of dividing liabilities between a village and a township when the village incorporates as a home rule city under MCL 117.14, the proportionate share of the liabilities must be determined separately for each liability and must be determined by calculating the assessed valuation of the property that could lawfully be taxed to pay the liability; thus, when calculating the proportion of a particular liability that a new city must assume when it incorporates, a township may not include the assessed valuation of taxable property from any village that was incorporated into the city if the township could not have lawfully levied a tax on that land to pay the liability at issue.

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache*) for Sylvan Township.

Johnson, Rosati, Schultz & Joppich, PC (by *Steven P. Joppich* and *Lisa A. Anderson*), for the city of Chelsea.

Before: GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM. In this dispute over the obligation to repay debt on municipal bonds, plaintiff, Sylvan Township (Sylvan), appeals by right the trial court's order granting the motion for summary disposition filed by defendant, city of Chelsea (Chelsea). On appeal, Sylvan argues that the trial court erred when it applied the doctrines of res judicata and equitable estoppel to bar its claim that Chelsea was obligated to pay a share of the municipal debt incurred by Sylvan before Chelsea incorporated as a home rule city. Because we agree that the trial court erred when it dismissed Sylvan's claim on the grounds that it was barred by res judicata and equitable estoppel, we reverse and remand.

I. BASIC FACTS

In September 2000, several qualified electors petitioned the State Boundary Commission (the Commission) to consider the incorporation of Chelsea as a home rule city. Chelsea was a village at the time. The petitioners' proposed boundaries for the city included all the territory of the village and some territory from Sylvan and Lima Townships. Beginning in March 2001, Sylvan opposed Chelsea's petition to incorporate before the Commission and in Ingham Circuit Court.

In accordance with certain development agreements, Sylvan decided to create a special assessment district for the construction of water and sewerage systems. It originally proposed the creation of a modest sewerage system that would serve only the developments covered by the agreements. The special assessment district was specifically created to pay for a wastewater treatment plant in the township. However, at some point, Sylvan abandoned its plan to construct its own wastewater treatment plant and instead entered into an agreement to connect with a neighboring

township's system using an interceptor line. The new project was more expensive than originally proposed. Sylvan did not pursue a new or revised special assessment to pay for the altered project.

In July 2001, Sylvan entered into agreements with Washtenaw County for the issuance of $12.5 million in bonds to cover the construction of the water and sewerage systems for the township. In the agreements, the parties noted that Sylvan had created special assessments that would become due in December 2002 and be collected through December 2021. In the Official Statement on the proposed bonds issued in September 2001 and prepared by a financial advisor retained by Washtenaw County, it was stated that Sylvan intended to "defray" its payments to the county "through a combination of special assessments, connection fees and user charges." The interest payments on the bonds were to be made in May and November of each year and were to commence in November 2001.

In October 2001, representatives from Chelsea, Sylvan, Lima Township, and a representative of the petitioners for incorporation entered into a joint settlement agreement. As part of the settlement, Chelsea agreed that it would annex less territory from Sylvan and Sylvan agreed to no longer oppose the incorporation of Chelsea as a home rule city.

In May 2002, after holding adjudicative hearings, the Commission recommended approval of the petition, which would allow a vote on whether Chelsea should be incorporated as a city through the adoption of a charter. The Director of the Department of Consumer and Industry Services adopted the Commission's recommendation and findings in June 2002. Chelsea held an election on the adoption of a charter for the proposed city in March 2004, and a majority of

the voters voted for the charter. Accordingly, the village and the specified areas from the adjacent townships became the city of Chelsea at that time.

Sylvan's water and sewerage systems were operating on some level by November 2002. See *NDC of Sylvan, Ltd v Sylvan Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket Nos. 301397 and 301410). In 2003 and 2004, Sylvan began to have disputes with the developers with whom it had agreed to establish special assessment districts to cover in part the costs of the water and wastewater systems. *Id*. The developers sued Sylvan on various grounds in 2007 and, in April 2010, the trial court issued an opinion and order in which it determined that the special assessments for the sewerage system were invalid. *Id*. The trial court enjoined Sylvan from collecting the unlawful special assessments against the developers. On appeal, this Court affirmed the trial court's decision in relevant part. *Id*.

In 2010, Sylvan asked Washtenaw County to approve refunding bonds as a way of refinancing Sylvan's obligations to the county. The county agreed and issued the refunding bonds in March 2010. The statement concerning the refunding bonds showed that the county was refunding $9.4 million of the original bonds. Sylvan tried to get the electors to approve a property tax increase to cover the payments on the refunding bonds, but the measure failed. In May 2012, Sylvan defaulted on its payment of the refunded bonds.

In July 2012, Sylvan entered into a new agreement with Washtenaw County. In the new agreement, the parties acknowledged that the special assessments had been invalidated and that Sylvan had been unable to get its electors to approve a millage to cover the refunded bonds. The parties agreed that the county

would continue to advance funds to cover Sylvan's obligations, but made that agreement contingent on Sylvan's electors' approval of a proposed millage increase. They further agreed that, if the millage passed, Sylvan would use any taxes collected from the new millage to repay the funds advanced by the county and service the debt on the refunded bonds.

In October 2012, Sylvan's lawyer sent a letter to Chelsea's City Manager concerning Sylvan's bond obligations. In the letter, Sylvan asserted that, because Chelsea "took" approximately 41% of Sylvan's assessed value when it incorporated as a city, under the Home Rule City Act, MCL 117.1 *et seq*., Chelsea assumed 41% of Sylvan's liability under the bonds. Sylvan invited Chelsea to engage in "further dialogue" on the matter to reach a "consensus as to the amount of [Chelsea's] contribution" to the shared obligation. Chelsea disagreed that it had assumed any liability under the bonds.

In March 2014, Sylvan sued Chelsea for declaratory relief. It alleged that, under MCL 117.14, Chelsea assumed a proportionate share of Sylvan's liabilities when it became a city, which included a share of Sylvan's liability for the repayment of the bond debt incurred to construct improvements for the treatment of wastewater. Sylvan asked the trial court to declare that Chelsea is liable for a proportionate share of Sylvan's liabilities under the bond contracts, must reimburse Sylvan for Chelsea's share of the debt already paid by Sylvan, and is obligated to pay its share of all future payments on the bonds as they come due. Sylvan amended its complaint in April 2014 to include Washtenaw County as a defendant.

In August 2014, Chelsea moved for summary disposition under MCR 2.116(C)(7) and (8). Chelsea argued,

in relevant part, that Sylvan specifically waived any right to contribution that it might have had when it settled its dispute over Chelsea's petition to incorporate. Chelsea further maintained that Sylvan's claim was barred under the doctrine of res judicata because Sylvan raised the issue with the Commission and the Commission did not require Chelsea to assume any portion of Sylvan's liabilities as part of its decision. Chelsea also argued that Sylvan had to assert its right to a division of liabilities under MCL 117.14 at the time of the city's incorporation and failed to do so. For that reason, Chelsea asserted, Sylvan's complaint for declaratory relief was untimely. Chelsea similarly argued that Sylvan unduly delayed asserting its claim, which prejudiced Chelsea, and engaged in inequitable conduct that warranted barring the claim under the doctrines of laches and equitable estoppel.

The trial court held a hearing on the motion in August 2014. After the parties presented their arguments, the trial court granted Chelsea's motion. Citing the decision by the Commission arising from the dispute over incorporation, the court stated that Sylvan's claim was barred by the doctrine of res judicata. The court also determined that Sylvan's claim was barred on equitable grounds:

> [T]he Township knew of the existence of this potential liability to the County . . . and chose not to assert that [claim] at the time of . . . the incorporation issue being before the Boundary Commission and the public. Subsequently the Township Board and not the City made intentional and unlawful decisions that caused the default on these bonds. . . . [I]t was never intended by anyone that the City residents would receive any benefit from . . . the proposed construction that was to [take] place on these bonds. Nor did . . . the City residents receive any benefit . . . . Subsequently, the Township represented to its

> own citizens at a millage election that the Township, not the City and the Township, that the Township was responsible for the entire 12 plus million dollars owed on the default of these bonds to the County and convinced the electorate to pass a millage not voted on by the people of Chelsea but voted on by the people of Sylvan Township to assume that debt and entered into an agreement with the County so that that debt could be paid off over a period of time rather than immediately . . . . Under all . . . those circumstances I do find that the Township is equitably estopped from making a claim against the City residents now . . . .

Later that same month, the trial court entered an order granting Chelsea's motion for summary disposition for the reasons stated on the record and dismissing Sylvan's claim with prejudice. Sylvan now appeals in this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

Sylvan argues on appeal that the trial court erred when it granted Chelsea's motion for summary disposition; specifically, it maintains that the trial court erred when it applied res judicata and equitable estoppel to bar its claim. In considering Chelsea's motion for summary disposition, it appears that the trial court relied on evidence outside the pleadings—including its own familiarity with the case. Accordingly, we shall treat the trial court's decision as though made under MCR 2.116(C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

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

reviews de novo the trial court's application of legal and equitable doctrines, including the doctrines of res judicata and equitable estoppel. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). "This Court also reviews de novo whether the trial court properly selected, interpreted, and applied the relevant statutes." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). Finally, this Court reviews de novo the proper construction of contractual agreements. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. RES JUDICATA

The trial court determined that the doctrine of res judicata barred Sylvan's claim because the claim was or could have been resolved in the litigation involving the boundary dispute.

> 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). [*Green v Ziegelman*, 310 Mich App 436, 444; 873 NW2d 794 (2015).]

The Legislature established the state boundary commission and delegated to it the authority to approve incorporations and annexations. See *Shelby Charter*

Twp v State Boundary Comm, 425 Mich 50, 58; 387 NW2d 792 (1986). The Legislature required the Commission to review all petitions and resolutions for the incorporation of cities or the annexation of territory. See MCL 123.1007(3); MCL 117.9(2). To that end, the Commission must determine whether the petition conforms to the requirements of the Home Rule City Act. See MCL 123.1008(2); MCL 117.9(2). The Commission is also required to conduct a hearing to review whether the proposed incorporation is reasonable. MCL 123.1008(1) and (3). After the hearing, the Commission may deny or approve the petition, or approve the petition with revisions. MCL 123.1010(1). If the Commission denies the petition, the order is final. MCL 123.1010(2). If the Commission approves the petition and the petition becomes final, as described by statute, the electors must then follow the procedures for the creation of a charter commission. See MCL 123.1010(3) to (6); MCL 117.15. The proposed city becomes incorporated when the electors adopt a charter for the city. MCL 117.17. If the electors do not adopt a charter within three years of the Commission's final order of approval, the incorporation proceedings end. MCL 123.1010(6).

The Commission has broad authority to reject or approve a proposed incorporation. See *Casco Twp v State Boundary Comm*, 243 Mich App 392, 397-398; 622 NW2d 332 (2000). And, when determining whether a proposed incorporation is reasonable, the Commission may plainly consider the effect that the proposed incorporation will have on the financial obligations of the communities affected by the proposal. See MCL 123.1009. But it is equally clear that the Legislature did not give the Commission the general authority to resolve disputes concerning the succession to property or liabilities that might be occasioned by the incorpo-

ration of a new city; indeed, it provided that the "[s]uccession to property and liabilities, division of properties, sharing in revenue from various taxes and state funds distributable among local units and assessment and collection of taxes in newly incorporated municipalities shall be governed by the existing provisions of law." MCL 123.1011. The reference to existing provisions of law encompasses MCL 117.14. It is also noteworthy that the Legislature made MCL 117.14 inapplicable when a city annexes a part of a village or township, except in limited circumstances, and when it does apply to annexations, the Legislature empowered the Commission to determine an equitable division of assets and liabilities. See MCL 117.9(9). By giving the Commission the authority to make an equitable division under a limited set of circumstances and providing that the division of assets and liabilities is otherwise governed by existing law, the Legislature impliedly limited the Commission's authority to resolve disputes arising from the incorporation of a new city. As Sylvan states on appeal, it would also be impractical for the Commission to address the division of assets and assumption of liabilities for newly incorporated cities because the electors could adopt a charter up to three years after the Commission's final decision. MCL 123.1010(6). During that time, there may be new liabilities or changes in circumstances that would alter the equities applicable to the division of property or the assumption of liabilities.

The Commission had no authority to make an equitable division of the assets or determine liabilities arising from Chelsea's incorporation as a city. Because the parties could not have resolved the issues involved in this suit before the Commission or in the related litigation concerning the Commission's actions, the

trial court erred as a matter of law when it applied res judicata to bar Sylvan's claim. *Dart*, 460 Mich at 586.

C. EQUITABLE ESTOPPEL

The trial court also determined that Sylvan's acts and representations equitably estopped it from now claiming that Chelsea is partially liable on the bonds. The doctrine of equitable estoppel has its origins in the prevention of fraud:

> It has its origin in moral duty and public policy; and its chief purpose is the promotion of common honesty, and the prevention of fraud. Where a fact has been asserted, or an admission made, through which an advantage has been derived from another, or upon the faith of which another has been induced to act to his prejudice, so that a denial of such assertion or admission would be a breach of good faith, the law precludes the party from repudiating such representation, or afterwards denying the truth of such admission. [*Hassberger v Gen Builders' Supply Co*, 213 Mich 489, 492-493; 182 NW 27 (1921) (quotation marks and citation omitted).]

In order to establish that Sylvan's claim should be barred under the doctrine of equitable estoppel, Chelsea had to present evidence that Sylvan's acts or representations induced Chelsea to believe that Sylvan would not enforce its rights under MCL 117.14, that Chelsea relied on this belief, and that Chelsea was prejudiced as a result of its reliance. See *McDonald*, 480 Mich at 204-205.

As Sylvan correctly points out on appeal, Chelsea did not present any evidence to support an inference that Sylvan—either by representations or acts—induced Chelsea to believe that it would not assert its rights under MCL 117.14. Chelsea also did not present any evidence that it relied to its detriment on a belief

that Sylvan would not assert its right to have Chelsea pay its share of the liabilities Sylvan incurred before Chelsea incorporated as a home rule city. Indeed, Chelsea's argument for equitable estoppel centered on its belief that Sylvan affirmatively waived its rights under MCL 117.14 when it entered into the agreement settling the dispute before the Commission and the related lawsuit, and on the fact that Sylvan did not earlier assert its rights. As will be discussed later in this opinion, Sylvan did not affirmatively waive its rights under MCL 117.14 in the settlement agreement and, for that reason, the agreement could not have induced Chelsea to believe that Sylvan would not assert its rights. In addition, although a party may induce reliance through silence, equitable estoppel will only arise from silence under circumstances in which the party to be estopped ought to speak out in order to prevent prejudice to the party relying on the silence. See *Lichon v American Universal Ins Co*, 435 Mich 408, 415; 459 NW2d 288 (1990) (stating that equitable estoppel might arise from silence when the party to be estopped ought to have spoken out); *Prout v Wiley*, 28 Mich 164, 167 (1873) (stating that equitable estoppel by silence may apply to a case involving a deed when the party stands by and watches the other party improve the property, or expend money, or sell the property to another without asserting the claim). Here, there was no evidence that Sylvan stood by and neglected its rights under MCL 117.14 while Chelsea changed its position in reliance on Sylvan's silence. In the absence of such evidence, the trial court should have denied Chelsea's motion to the extent that it argued that Sylvan's claim was barred by equitable estoppel.

The trial court also erred to the extent that it applied equitable estoppel on the basis of evidence that

was not in the record. It appears from the trial court's statements after oral arguments that it applied equitable estoppel in part because it felt that Sylvan engaged in misconduct that created the problems giving rise to Sylvan's inability to meet its bond obligations. That is, it appears that the trial court found that it would be inequitable to require Chelsea to assume a portion of a debt when Sylvan's misconduct created the circumstances that made it necessary for Sylvan to pay the liabilities from its general fund and raise taxes. The trial court's belief that Sylvan should alone bear the burdens of its misconduct does not implicate equitable estoppel absent evidence that the purported misconduct led Chelsea to believe that Sylvan would not assert its rights and that Chelsea reasonably relied on the belief to its detriment. *McDonald*, 480 Mich at 204-205. There is no evidence that Sylvan's handling of the dispute with the developers caused Chelsea to believe that Sylvan would not assert its rights under MCL 117.14 or that Chelsea relied on such a belief to its prejudice. Therefore, on this record, we conclude that the trial court erred when it applied equitable estoppel to bar Sylvan's claim.

D. WAIVER

On appeal, Sylvan argues that a plain reading of the settlement agreement demonstrates that it did not waive its rights under MCL 117.14 in that agreement. It further argues that the trial court should have granted its request for summary disposition in its favor on that defense.

In the settlement agreement, Sylvan and Chelsea (along with the other parties) stated that the agreement related to "the proposed boundaries of the area proposed to be incorporated as a Home Rule City" by

Chelsea. They then agreed that the proposed city would include boundaries with "the limited area" depicted in an attached exhibit. In consideration of the agreement, Sylvan waived its "objections to the legal sufficiency of the Petition in this matter" and agreed that it would not "reassert any of the claims originally set forth" in the complaint that Sylvan filed in Ingham Circuit Court concerning the Commission's approval of the petition. Chelsea and Sylvan also agreed that neither party waived "any claims[,] arguments, positions or rights," "except as to this Commission Docket and except as set forth in paragraph 3 . . . ."

Sylvan did not voluntarily and intentionally abandon its right to enforce MCL 117.14 in this agreement. See *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). The waiver provision stated in Paragraph 3 applied to Sylvan's right to object to the sufficiency of the petition and petition process. Even reading the waiver in Paragraph 3 together with Paragraph 6, which referred to the claims or arguments raised in "this Commission Docket," Sylvan cannot be said to have waived its right to raise a claim that Chelsea assumed a portion of its liabilities. Although Sylvan informed the Commission about the debt that Sylvan incurred in constructing its water and sewerage improvements, it did not raise that issue in the context of a division of assets or the assumption of liabilities under MCL 117.14. Instead, it raised that issue as a factor for consideration by the Commission when exercising its discretion to approve the petition. See MCL 123.1009. Therefore, to the extent that Sylvan waived anything as a result of bringing that issue up in the "Commission Docket," it waived the right to challenge the petition on the grounds that Chelsea's incorporation would adversely affect Sylvan's ability to meet its bond obligations.

Similarly, a review of Sylvan's complaint in Ingham Circuit Court shows that Sylvan challenged the validity of the petition to incorporate Chelsea as a home rule city. At no point in its petition for interlocutory review did Sylvan raise a claim or dispute concerning the division of assets or assumption of liabilities that might be occasioned by the incorporation.

Because Sylvan did not waive its right to enforce MCL 117.14 in the settlement agreement, the trial court should have granted Sylvan's request for summary disposition on this defense.

E. LACHES AND THE PERIOD OF LIMITATIONS

Sylvan also argues on appeal that the trial court erred when it refused to dismiss Chelsea's defenses premised on the period of limitations and laches. More to the point, Sylvan argues that its claim is plainly timely because it sued within months after it first had to make a payment from its general fund. Chelsea counters that Sylvan's claim is plainly untimely because it comes years after Chelsea incorporated as a city.

Sylvan's claim for declaratory relief depends on the nature of the claim underlying its request for relief. See *New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, 308 Mich App 638, 646; 866 NW2d 850 (2014). The Legislature did not provide any specific procedure for effecting the assumption of liabilities under MCL 117.14. The statute merely provides that, for a new city, the liabilities "shall be . . . assumed" by the new city effective "as of the date of filing the certified copy of the charter" and using "the same ratio" provided for cases in which a city annexes a portion of a township. MCL 117.14. Because the new city apparently assumes its share of the township's liabilities by operation of

law, the township has no obligation to take steps to formalize the assumption of liability by the newly formed city; the township may rely on MCL 117.14 and require the new city to meet its share of the township's obligations as those obligations come due. See *Dearborn Twp v City of Dearborn*, 308 Mich 284, 289, 293-294; 13 NW2d 821 (1944).[1]

Chelsea filed its charter in March 2004, and it assumed by operation of law a proportional share of Sylvan's liabilities, as those liabilities existed on that date. Sylvan now seeks to compel Chelsea to meet its obligation to pay its share of Sylvan's liability on the bonds at issue. In particular, Sylvan asked the trial court to order Chelsea to compensate Sylvan for that portion of the debt on the bonds at issue that should have been paid by Chelsea, which Sylvan had already paid, and to apportion liability for the remaining debt on the bonds. Chelsea responded, in relevant part, by arguing that Sylvan engaged in conduct that makes it inequitable for the trial court to apportion any of Sylvan's liabilities to Chelsea.

Sylvan's claim is in the nature of an equitable action for an accounting or contribution, which requires the consideration and adjustment of rights among various parties. See *Tkachik v Mandeville*, 487 Mich 38, 47; 790 NW2d 260 (2010) (discussing the nature of the equitable doctrine of contribution); *Haylor v Grigg-Hanna Lumber & Box Co*, 287 Mich 127, 133; 283 NW

[1] It should be noted that Sylvan's creditors may not rely on the statutory assumption of liability to compel payment directly from Chelsea. See *Turnbull v Alpena Twp Bd of Ed*, 45 Mich 496, 499; 8 NW 65 (1881) ("A debt once existing must remain a debt against the corporation that created it, and its obligation is not destroyed by a change in corporate limits. If contribution is required, it must be obtained by the corporation and not by its creditors, unless otherwise provided by law.").

1 (1938) ("A resort to equity is necessary whenever complete and adequate relief requires an adjustment of diverse rights among the parties, as in adjusting liens, distributing funds and in matters of account."). Nevertheless, a claim for contribution under MCL 117.14 does not fit within the traditional framework applied to an action for contribution by joint tortfeasors; the traditional claim involves two or more tortfeasors who caused an injury that resulted in an enforceable judgment. See MCL 600.2925c. Consequently, MCL 600.2925c does not on its face apply to a claim for contribution under MCL 117.14; because no specific period of limitations encompasses an action to enforce MCL 117.14, we conclude that the six-year period of limitations provided under MCL 600.5813 applies.

On appeal, Sylvan argues that the accrual date for its claim should be the same as the accrual for a claim of contribution by a joint tortfeasor, citing *Sziber v Stout*, 419 Mich 514, 533-534; 358 NW2d 330 (1984) (stating that a claim of contribution accrues when a judgment has been rendered and the plaintiff has paid more than his or her share). Given that Chelsea assumed the liabilities by operation of law, it seems inapt to require a judgment and an overpayment on the judgment. Rather, any claim that Sylvan had against Chelsea for an accounting of the debts and liabilities accrued when Chelsea first failed to pay its share of the assumed liability, without regard to whether Sylvan itself paid Chelsea's share. See MCL 600.5827. To the extent that Sylvan incurred new or additional liabilities related to the bonds after the date of Chelsea's incorporation (such as by increasing the obligations through misconduct), Chelsea did not assume any portion of the new or additional debt. See *Dearborn Twp*, 308 Mich at 290.

As this Court has recognized, there may be fact questions that must be resolved in order to determine when a claim accrued. See *Kincaid*, 300 Mich App at 523. In this case, the trial court did not grant Chelsea's motion for summary disposition on the ground that Sylvan's claim was time-barred, and the parties did not develop the record sufficiently to identify the applicable accrual date as a matter of law. It is unclear whether and when Chelsea might have become obligated to make a payment on the shared liability (assuming there to be a shared liability). For example, Sylvan's agreement with the county provides that the township will pay principal and interest on the bonds without regard to the source of the funds used to make the payments. Stated another way, the obligation appears to be absolute—it does not apparently depend on whether there are special assessments. Thus, Chelsea might have been obligated to pay its share of the payments immediately after it incorporated, notwithstanding that there were special assessments available to Sylvan to make the payments. For that reason, Sylvan's failure to assert its rights under MCL 117.14 might be time-barred with respect to the earlier payments. But see *Dearborn Twp*, 308 Mich at 295-296 (noting that the right to have contribution does not arise until a contingent liability becomes a fixed liability). It is also unclear how the refunding of the bonds might have affected the nature and extent of the liability at issue. Because the parties did not adequately address these issues and did not have occasion to develop the record concerning the timing and nature of the required payments, we decline to further address whether and to what extent Sylvan's claim might be barred under the applicable period of limitations.

For similar reasons, we decline to consider whether laches might properly apply to bar Sylvan's claim in whole or in part; as we have explained, the primary inquiry when applying the doctrine of laches is whether the plaintiff's failure to earlier assert his or her claim prejudiced the defendant:

> Although considerations of timing are important when determining whether laches applies to the facts, laches is not triggered by the passage of time alone. Laches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to assert. As such, when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay. It is the prejudice occasioned by the delay that justifies the application of laches. [*Knight v Northpointe Bank*, 300 Mich App 109, 114-115; 832 NW2d 439 (2013) (quotation marks and citations omitted).]

In order to determine whether Chelsea suffered prejudice as a result of Sylvan's delay, it is essential to determine when it was practicable for Sylvan to assert its claim. Sylvan argues that it was not practicable until it became necessary for Sylvan to refinance the bonds and raise taxes to cover the expenses. But that assertion may be incorrect. If Chelsea had an obligation to pay its share earlier—perhaps years earlier—and Sylvan failed to assert its rights, the trial court might reasonably conclude that Sylvan should be charged with laches if the delay prejudiced Chelsea's rights. For example, had Sylvan earlier asserted its rights under MCL 117.14, Chelsea might have been able to intervene in a way that prevented Sylvan from jeopardizing the special assessments or might have been able to otherwise take actions to limit its exposure to liability. On this record, we cannot determine when it was practicable for Sylvan to assert its rights

or determine whether Chelsea suffered prejudice warranting the application of laches.

The trial court did not err to the extent that it refused to dismiss Chelsea's defenses premised on the period of limitations or the doctrine of laches.

F. ALTERNATIVE RELIEF

Chelsea argues on appeal that, by referring to territory that is "taken" from a township, MCL 117.14, the Legislature intended the division of assets and liabilities to apply only to the annexation of territory from a township, which necessarily does not include territory within a neighboring village; namely, Chelsea asks this Court to distinguish between territory held by a particular municipality and land subject to taxation by multiple municipalities. Accordingly, Chelsea asks this Court to dismiss Sylvan's claim "for a declaration that Chelsea owes a share of liability for any territory that once comprised the Village of Chelsea" under MCR 2.116(C)(8). In its reply, Sylvan argues that this Court should not consider the issue because Chelsea did not raise it in a cross-appeal and the issue involves the extent of Chelsea's share of the liability rather than whether it has any liability at all.

Although Chelsea raised this issue in its motion for summary disposition, the trial court did not address it, and it does not provide an independent basis for affirming the trial court's decision; therefore, Sylvan is probably correct when it argues that this issue should have been raised by cross-appeal. See *In re Herbach Estate*, 230 Mich App 276, 283-284; 583 NW2d 541 (1998). Nevertheless, there is nothing to prevent Chelsea from raising this issue on remand and nothing to prevent the parties from challenging the trial court's resolution of the issue in a subsequent appeal. Because

the parties have addressed this issue on appeal and it is one of law that this Court can decide on the existing record, in the interests of efficiency, we elect to exercise our discretion to provide further or different relief, as the case may require, and consider this issue. See MCR 7.216(A)(7).

1. THE GOVERNING MUNICIPAL LAW

In addition to the provisions for counties, Michigan's Constitution recognizes three types of local government: townships, villages, and cities. See Const 1963, art 7, § 14 (giving counties the power to organize and consolidate townships); Const 1963, art 7, § 17 (providing that townships are a body corporate); Const 1963, art 7, § 21 (stating that the Legislature must provide by general laws for the incorporation of cities and villages). These entities are often referred to as municipal corporations. See *City of Roosevelt Park v Norton Twp*, 330 Mich 270, 273; 47 NW2d 605 (1951) (noting that a township is a municipal corporation); *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 210-213; 828 NW2d 459 (2012) (interpreting statutory provisions that refer to cities, villages, and townships as municipalities). The Constitution gives the Legislature the authority to establish laws governing the creation, annexation, dissolution, and interaction of local units of government. See Const 1963, art 7, § 21. The issues in this case involve all three types of municipalities.

Chelsea was established as a village in the nineteenth century. See *Wilkinson v Conaty*, 65 Mich 614, 615; 32 NW 841 (1887) (noting that the real property at issue was part of the original plat of the village of Chelsea and that its owner mortgaged the land in 1867). In 1909, Michigan's Legislature enacted parallel

acts governing home rule villages, see 1909 PA 278, and home rule cities, see 1909 PA 279. The Home Rule Village Act, MCL 78.1 *et seq*., and the Home Rule City Act, MCL 117.1 *et seq*., as they have been amended over time, generally govern villages and cities chartered after 1909. However, because Chelsea existed as a village before 1909, Chelsea continued its corporate character as a village under the General Law Village Act, MCL 61.1 *et seq*., which remains in force. See MCL 78.1(2); see also MCL 74.7 (stating that villages incorporated before February 1895 are reincorporated automatically under, and made subject to, the General Law Village Act). When Chelsea became a city, it did so under the Home Rule City Act.

2. THE DIVISION OF ASSETS AND LIABILITIES

The adjustment of property and liabilities arising from the alteration of municipal boundaries historically involved only townships and cities. See MCL 123.1. This was because the Legislature treated villages as component parts of townships. See MCL 123.9 (stating that the act will apply to a village when "it shall not be a part of any township"). However, after the enactment of the Home Rule City Act and the Home Rule Village Act, the Legislature specifically addressed the adjustment of rights and liabilities involving the alteration of territorial boundaries for all three types of municipalities. See MCL 78.10 (providing for the division of property and the assumption of liabilities involving the annexation of territory by a village from a township, village, or city); MCL 117.14 (regulating the division of property and the assumption of liabilities involving the annexation of territory by a city from a township, village, or city). And, when either the Home Rule City Act or the Home Rule

Village Act applies, it is error for a trial court to adjust the rights and liabilities of the affected municipalities using MCL 123.1. See *Dearborn Twp*, 308 Mich at 289-290.

Sylvan relies on MCL 117.14, which is part of the Home Rule City Act, for the proposition that Chelsea assumed a portion of its liability on the bonds at issue when it incorporated as a city. MCL 117.14 addresses the different ways in which territory might be transferred from one municipal entity to another and prescribes rules for the disposition of real property, personal property, and liabilities affected by the transfer.

The Legislature first addresses those territorial transfers to a city from another municipality when the city acquires ownership of all of the municipality's property and assumes all of the municipality's liabilities:

> Whenever an incorporated village is incorporated as a city, without change of boundaries, such city shall succeed to the ownership of all the property of such village and shall assume all of its debts and liabilities. Whenever a city, village or township is annexed to a city, the city to which it is annexed shall succeed to the ownership of all the property of the city, village or township annexed, and shall assume all of its debts and liabilities. [MCL 117.14.]

Thus, the statute contemplates that a city will succeed to all of an existing municipality's property and liabilities in two situations: when a new city is formed from a village and the boundaries remain the same, and when an existing city annexes an entire municipality.

The statutory scheme then turns to situations in which an existing city annexes part—but not all—of another municipality. When the annexed territory in-

cludes real property, which is owned by the municipality that is losing the territory, the municipality that owns the property must sell it and divide the proceeds with the city annexing the territory:

> Whenever a part of a city, village or township is annexed to a city, the real property in the territory annexed which belongs to the city, village or township from which it is taken shall be sold by the authorities of the city, village or township in which said land was located before such annexation, and that portion of the proceeds of such sale shall be paid to the city acquiring such territory which shall be in the same ratio to the whole amount received as the assessed valuation of the taxable property in the territory annexed bears to the assessed valuation of the taxable property in the entire city, village or township from which said territory is taken. [*Id*.]

The Legislature provided a similar scheme for the division of personal property, except that the division of personal property applies to all of the personal property owned by the municipality that is losing the territory without regard to the location of the personal property:

> Whenever a part of a city, village or township is annexed to a city, all of the personal property belonging to any such city, village or township from which territory is detached shall be divided between the township, city or village from which said territory is detached and the city to which the territory is annexed, in the same ratio as the assessed valuation of the taxable property in the territory annexed bears to the assessed valuation of the taxable property in the entire city, village or township from which said territory is taken. [*Id*.]

Likewise, the Legislature provided that the city annexing territory from another municipality must assume a portion of the liabilities of the municipality losing the territory:

> The indebtedness and liabilities of every city, village and township, a part of which shall be annexed to a city shall be assumed by the city to which the same is annexed in the same proportion which the assessed valuation of the taxable property in the territory annexed bears to the assessed valuation of the taxable property in the entire city, village or township from which such territory is taken. Assessed valuation shall be determined in every division pursuant to this section from the last assessment roll of the city, village or township which has been confirmed by the board of review. [*Id.*]

The Legislature also addressed a situation involving the creation of a new city from a township:

> Whenever a new city shall be incorporated, the personal property of the township from which it is taken shall be divided and its liabilities assumed between such city and the portion of the township remaining after such incorporation, which incorporation shall be effective as of the date of filing the certified copy of the charter as hereinafter provided, in the same ratio as herein provided in case of the annexation of a part of a township to a city . . . . [*Id.*]

Because Chelsea incorporated as a new city and the new city included territory beyond the village's existing boundaries, Sylvan argues that the last quoted sentence governs the division of assets and liabilities for this case. In making this argument in the trial court, Sylvan maintained that Chelsea assumed a proportion of Sylvan's indebtedness and liabilities equal to the proportion of the assessed value of that portion of the township annexed by the new city as well as that portion of the village of Chelsea that was in Sylvan. Using this area to determine the valuation of the taxable property, Sylvan maintains that Chelsea assumed approximately 41% of Sylvan's debts and liabilities on the day that the electors adopted Chelsea's city charter.

3. SHARE OF LIABILITY

The Legislature provided that, when a village incorporates into a city without changing its boundaries, the new city succeeds to the ownership "of all the property of such village" and assumes "all of its debts and liabilities." MCL 117.14. Notably, the Legislature did not specifically address whether the new city would also assume a portion of the liabilities of any township that has the authority to levy taxes on property within the village. Rather, throughout MCL 117.14, the Legislature apparently distinguished between territory within a particular municipal boundary—a township, village, or city—and territory subject to assessment; the Legislature essentially placed villages on the same footing as any other type of municipality. The Legislature used the term "territory" in the same way in the analogous provisions in the Home Rule Village Act, which the Legislature adopted contemporaneously with the Home Rule City Act. A village may annex territory in much the same manner as a city. See MCL 78.2. And, when a village annexes territory from a township, the village acquires property and assumes liabilities from the township in the same way that a city does when it annexes territory from a township. See MCL 78.10. Because a village that annexes territory from a township assumes the liabilities of the township in "the same proportion which the assessed valuation of the taxable property in the territory annexed bears to the assessed valuation of the taxable property in the entire city, village or township from which such territory is taken," MCL 78.10, it stands to reason that the Legislature understood that the village's territory is distinct from the territory held by the township, even if the township has the authority to levy taxes on land within the village.

Notwithstanding the plain language of the statutory schemes, in an early case, our Supreme Court determined that a township does not lose territory as a result of the incorporation of a village. *Dearborn Twp*, 308 Mich at 296. The Court relied in significant part on the fact that the village's property could still be taxed by the township:

> The organization of the village of Dearborn prior to the date of issuing any of the bonds in suit did not result in detaching any of the township's territory, nor relieve the area within the village boundaries from its proportion of contingent liability on the special assessment bonds. In the sense which is controlling in the instant case, none of the township's territory was annexed by any municipality concerned in this litigation until the first incorporation of the city of Dearborn. Prior to that event the village area continued to be a part of the township and subject to assessment to meet township obligations. [*Id*.]

The Court noted that the city of Dearborn incorporated in 1927 using the territory constituting the village of Dearborn. *Id*. at 289. By holding that none of the township's territory was annexed by any municipality until the city of Dearborn incorporated in 1927, the Court impliedly held that the incorporation of a village as a city constitutes the taking of territory from the township that has the authority to tax the village—even when the boundaries have not changed. *Id*. at 296.

Unfortunately, our Supreme Court did not construe MCL 117.14 in its decision, and did not address the fact that the Legislature appeared to treat these municipalities as distinct territories in the statutory scheme; the Court simply assumed that a township's territory included any territory that it could tax, notwithstanding that the territory fell within a village's boundaries. In making the assumption, the Court relied on earlier

decisions that did not involve the same statutory provision. See *id*. at 296-297, citing *Bray v Stewart*, 239 Mich 340, 344; 214 NW 193 (1927) (discussing which electors may vote on a proposed annexation), and *Village of DeWitt v DeWitt Twp*, 248 Mich 483-484; 227 NW 787 (1929) (noting that the statute under consideration made no provision for the division of assets and liabilities as between a township and a village arising from the incorporation of a village within a township). This Court has similarly assumed that a village's territory is also the territory of the township within which it is located. See *City of Saugatuck v Saugatuck Twp*, 157 Mich App 52, 56-58; 403 NW2d 100 (1987); *Petersburg v Summerfield Twp*, 41 Mich App 639, 641; 200 NW2d 788 (1972).

As Chelsea correctly notes, a township cannot levy taxes on the taxable property in a village that it otherwise has the authority to tax in order to meet its obligations under a contract with a county for the acquisition, improvement, enlargement, or extension of a sewage disposal system. See MCL 123.742(1) and (2). Accordingly, if this Court were to interpret MCL 117.14 to require Chelsea to assume Sylvan's liabilities in a proportion that includes that part of the former village of Chelsea that was subject to taxation by Sylvan, it would in effect allow Sylvan to do indirectly under MCL 117.14 what it was directly prohibited from doing under MCL 123.742(2). Although we believe that the Legislature intended to treat the territory of a village as distinct from the township or townships in which the village lies for purposes of dividing assets and liabilities under MCL 117.14, we must construe that statute consistently with our Supreme Court's decision in *Dearborn Twp*. Even applying that decision, however, we agree that Sylvan cannot include the territory that was within Chelsea's village boundaries

when determining the proportion of the liability for the bonds, if any, which Chelsea assumed when it incorporated as a home rule city.

Because our Supreme Court impliedly determined that the Legislature used the term "territory" in MCL 117.14 as essentially synonymous with land subject to taxation, we must give effect to that interpretation. Accordingly, for purposes of calculating the division of personal property and liabilities between a village and a township when the village incorporates as a home rule city, we hold that the home rule city has effectively "taken," MCL 117.14, from the township that portion of the village's territory that was subject to taxation by the township. *Dearborn Twp*, 308 Mich at 296. For purposes of dividing liabilities, however, we conclude that the proportionate share of the liabilities must be determined separately for each liability and must be determined by calculating the assessed valuation of the property that could *lawfully* be taxed to pay the liability. That is, applying the reasoning from *Dearborn Twp*, we hold that—for purposes of calculating the proportion of a particular liability that a new city must assume when it incorporates—a township may not include the assessed valuation of taxable property from any village that was incorporated into the city if the township could not have lawfully levied a tax on that land to pay the liability at issue.

Applying the law to the facts of this case, Sylvan could not lawfully levy a tax on the real property in the former village of Chelsea to pay its liabilities under the bonds at issue. See MCL 123.742(2). Consequently, it could not include any part of the former village of Chelsea's territory in calculating the proportion of the liability on that debt, which Chelsea assumed when it incorporated.

III. CONCLUSION

The trial court erred when it applied the doctrines of res judicata and equitable estoppel to bar Sylvan's claim. Consequently, it erred when it granted Chelsea's motion for summary disposition on those grounds. It also erred when it denied Sylvan's motion for summary disposition of Chelsea's res judicata, equitable estoppel, and waiver defenses. The trial court did not, however, err when it denied Sylvan's motion for summary disposition of Chelsea's defenses premised on the period of limitations and laches. For these reasons, we reverse in part the trial court's decision, vacate its order granting summary disposition, and remand for further proceedings. On remand, the trial court shall enter an order dismissing Chelsea's res judicata, equitable estoppel, and waiver defenses and providing that the proportion of the liability at issue that Chelsea must assume, if any, must be calculated without including any portion of the assessed taxable value of the land formerly encompassed by the village of Chelsea.

Trial court decision reversed in part, order granting summary disposition vacated, and case remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. None of the parties having prevailed in full, we order that none may tax costs. MCR 7.219(A).

GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ., concurred.

PEOPLE v CARLTON

Docket No. 321630. Submitted October 14, 2015, at Lansing. Decided November 24, 2015, at 9:15 a.m.

Robert M. Carlton was charged in the Isabella County Trial Court, Criminal District Division, with possession of marijuana, MCL 333.7403(2)(d). Security personnel at Soaring Eagle Casino had viewed defendant, a registered patient under the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., smoking what appeared to be marijuana in his vehicle in the casino's parking lot and called the police. Defendant admitted to the responding police officers that he had been smoking marijuana, and the officers found marijuana in his vehicle. Defendant moved to dismiss the possession charge, arguing that he was immune from prosecution under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424. The court, Thomas Brookover, J., agreed and granted defendant's motion to dismiss. The court denied the prosecution's motion to amend the complaint to add a charge of improperly transporting medical marijuana, MCL 750.474(1). The prosecution appealed in the Isabella County Trial Court, Criminal Circuit Division, Paul H. Chamberlain, J. The circuit division affirmed the district division's denial of the prosecution's motion to amend the complaint and the dismissal of the possession charge. The prosecution filed a delayed application for leave to appeal in the Court of Appeals. The Court of Appeals entered an order granting the application with regard to the denial of the prosecution's motion to amend. The prosecution sought leave to appeal that order in the Michigan Supreme Court. In lieu of granting the application, the Supreme Court remanded the case to the Court of Appeals for consideration, as on leave granted, of the additional issue of whether the circuit division correctly affirmed the dismissal of the possession charge. 497 Mich 957 (2015).

The Court of Appeals *held*:

1. A qualifying patient who has been issued and possesses a registry identification card is generally immune from prosecution for possession of medical marijuana under § 4 of the act. The medical use of marijuana, however, is allowed only to the extent

the medical use is carried out in accordance with the act. Section 7(b) of the act, MCL 333.26427(b)(3)(B), specifically states that the act does not permit any person to smoke marijuana in any public place. Accordingly, any person who smokes marijuana in any public place is not entitled to the immunity provided under § 4. Similarly, although a patient may assert, under § 8 of the act, MCL 333.26428, the medical purpose for using marijuana as a defense to any prosecution involving marijuana, the § 8 defense is only available if the defendant was in compliance with § 7(b)(3)(B) of the act. Consequently, if defendant was smoking marijuana in a public place, he was not entitled to assert either the immunity provided under § 4 or the defense provided under § 8. The term "public place" must be given its plain and ordinary sense, as it would have been understood by the electors. A public place is generally understood to be any place that is open to or may be used by the members of the community, or that is otherwise not restricted to the private use of a defined group of persons. The relevant inquiry, therefore, is whether the place at issue is generally open to use by the public. A person's car is private property, and, in that sense, one might characterize the interior space of a car as a place that is private. However, a parking lot, which is open to the general public, is open for the specific purpose of allowing the members of the public to park their vehicles. The fact that a person in a vehicle in such a parking lot occupies a place that can be characterized as private in some limited sense does not alter the fact that the person is at the same time located in a public place. Accordingly, the exception to the protections of the Michigan Medical Marihuana Act stated under MCL 333.26427(b)(3)(B) applies to persons who smoke medical marijuana in a parking lot that is open to use by the general public, even when the smoking occurs inside a privately owned vehicle. This construction of the phrase "any public place" is consistent with the fact that MCL 333.26427(b)(3)(A) separately excludes smoking marijuana on any form of public transportation from the protections afforded under the act. If the electors understood the term "place," as used in the phrase "any public place," to include the interior of vehicles, there would have been no need to separately exclude smoking on any form of public transportation from the protections afforded by the act. In this case, the undisputed evidence showed that defendant was smoking marijuana in a car that was parked in a parking lot that was open to the general public. Consequently, under MCL 333.26427(b)(3)(B), defendant was not entitled to assert the immunity provided under § 4 of the act or the defense provided under § 8 of the act, and the circuit division erred when it determined otherwise; the circuit division should have reversed

the district division's decision to dismiss the possession charge and remanded the matter to the district division for further proceedings.

2. A trial court may allow the prosecution to amend a complaint to include a new charge if amendment would not cause unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. In this case, the district division did not state a rationale in support of its decision to deny the prosecution's motion for leave to amend. Given that remand was required because of the resolution of the first issue, rather than deciding this issue on the undeveloped record, it was appropriate to vacate the district division's opinion and order denying the prosecution's request for leave to amend. On remand, if the prosecution elects to again move to amend the complaint, the district division should consider the motion and articulate a sufficient basis for deciding it to permit meaningful appellate review of its decision.

Reversed and remanded for further proceedings.

SHAPIRO, J., concurring in part and dissenting in part, agreed that the district division erred by finding as a matter of law that defendant was not in a public place, but concluded that the majority also erred by finding as a matter of law that defendant was in a public place. The question whether a defendant was in a public place for purposes of the Michigan Medical Marihuana Act is one that should be determined by the finder of fact. The statutory language leaves open the possibility that in some circumstances a private vehicle can constitute a private place even though it is located in an area to which the public has access. MCL 333.26427(b)(3) provides that the medical marijuana protections do not permit a patient to smoke marijuana on any form of public transportation or in any public place. The nature of public transportation is that it is open to the public. It is, by definition, a public place. Accordingly, there would be no reason to separately list public transportation unless the drafters and electors believed that it was possible for vehicles to be private places. Defendant asserted a statutory defense to the crime. The factual validity of the defense was a question for the jury, not for judges. The judicial role was limited to determining whether defendant established a prima facie case for his defense, not whether it ultimately succeeded. Defendant presented prima facie evidence of his entitlement to immunity. Defendant, therefore, should have been permitted to introduce evidence that he was a lawful marijuana patient, and the trial court should have instructed the jury to determine whether he was in a public or private place. If it found the latter, defendant should have been

acquitted. Judge SHAPIRO concurred in the majority's decision to vacate the district division's ruling denying the prosecution's motion to amend the complaint.

STATUTES — MICHIGAN MEDICAL MARIHUANA ACT — SMOKING MARIJUANA IN A PUBLIC PLACE — PUBLIC PLACE DEFINED.

Under MCL 333.26427(b)(3)(B), a person who was smoking marijuana in a public place is not entitled to assert either the immunity provided under § 4 or the defense provided under § 8 of the Michigan Medical Marihuana Act, MCL 333.26424 and MCL 333.26428; the relevant inquiry is whether the place at issue was generally open to use by the public; a person smoking marijuana in a privately owned car in a parking lot that is open for use by the general public is in a public place and is not entitled to assert either the immunity provided under § 4 or the defense provided under § 8 of the Michigan Medical Marihuana Act (MCL 333.26421 *et seq*.).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Risa N. Hunt-Scully*, Prosecuting Attorney, for the people.

Alane & Chartier, PLC (by *Mary Chartier*), for defendant.

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

M. J. KELLY, P.J. In this dispute over the proper interpretation of the Michigan Medical Marihuana Act,[1] see MCL 333.26421 *et seq.*, the prosecution appeals by leave granted the circuit court's order affirming the district court's decision to dismiss the charges against defendant, Robert Michael Carlton, and denying the prosecution's request to amend the complaint. On appeal, we must determine whether the immunity and defenses provided under the Michigan Medical Marihuana Act apply to a person who smokes marijuana in

[1] Although the Legislature used the spelling "marihuana" in the act, this Court uses the more common spelling, "marijuana," in its opinions.

his or her own car while that car is parked in the parking lot of a private business that is open to the general public. We conclude that the protections do not apply under those circumstances. We also conclude that the circuit court erred when it affirmed the district court's denial of the prosecution's motion to amend the complaint. Accordingly, for the reasons more fully explained later in this opinion, we reverse and remand for further proceedings.

I. BASIC FACTS

The parties do not dispute the basic facts. In August 2013, Carlton went to Soaring Eagle Casino and parked his car in the casino's parking lot. At around 11:30 at night, security personnel, who were monitoring the casino's live-feed cameras, saw Carlton smoking what they believed to be marijuana inside his car. The security personnel called police officers and the officers went to the parking lot to investigate. Carlton admitted to the officers that he had been smoking marijuana and the officers saw a marijuana roach on the car's dashboard. The officers searched the car and found four bags of marijuana in a Styrofoam cooler that was on the floor board of the front passenger's seat. Carlton was the only person in the car at the time.

The prosecutor charged Carlton with misdemeanor possession of marijuana premised on the evidence that Carlton was smoking marijuana in a public place. MCL 333.7403(2)(d). Carlton's trial lawyer moved to dismiss the charge before the district court.

The district court held a hearing on the motion in October 2013. Carlton's lawyer stated that the evidence showed that Carlton was validly registered as a patient under the Michigan Medical Marihuana Act and was

smoking in his car. Because his car was not a place open to the public, she argued that Carlton was immune from prosecution under § 4 of the act. See MCL 333.26424(a). The prosecutor disagreed and argued that the fact that Carlton was in his car was irrelevant; the car was located in the casino's parking lot, which is a public place. The prosecutor noted that the act specifically provides that it does not permit registered patients to smoke marijuana in a public place. See MCL 333.26427(b)(3)(B). Accordingly, he maintained, Carlton was not entitled to immunity under the act. The prosecutor also requested leave to amend the complaint to add a charge of improperly transporting medical marijuana. See MCL 750.474(1).

The district court issued an opinion and order in November 2013. The district court determined that a person is not in a public place when he or she is in his or her car, even if the car is parked in a parking lot that is open to the public. The district court granted Carlton's motion for that reason. The district court denied the prosecutor's request for leave to amend the complaint.

The prosecution appealed the district court's decision in the circuit court. The prosecution argued that the district court erred when it determined that a car is not a public place even when parked in a public parking lot. The prosecution also argued that the district court abused its discretion when it denied leave to amend the complaint.

The circuit court held a hearing on the appeal in February 2014 and issued its opinion and order in March 2014. The circuit court agreed with the district court's ruling that a privately owned automobile is not a public place within the meaning of MCL 333.26427(b)(3)(B). For that reason, the circuit court

affirmed the district court's decision to dismiss the charge and deny leave to amend.

The prosecution then appealed in this Court and this Court granted leave in September 2014, but only to consider whether the circuit court erred when it affirmed the district court's denial of the prosecution's motion for leave to amend.[2] The prosecution appealed this Court's order to our Supreme Court in October 2014. The prosecution asked the Supreme Court to remand the matter to this Court for consideration of both issues. In February 2015, the Supreme Court granted the prosecution's request for a remand to this Court for consideration of both issues. See *People v Carlton*, 497 Mich 957 (2015).

II. MOTION TO DISMISS

A. STANDARD OF REVIEW

The prosecution first argues that the lower court erred when it interpreted the phrase "any public place," as used in MCL 333.26427(b)(3)(B), to exclude privately owned cars that are parked in parking lots that are open to the general public. This Court reviews de novo whether the trial court properly interpreted and applied the Michigan Medical Marihuana Act. *People v Anderson (On Remand)*, 298 Mich App 10, 14-15; 825 NW2d 641 (2012).

B. THE PUBLIC-PLACE EXCEPTION

A "qualifying patient who has been issued and possesses a registry identification card" is generally immune from prosecution for possession of medical

[2] See *People v Carlton*, unpublished order of the Court of Appeals, entered September 18, 2014 (Docket No. 321630).

marijuana under § 4 of the act. MCL 333.26424(a). For purposes of this appeal, we assume that Carlton is a qualifying patient and had in his possession a valid registry identification card when he smoked the marijuana underlying the charge at issue. See MCL 333.26423(i) and (j). Accordingly, Carlton could qualify for immunity from prosecution under § 4. Carlton might also be able to assert "the medical purpose for using" marijuana as a defense, under § 8 of the act, to the prosecution for possessing marijuana. See MCL 333.26428(a).

Although the act provides immunity under § 4 and a defense under § 8, both the immunity and defense provisions are subject to limitation. When the electors approved the Michigan Medical Marihuana Act, they provided that the "medical use of marihuana is allowed" only to the extent that the medical use was "carried out in accordance" with the act. MCL 333.26427(a). They also specifically stated that the act does not "permit any person" to smoke marijuana "in any public place." MCL 333.26427(b)(3)(B). Because the act cannot be interpreted to "permit" a person to smoke marijuana in any public place and the medical use of marijuana is allowed —that is, permitted—only to the extent that it is carried out in accordance with the act, it necessarily follows that any person who smokes marijuana in "any public place" is not entitled to the immunity provided under § 4. Similarly, the electors stated that the defense described under § 8 applied to every prosecution involving marijuana "[e]xcept as provided" under MCL 333.26427(b). MCL 333.26428(a). These provisions in effect create an exception to the protections afforded under § 4 and § 8 of the act for situations in which the patient engages in the conduct listed under MCL 333.26427(b). Consequently, if Carlton was smoking marijuana in a public place, he would not—as a matter

of law—be entitled to assert either the immunity provided under § 4, or the defense provided under § 8, as a challenge to his prosecution for possession of marijuana in violation of MCL 333.7403(2)(d).

It is undisputed that Carlton was smoking marijuana in plain sight while seated in his own car and that his car was parked in a parking lot that was open to the public. On appeal, the parties ask this Court to interpret the phrase "public place," as used MCL 333.26427(b)(3)(B), by referring to cases involving other crimes, such as gross indecency, see *People v Lino*, 447 Mich 567; 527 NW2d 434 (1994), or disorderly conduct, see *People v Favreau*, 255 Mich App 32; 661 NW2d 584 (2003), which involve acts done in public or in a public place, or by examining the privacy expectations informing search and seizure cases, see *United States v Jones*, 565 US ___; 132 S Ct 945; 181 L Ed 2d 911 (2012). We do not agree that the phrase "public place" has acquired a technical or peculiar meaning in the law. See *People v Bylsma*, 493 Mich 17, 31; 825 NW2d 543 (2012). Rather, this phrase must be given its plain and ordinary sense, as it would have been understood by the electors. See *People v Mazur*, 497 Mich 302, 308; 872 NW2d 201 (2015).

In adopting the Michigan Medical Marihuana Act, the electors balanced the needs of persons suffering from medical conditions, who might benefit from the medical use of marijuana, against the public's continued interest in restraining the harmful effects of recreational marijuana use. See MCL 333.26422; see also *People v Redden*, 290 Mich App 65, 93; 799 NW2d 184 (2010) (O'CONNELL, P.J., concurring) ("[T]he [Michigan Medical Marihuana Act] reflects the practical determination of the people of Michigan that, while marijuana is classified as a harmful substance and its use and

manufacture should generally be prohibited, law enforcement resources should not be used to arrest and prosecute those with serious medical conditions who use marijuana for its palliative effects."). The electors chose to exclude patients who smoke medical marijuana in any public place from the protections of the act as part of the balancing of these interests, and, presumably, to assure the public and voters that the smoking of marijuana—even for medical purposes—would not intrude into the public sphere. MCL 333.26427(b)(3)(B). A "public place" is generally understood to be any place that is open to or may be used by the members of the community, or that is otherwise not restricted to the private use of a defined group of persons. See, e.g., *The Oxford English Dictionary* (2d ed, 1991) (defining the adjective "public" to mean "open to, may be used by, or may or must be shared by, all members of the community; not restricted to the private use of any person or persons; generally accessible"). As Michigan courts have recognized, in common usage, when persons refer to a public place, the reference typically applies to a location on real property or a building. See, e.g., *People ex rel Allegan Prosecuting Attorney v Harding*, 343 Mich 41, 47; 72 NW2d 33 (1955) (stating that, as applied to an "inclosure, room, or building," a public place is one where, by general invitation, members of the public attend for reasons of business, entertainment, instruction, or the like, and are welcome as long as they conform to what is customarily done there) (citation and quotation marks omitted); *People v DeVine*, 271 Mich 635, 640; 261 NW 101 (1935) (holding that an act of indecent exposure occurring on the front porch of a private dwelling that was frequented by neighbor children was done in a public place); *Fuller v Hessler*, 226 Mich 311, 313; 197 NW 524 (1924) (stating that a privately owned vacant lot is not a

public place within the meaning of an ordinance referring to streets, alleys, or public places); *Westland v Okopski*, 208 Mich App 66, 75-77; 527 NW2d 780 (1994) (holding that the Knights of Columbus Hall was a public place); *People v Adams*, 150 Mich App 181, 184; 388 NW2d 254 (1986) (recognizing that the front steps leading into an apartment are a public place). The parking lot of a business that is open for the general public's use—even if it is intended for the use of the business's customers alone—is a public place in this ordinary sense. See *Harding*, 343 Mich at 46-47 (holding that the building, which the defendants characterized as a hotel, was a public place because it was open for use by the general public). The question on appeal is whether a person ceases to be in the public place (a parking lot that is open for use by the general public) while he or she is in a privately owned vehicle. For purposes of MCL 333.26427(b)(3)(B), we conclude that a person does not cease to be in a public place when the person is in a car in a parking lot open for use by the general public.

It is important to note that, even though smoking medical marijuana in a public place might or might not be done "in public," i.e., in front of others, the electors did not except the smoking of medical marijuana in public from the protections afforded under the act; rather, they provided that a person who smokes medical marijuana in "any public place" would not be entitled to the immunity provided under § 4 or the defense provided under § 8.[3] MCL 333.26427(b)(3)(B).

[3] We find it noteworthy that the electors specifically excepted smoking medical marijuana—as opposed to other forms of marijuana delivery—from the protections afforded under the act when done in "any public place." MCL 333.26427(b)(3)(B). By allowing other forms of medical marijuana use in public places, but removing the protections for smoking marijuana in public places, the electors expressed a clear policy

Because the electors chose to define the exception by reference to the character of the place rather than by the specifics attending the act, whether members of the general public might stumble upon the patient smoking the medical marijuana, or otherwise detect the patient's smoking, is not relevant to determining whether the exception applies. For similar reasons, the fact that a public place was intended to be used in private does not alter the public character of that place. A person who goes into a restroom that is generally open to the public, enters a stall, and closes the door, does not thereby transform the stall from a public place to a private place. Stated another way, even if a patient successfully conceals his or her smoking of medical marijuana from detection, the patient will not be entitled to the protections of the act if he or she smoked the marijuana in a public place. The relevant inquiry is whether the place at issue is generally open to use by the public without reference to a patient's efforts or ability to conceal his or her smoking of marijuana.[4]

A person's car is private property, and, in that sense, one might characterize the interior space of a car as a "place" that is private, or at least privately owned. However, a parking lot, which is open to the general public, is open for the specific purpose of allowing the members of the public to park their vehicles.[5] Nevertheless, we do not agree that permitting the general

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choice: smoking marijuana in a public place should continue to be criminally prosecuted, even when done for a medical purpose.

[4] Conversely, it follows that, if a patient smokes his or her medical marijuana in a private place, such as his or her home, the fact that his or her smoking might be visible to members of the public through a window would not transform his or her home into a public place.

[5] Because it is not now before us, we do not consider whether the lease or license of a parking spot or space, such as a space for a recreational

public to use the lot to park private vehicles transforms the public character of the lot such that a patient who smokes marijuana while seated in a vehicle parked in the parking lot ceases to be in the public lot. The lot remains a public place and the fact that a person in a vehicle occupies a place that can be characterized as private in some limited sense does not alter the fact that the person is at the same time located in a public place. See *Lansing v Johnson*, 12 Mich App 139, 143-144; 162 NW2d 667 (1968) (characterizing the caselaw discussing unreasonable searches and seizures as "inapposite" in a case involving whether a defendant who was passed out in his car, which was parked on a public street, was disorderly in a public place: "But the point is that this defendant, though in his car, was in a 'public place' and the authorities are ample in support of that proposition."). And, as with the bathroom stall, whether the members of the general public are able to see the person smoking medical marijuana does not alter the public character of the place. Therefore, we hold that the exception stated under MCL 333.26427(b)(3)(B) applies to persons who smoke medical marijuana in a parking lot that is open to use by the general public, even when smoking inside a privately owned vehicle, and even if the person's smoking is not directly detectable by the members of the general public who might be using the lot.

This construction of the phrase "any public place" is also consistent with the electors' decision to separately exclude smoking marijuana on "any form of public transportation" from the protections afforded under the act. MCL 333.26427(b)(3)(A). If the electors understood the term "place," as used in the phrase "any

vehicle at a campsite, might transform the public character of the spot or space for the term of the lease or license.

public place," to include the interior of vehicles, there would have been no need to separately exclude smoking on "any form of public transportation" from the protections afforded by the act, because smoking marijuana on public transportation would necessarily constitute smoking marijuana in a public place. See *People v Miller*, 498 Mich 13, 25; 869 NW2d 204 (2015) (stating that courts must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory).

Here, the undisputed evidence showed that Carlton was smoking marijuana in a car that was parked in a parking lot that was open to the general public. Consequently, under MCL 333.26427(b)(3)(B), Carlton was not entitled to assert the immunity provided under § 4 of the act or the defense provided under § 8 of the act, and the circuit court erred when it determined otherwise; the circuit court should have reversed the district court's decision to dismiss the possession charge and remanded the matter to the district court for further proceedings.

III. LEAVE TO AMEND

The prosecution next argues that the circuit court erred when it determined that the district court did not abuse its discretion when it denied leave to amend the complaint to include a charge that Carlton improperly transported medical marijuana in violation of MCL 750.474(1). A trial court has the discretion to "amend an information at any time before, during, or after trial." *People v Goecke*, 457 Mich 442, 459; 579 NW2d 868 (1998), citing MCL 767.76; see also *People v Hutchinson*, 35 Mich App 128, 132-134; 192 NW2d 395 (1971) (discussing the nature of a complaint and treat-

ing a motion to amend the complaint in the same manner as a motion to amend the information). The trial court may allow the prosecution to amend the complaint to include a new charge if amendment would not cause "unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993); see also MCR 6.112(H).

In this case, the district court did not state a rationale in support of its decision to deny the prosecutor's motion for leave to amend. Therefore, this Court—as was true of the circuit court before us—is left to speculate about the reasoning that led the district court to conclude that the request for amendment would unacceptably prejudice Carlton. The fact that the new charge might carry a more severe penalty is not a sufficient basis to conclude that Carlton would be unacceptably prejudiced. See *Hunt*, 442 Mich at 365. Similarly, the fact that Carlton may not have immunity or a defense under the Michigan Medical Marihuana Act is not a basis for concluding that he would be prejudiced; the relevant inquiry is whether he would have a fair opportunity to meet the charges against him. *Id*. at 364. At this stage in the prosecution, it is also difficult to see how Carlton might be unduly prejudiced by granting leave to amend. See *People v Munn*, 25 Mich App 165, 167; 181 NW2d 28 (1970) (stating that, at such an early stage in the process, the prosecutor could permissibly have dismissed the complaint and warrant and then immediately issued a new complaint). Moreover, this does not appear to be a case involving prosecutorial vindictiveness. See *People v Jones*, 252 Mich App 1, 7-8; 650 NW2d 717 (2002). Nevertheless, given our resolution of the first issue, rather than deciding this issue on

the undeveloped record, we elect to exercise our discretion to grant further or different relief. MCR 7.216(A)(7).

Because we have already determined that it is necessary to remand this matter to the district court for further proceedings, we vacate the district court's opinion and order denying the prosecutor's request for leave to amend. On remand, if the prosecutor elects to again move to amend the complaint, the trial court should consider the motion and articulate a sufficient basis to permit meaningful appellate review of its decision.

IV. CONCLUSION

The circuit court erred when it affirmed the district court's dismissal of the possession of marijuana charge against Carlton on the ground that Carlton had immunity under § 4 or a defense under § 8 of the Michigan Medical Marihuana Act. Because Carlton was smoking marijuana in a "public place," MCL 333.26427(b)(3)(B), he could not assert the immunity or defense provided under that act. Consequently, the circuit court should have reversed the district court's decision and ordered further proceedings.

For the reasons stated, we reverse the circuit court's opinion and order affirming the district court's opinion and order. We vacate both opinions and orders in full and remand this matter to the district court for further proceedings consistent with this opinion.

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

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

SHAPIRO, J. (*concurring in part and dissenting in part*). I agree with my colleagues that the district court erred by finding as a matter of law that defendant *was not* in a public place. However, I believe my colleagues similarly err by finding as a matter of law that defendant *was* in a public place. In my view, the question whether defendant was in a public place is one that must ultimately be determined by the finder of fact.

My conclusion is grounded in the statutory language. MCL 333.26427(b)(3) provides that medical marijuana protections do not permit a patient to:

> (3) Smoke marihuana:
>
> (A) on any form of *public transportation*; or
>
> (B) in any *public place*. [Emphasis added.]

The nature of "public transportation" is that it is open to the public. It is, by definition, a "public place." Accordingly, there would be no reason to separately list "public transportation" unless the drafters and electors believed that it was possible for vehicles to be private places.

For this reason, I think the majority is too quick to ignore the commonsense privacy component of a personal vehicle. The majority examines only whether the vehicle itself is in a place defined as public. But the statutory language leaves open the possibility that in some circumstances a private vehicle can constitute a private place even though it is located in an area to which the public has access. While this is not always the case, I do not think that the drafters and electors intended to wholly foreclose it as a matter of law.

Defendant has asserted a statutory defense to the crime. The factual validity of such defenses is a ques-

tion for the jury, not for judges. Our role must be limited to determining whether defendant can establish a prima facie case for the defense, not whether it ultimately succeeds. In my view, defendant has presented prima facie evidence. Although the parking lot was available to the public, the record also shows that defendant was in his closed and private vehicle, that he was not on public property, that there were no other people in the relevant area of the parking lot, and that he was only observed by private security officers who were monitoring the parking lot from some distance by means of a closed circuit camera. Under these circumstances, I see no reason why we are better suited to deciding the issue than a jury.

Accordingly, although we are reinstating the charge, defendant should be permitted to introduce evidence that he is a lawful marijuana patient, and the trial court should instruct the jury to determine whether he was in a public or private place. If they find the latter, defendant should be acquitted.

Defendant also claims that the amendment of the charges against him constituted prosecutorial vindictiveness. I am less sanguine than the majority is with regard to whether the amendment of the information was intended to punish defendant for raising grounds for dismissal. The timing of the additional, and more serious, charge suggests that it was added to punish defendant for pursuing dismissal of the initial charges, which is a violation of due process. See *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612 (1996) (stating that punishing a person for doing "what the law plainly allows him to do is a due process violation of the most basic sort") (citation and quotation marks omitted); accord *People v Jones*, 252 Mich App 1, 7; 650 NW2d

717 (2002). However, I must agree with the majority that, without a further record, we cannot properly review the issue.

Accordingly, I concur in their decision to vacate the lower court ruling without determining how it should thereafter rule.

PEOPLE v MASROOR

Docket Nos. 322280, 322281, and 322282. Submitted October 1, 2015, at Detroit. Decided November 24, 2015, at 9:25 a.m. Convening of special panel declined 313 Mich App 801. Leave to appeal granted 499 Mich 934.

Mohammad Masroor was convicted by jury in the Wayne Circuit Court of 10 counts of first-degree criminal sexual conduct and five counts of second-degree criminal sexual conduct, for sexually assaulting his three nieces over a period of several years, beginning in 2000. The court, Michael M. Hathaway, J., sentenced defendant to 35 to 50 years of imprisonment for each of his 10 convictions of first-degree criminal sexual conduct, and to 10 to 15 years of imprisonment for each of his five convictions of second-degree sexual conduct. Defendant lived in the same home with his nieces and was involved in their homeschooling; he also instructed the girls on the Koran. After moving his family to Canada, defendant became an imam for a mosque in Toronto. Defendant's nieces reported the abuse in 2011. Defendant's convictions resulted from three separate cases, each charging defendant with a number of the total of 15 offenses charged. Defendant appealed his convictions in all three cases. The cases were consolidated for hearing by the Court of Appeals. *People v Masroor*, unpublished order of the Court of Appeals, issued July 2, 2014 (Docket Nos. 322280, 322281, and 322282).

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by admitting evidence that defendant had also sexually assaulted his own children. Although the trial court erred by admitting the evidence without conducting a balancing test under MRE 403, there was no error requiring reversal. Even though MCL 768.27a permits the admission of some evidence otherwise excluded by MRE 404(b), the evidence at issue must still satisfy the balancing test between probative value and unfair prejudice as required by MRE 403. In this case, the evidence that defendant similarly assaulted his own children was highly probative of defendant's propensity to sexually abuse children, and his plan, scheme, or system of committing such acts.

Defendant did not produce any evidence indicating that use of the other-acts evidence would have created a danger of unfair prejudice sufficient to outweigh the evidence's probative value.

2. Defendant's counsel was not ineffective. Although defense counsel failed to offer any focused or cogent argument against the admission of the other-acts evidence, and the failure to do so may have fallen below objectively reasonable professional standards, the other-acts evidence would still have been admitted. In addition, defense counsel was not ineffective for having engaged in cross-examinations of the witnesses that revealed evidence more damaging than had been elicited on direct examinations of the witnesses. Defense counsel was tasked with discrediting the extraordinarily damaging testimonies of the witnesses. Even though defense counsel's cross-examinations revealed a few additional sexual acts or threats not included in the witnesses' direct examinations, it was highly unlikely that defense counsel's strategic decision to impeach the witnesses would have had any effect on the jury's verdicts.

3. The Court of Appeals' decision in *People v Steanhouse*, 313 Mich App 1 (2015), requires that the instant case be remanded for evaluation of defendant's sentences for reasonableness, which, according to *Steanhouse*, may be determined by referring to Michigan's former standard of review, "the principle of proportionality." The principle of proportionality requires that sentences be proportionate to the seriousness of the circumstances surrounding the offense and the offender. The panel emphasized its disagreement with *Steanhouse*'s outcome, which requires pre-*Lockridge* cases to be remanded for resentencing according to the procedure in *United States v Crosby*, 397 F3d 103 (CA 2, 2005) and stated that were it not required to follow *Steanhouse*, it would have affirmed defendant's sentences. The panel declared a conflict with *Steanhouse* under MCR 7.215(J)(2).

4. Defendant failed to show that his sentences were cruel or unusual. That is, defendant failed to compare his sentences with the penalties imposed on other offenders in Michigan for other crimes or with the penalties imposed for the same crime in other states. Because he failed to introduce evidence that his sentences were unreasonable, defendant's appeal for less-severe sentences was unavailing.

Convictions affirmed and remanded for sentencing purposes.

SAWYER, J., concurred in the result only.

1. EVIDENCE — SEXUAL CONDUCT INVOLVING MINORS — STATUTORY AUTHORITY TO ADMIT OTHER-ACTS EVIDENCE — PROBATIVE VALUE VERSUS UNFAIR PREJUDICE.

Even when other-acts evidence is admissible under MCL 768.27a, a trial court must conduct the balancing test found in MRE 403 to determine whether the danger of unfair prejudice outweighs the probative value of the evidence.

2. SENTENCING — GUIDELINES — DEPARTURE — REVIEW FOR REASONABLENESS.

A sentence departure under the advisory sentencing guidelines is reviewed for reasonableness; the principle of proportionality applies to determining whether a sentence is reasonable.

3. SENTENCING — CONSTITUTIONAL CHALLENGES — CRUEL OR UNUSUAL PUNISHMENT — FACTORS TO CONSIDER.

Showing that a sentence is cruel or unusual requires a defendant to compare his or her sentence with penalties imposed on other offenders in Michigan and with penalties imposed for the same crime in other states.

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

Michael J. McCarthy, PC (by *Michael J. McCarthy*), for defendant.

Before: GLEICHER, P.J., and SAWYER and MURPHY, JJ.

PER CURIAM . A jury convicted defendant of multiple counts of criminal sexual conduct in these three consolidated cases. The complainants were defendant's young nieces. Defendant lived in their Detroit home for several years when the girls were under age 13. They revealed the abuse many years later.

Defendant challenges the admission of other-acts evidence, asserts that his counsel performed ineffec-

tively, and claims that the trial court improperly imposed a substantial departure sentence for each conviction of first-degree criminal sexual conduct. Although the trial court should have evaluated the other-acts evidence under MRE 403, this error was harmless as the evidence qualified as admissible. Nor do we discern a ground for reversal regarding counsel's performance.

Defendant's departure sentences present a more nuanced issue. Because we are bound by this Court's recent decision in *People v Steanhouse*, 313 Mich App 1; 880 NW2d 297 (2015), pursuant to MCR 7.215(J)(1), we must remand this matter to the trial court for reconsideration of defendant's sentences at a hearing modeled on the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005). Were we not obligated to follow *Steanhouse*, we would affirm defendant's sentences by applying the federal "reasonableness" standard described in *Gall v United States*, 552 US 38, 46; 128 S Ct 586; 169 L Ed 2d 445 (2007), which was specifically rejected by our colleagues in *Steanhouse*. Pursuant to MCR 7.215(J)(2), we declare a conflict with *Steanhouse* so that the procedure established by that panel may be more carefully considered by a larger number of the judges of this Court. In the meantime, we affirm defendant's convictions and remand for resentencing pursuant to *Steanhouse*.

I

Defendant emigrated from Bangladesh to Detroit in 2000 and moved into his brother's family home. The complainants, defendant's nieces, were then aged 12, 11 and 9. The eldest, RSS, testified that defendant began touching her breasts and vagina within days of his arrival, and penetrated her with his penis a week

later. The sexual abuse continued even after defendant's wife and five children arrived and he had moved with them to a nearby home in Hamtramck.

Toward the end of 2001, defendant's second-eldest niece, MK, questioned RSS in a manner suggesting that defendant had also abused MK. RSS warned defendant "to stay away from my sister." Defendant "disagreed he was doing anything" with MK. Later, RSS and defendant forged an agreement that she would have a "relationship" with defendant if he left MK alone. Defendant ensured RSS's silence by threatening that "in our culture if a girl, if she's not a virgin . . . then the parents, . . . this is how they can . . . get her killed."

MK recalled that defendant persuaded her parents that she and her younger sister should be homeschooled when they reached puberty. Defendant offered to tutor the girls, as he was well-versed in the Koran. He began sexually abusing MK when the homeschooling commenced. The abuse continued even after defendant and his family moved to their new residence. MK explained that she cooperated with defendant because he manipulated her by invoking the Koran and insisting that "[w]e're the ones . . . making him do this. And it's not his fault, so it's our fault." Because defendant had studied theology, MK believed him.

MAB was nine years old when defendant first put her hand on his penis. He penetrated MAB with his finger on numerous occasions thereafter. Defendant guaranteed MAB's silence by forcing her to take an "oath" that she would "let him do whatever he want[s] and I cannot tell him no" in exchange for defendant's agreement to fix a computer that MAB incorrectly believed she had broken. At the end of 2002, defendant violated her with his penis.

In 2008, defendant and his family moved to Canada, where defendant became the imam at a Toronto mosque. Defendant's crimes came to light in 2011, when one of his daughters revealed to her sister and her mother that defendant had engaged in sexual intercourse with her. Shortly thereafter, defendant's nieces reported defendant's sexual acts to the police. The Wayne County prosecutor charged defendant with multiple counts of criminal sexual conduct involving the three complainants, and the trial court consolidated the cases for trial. During the trial, the prosecutor presented the testimony of defendant's five children who related that defendant had perpetrated sexual assaults against them similar to those described by defendant's nieces.

The jury convicted defendant of 10 counts of first-degree criminal sexual conduct—4 counts under MCL 750.520b(1)(a) (victim under 13 years of age) and 6 counts based on multiple variables, including MCL 750.520b(1)(b)(*ii*) (victim at least 13 but less than 16 years of age and a relative). The jury also convicted defendant of 5 counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age). The trial court sentenced defendant to 35 to 50 years' imprisonment for each of his 10 first-degree criminal sexual conduct convictions and 10 to 15 years' imprisonment for each of his 5 second-degree criminal sexual conduct convictions. We consolidated defendant's three appeals. *People v Masroor*, unpublished order of the Court of Appeals, entered July 2, 2014 (Docket Nos. 322280, 322281, and 322282).

II

Defendant first contends that the trial court erred by admitting the other-acts evidence provided by his

children. During a pretrial motion hearing, the trial court indicated that it was inclined to allow the evidence based on "a statute . . . that kind of trumps or transcends" MRE 404(b). The court expressed that when applying "the statute" to other-acts evidence, it was "not even required to indulge in the balancing of prejudicial versus probative. It's, it's just in." Defense counsel objected to the admission of this evidence by asserting, "I think there should be some sort of balancing test." The trial court ruled the evidence admissible without engaging in a balancing analysis. On the fourth day of the trial, the prosecutor directed the trial court's attention to *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012), which, as we will discuss in greater detail, most assuredly requires the application of a "balancing test" for evidence offered under MCL 768.27a, the "statute" referenced by the court.

The trial court repeatedly characterized the testimony at issue as "404(b)" evidence. MRE 404(b)(1) provides:

> 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, preparation, 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 prosecutor actually premised his request to admit the other-acts evidence on MCL 768.27a rather than MRE 404(b). MCL 768.27a states:

> (1) Notwithstanding section 27 [MCL 768.27, the statutory analog of MRE 404(b)], 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.
>
> (b) "Minor" means an individual less than 18 years of age.

In *Watkins*, 491 Mich at 468, our Supreme Court concluded that MRE 404(b) and MCL 768.27a irreconcilably conflict. While "MRE 404(b) requires the exclusion of other-acts evidence if its only relevance is to show the defendant's character or propensity to commit the charged offense," *Watkins*, 491 Mich at 468, MCL 768.27a allows "the admission of evidence that defendant committed another listed offense 'for its bearing on any matter to which it is relevant,' " including the defendant's character and propensity to commit the charged offense, *Watkins*, 491 Mich at 469-470. Thus, "MCL 768.27a permits the admission of evidence that MRE 404(b) precludes." *Watkins*, 491 Mich at 470.

> Parsed out, MCL 768.27a can be rephrased as follows: In spite of the statute [MCL 768.27, which codified what became the substance of MRE 404(b)] 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. Thus, the statute estab-

> lishes an exception to MRE 404(b) in cases involving a charge of sexual misconduct against a minor. [*Watkins*, 491 Mich at 471.]

The *Watkins* Court further held "that MCL 768.27a is a valid enactment of substantive law to which MRE 404(b) must yield." *Id*. at 475.

Nonetheless, evidence admissible under MCL 768.27a may "be excluded under MRE 403 if 'its probative value is substantially outweighed by the danger of unfair prejudice . . . .' " *Watkins*, 491 Mich at 481, quoting MRE 403. However, "when applying MRE 403 to evidence admissible under MCL 768.27a, courts 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.

> This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial. There are several considerations that may lead a court to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive. [*Watkins*, 491 Mich at 487-488 (citations omitted).]

The Supreme Court instructed trial courts to engage in the MRE 403 balancing analysis with respect "to each separate piece of evidence offered under MCL 768.27a."

Watkins, 491 Mich at 489. If a trial court determines that MRE 403 does not bar the introduction of other-acts evidence admissible under MCL 768.27a, a limiting instruction may be given to ensure that the jury properly uses the evidence. *Watkins*, 491 Mich at 490.

Despite the trial court's lack of familiarity with *Watkins* and its failure to perform the requisite balancing, we discern no error requiring reversal. Defense counsel sought application of a balancing test, but never articulated any manner in which an unfairly prejudicial aspect of the other-acts evidence surpassed its probity. And on appeal, counsel has failed to shed any additional light on how or why a danger of unfair prejudice should have precluded the introduction of the indisputably probative evidence. In other words, defendant has put nothing on the "prejudice" side of the scale that might outweigh the evidence's probative force. Defendant now insists that the evidence portrayed him as a "monster preying on children," but this argument falls far short of addressing the relevancy considerations set forth in *Watkins*. The evidence was highly probative of defendant's propensity to sexually abuse children and his plan, scheme, or system for committing such acts, MRE 404(b)(1). The trial court did not abuse its discretion by admitting it.

III

Defendant next contends that his attorney furnished constitutionally ineffective assistance by failing to offer any cogent argument against the admission of the other-acts evidence, and by conducting cross-examinations that revealed more damaging evidence than had been elicited on direct exam. Because defendant did not move for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on

the existing record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). We review "the ultimate constitutional question arising from an ineffective assistance of counsel claim de novo." *Id*.

In evaluating counsel's performance we must begin by assuming that counsel served effectively. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id*. The defendant must overcome the presumption that counsel's decisions were sound trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Counsel enjoys great latitude in matters of trial strategy and tactics. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). That a defense strategy ultimately fails does not establish ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Trial counsel's failure to offer a more salient balancing argument pursuant to *Watkins* may have fallen below objectively reasonable professional standards, but this omission did not affect the outcome of defendant's trial. Even had counsel advanced a proper argument, we are confident that the other-acts evidence would have been admitted. Appellate counsel has presented no reason to think the evidence was *unfairly* prejudicial for the possible reasons listed in *Watkins*, or subject to exclusion on any other ground. Accordingly, no reasonable probability exists that a timely citation to *Watkins* or more focused legal reasoning would have yielded a different verdict.

Defendant's remaining ineffective assistance arguments arise from counsel's cross-examination of the complainants. During the three cross-examinations, counsel attempted to undermine the witnesses' credibility by confronting them with excerpts of their preliminary examination testimony and perceived inconsistencies in their courtroom statements. While questioning the three women, counsel referenced several sexual acts committed and threats made by defendant that had not been exposed during the complainants' direct examination.

We disagree that the tactical choices made by defense counsel during cross-examination constitute performance falling below an objective standard of reasonableness. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Given the complainants' extraordinarily damaging direct testimonies, counsel was faced with a need to discredit these witnesses through impeachment. Counsel used the tool he had available—testimonial inconsistency. His vigorous cross-examinations reflected an informed trial strategy intended to provide the jury with some basis for disbelieving the complainants, and this approach fell within the wide range of professionally competent assistance. Furthermore, the few additional sexual acts or threats mentioned during the cross-examinations were highly unlikely to have played any role in the jury's verdict. Accordingly, we conclude that defendant has failed to establish either deficient performance or prejudice.

IV

We turn to defendant's sentences. Under the now advisory sentencing guidelines, the probation department calculated defendant's minimum sentence range as 108 to 180 months. The trial court recalculated this range by adding and subtracting points under the prior record and offense variables, but the range remained the same. Reasoning that this case "crie[d] out" for a departure sentence, the court adopted the prosecutor's suggestion that defendant serve a term of 35 to 50 years' imprisonment for each of the 10 counts of first-degree criminal sexual conduct. Defendant's minimum sentences exceed the maximum minimum sentences calculated under the guidelines by 20 years, or 133%.

Trial counsel objected to the scoring of defendant's guidelines pursuant to *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013), in which the United States Supreme Court held that any fact that increases a defendant's statutory mandatory minimum sentence is an "element" of the crime that must be submitted to a jury. Appellate counsel raises the same argument. Recently, our Supreme Court relied on *Alleyne* in holding that Michigan's sentencing scheme, which permits judicial fact-finding in scoring the offense and prior record variables, violates the Sixth Amendment. *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015). The Michigan Supreme Court remedied that defect by rendering Michigan's sentencing guidelines advisory, just as the United States Supreme Court had done with regard to the federal sentencing guidelines in *United States v Booker*, 543 US 220, 227, 233; 125 S Ct 738; 160 L Ed 2d 621 (2005). *Lockridge*, 498 Mich at 365.

Although Michigan's sentencing guidelines are "constitutionally deficient," our Supreme Court decreed in *Lockridge* that trial courts must still score the offense and prior record variables and assess the "highest number of points possible" for each one. *Id*. at 392 n 28. A sentencing court is obligated to "consult the applicable guidelines range and take it into account when imposing a sentence." *Id*. at 392. Directly pertinent to this case, the Supreme Court further held that when a court has calculated a mandatory minimum sentence range based on facts not found by a jury, "the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Id*., citing *Booker*, 543 US at 261.

Neither trial nor appellate counsel had the benefit of *Lockridge* when they formulated their objections to defendant's departure sentences. On appeal, counsel contends that the trial court lacked substantial and compelling reasons for the departure sentences, and that the sentences qualify as disproportionate under the Eighth Amendment. We construe these legal challenges as preserved objections to the reasonableness of defendant's sentences. In *Lockridge*, the Supreme Court did not elaborate on how the reasonableness standard is to be applied, despite that the sentence in that case also represented an upward departure from the guidelines.

The Supreme Court described the departure sentence imposed on Mr. Lockridge as a "minimal (10-month) departure above the top of the guidelines minimum sentence range." *Lockridge*, 498 Mich at 365 n 2. In imposing this sentence, the trial court offered

several "substantial and compelling reasons justifying the departure," including that

> defendant had violated probation orders that forbade him from being where he was when he killed his wife, that he killed his wife in front of their three children as they struggled to stop him from doing so, and that he left the children at home with their mother dead on the floor without concern for their physical or emotional well-being, which were not factors already accounted for in scoring the guidelines. [*Id*. at 366.]

The Supreme Court affirmed the defendant's sentence without further analysis, implicitly finding it reasonable but offering no insight as to the proper execution of the evaluative task.[1]

Although defendants receiving departure sentences cannot demonstrate prejudicial error arising from the calculation of their guidelines, *Lockridge* clearly instructs us to review departure sentences for "reasonableness," *id*. at 365, 392, and specifically directs sentencing courts to "justify the sentence imposed in order to facilitate appellate review." *Id*. at 392. Because our Supreme Court relied on *Booker* in erecting a "reasonableness" standard of review for departure sen-

[1] The Court determined that judicially found facts were used to increase Lockridge's mandatory minimum sentence, contravening the Sixth Amendment. *Lockridge*, 498 Mich at 399. However, the Supreme Court did not order a remand for resentencing, explaining: "Because he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for *departing* from that range), the defendant cannot show prejudice from any error in scoring the [offense variables] in violation of *Alleyne*." *Id*. at 394. Furthermore, the Court indicated in a footnote that "the reasons articulated by the trial court adequately justified" the departure sentence imposed. *Id*. at 365 n 2. We presume that although the Supreme Court elected to refrain from conducting a detailed reasonableness analysis in *Lockridge*, it nevertheless intended that in future cases, a reasonableness standard would be applied by this Court.

tences, logic dictates that federal caselaw should inform the contours of that standard. In *Lockridge*, the Supreme Court traced the evolution of the United States Supreme Court's sentencing jurisprudence in considerable detail, beginning with that Court's decision in *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986), and culminating in *Alleyne*. We would follow a similar tack in elucidating a framework for "reasonableness" review but for this Court's opinion in *Steanhouse*, which commands us to submit defendant's sentences to a "proportionality" review under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), by remanding to the trial court for a new sentencing hearing conducted as prescribed by the United States Court of Appeals for the Second Circuit in *Crosby*.[2]

In the next part of this opinion, we apply *Steanhouse* to the facts of this case. In Part VI, we set forth the federal reasonableness standard that we would apply but for *Steanhouse*, and in Part VII we explain why the federal reasonableness standard should be adopted by a conflict panel of this Court and by the Michigan Supreme Court.

V

According to *Steanhouse*, 313 Mich App at 42-48, this Court reviews a departure sentence for "reasonableness" under an abuse-of-discretion standard governed by whether the sentence fulfills the "principle of proportionality" set forth in *Milbourn* "and its prog-

[2] *Crosby* does not dictate automatic resentencing. Rather, in a *Crosby* remand, the court may " 'determine whether to resentence, now fully informed of the new sentencing regime, and if so, to resentence.' " *Lockridge*, 498 Mich at 396, quoting *Crosby*, 397 F3d at 117 (emphasis omitted).

eny." In a nutshell, *Milbourn*'s "principle of proportionality" requires a sentence "to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. *Milbourn* instructs that departure sentences "are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing" so that the sentence range calculated under the guidelines "is disproportionate, in either direction, to the seriousness of the crime." *Id*. at 657. The *extent* of the departure must also satisfy the principle of proportionality. *Id*. at 660.

We now apply these principles to defendant's departure sentences.

After announcing that defendant's crimes merited departure sentences, the trial court continued that although all criminal sexual conduct cases against a child under 13 years of age are horrible, this case stood out as "uniquely vile and horrible for many reasons." The court noted that there were three complainants who were family members and who trusted defendant. The court also mentioned the "vile nature of . . . defendant's conduct" in using his position as a religious leader in the family and as the complainants' teacher to perpetrate the abuse.

> And so the, the violation, the sexual violations that they experienced, their own sort of superstition about how that would be consequential in their lives and what would happen to them if anybody found out, and that they had to respect their, their uncle, the imam, even while he [was] sexually assaulting them really makes this case especially uniquely horrible in terms of their -- of the psychological impact that these crimes had on them, and, and the great trauma that they obviously were experiencing just in testifying in this case many years after the fact.

The court observed that defendant was convicted of 15 different acts of criminal sexual conduct, including 10 counts of first-degree criminal sexual conduct and 5 counts of second-degree criminal sexual conduct. The court noted that there was a maximum of 20 points assessed under Prior Record Variable (PRV) 7 (subsequent or concurrent felony convictions) when the offender has two or more subsequent or concurrent felony convictions. See MCL 777.57(1)(a). The court observed that the variables may be used "as a springboard for articulating reasons for a departure[.]" Here, the court stated, there were *14* contemporaneous felony convictions.

> So just on the basis of the verdict alone we can easily score 140 [points] on PRV 7 which would just all by itself push the defendant way over into the top grid on his PRV points.
>
> So [the prosecutor] was not just blowing these numbers out of his ear when he suggested that an appropriate sentence would be 35 to 50 years. There is a basis in the sentencing guidelines themselves if one finds, as I do, that PRV 7, the score on PRV 7 has [been] given inadequate impact given the crimes that the defendant committed.

The court next noted that Offense Variable (OV) 4 (psychological injury to the victim) requires the assessment of 10 points for psychological injury to a victim requiring professional treatment. See MCL 777.34(1)(a). The court stated that because there were three victims, "[W]e could, you know, theoretically give him, say, 30 points if we were using OV 4 as a springboard for a proportionality description of a departure reason. And that's objective and verifiable. There were three victims."

The court then addressed OV 13 (continuing pattern of criminal behavior), which requires the assessment of 50 points if the offense was part of a pattern of felonious

criminal activity involving three or more sexual penetrations against a person or persons less than 13 years of age. See MCL 777.43(1)(a). The court noted that "the trial evidence was, and, and consistent with the jury's verdict, that there were vastly more of those acts that they found. And that's objective and verifiable."

The trial court then elaborated further regarding its departure decision, using the terminology applicable in pre-*Lockridge* sentencing:

> And is it compelling and substantial? Well, I don't know how it isn't in this case.
>
> This is, you know, as I said at the beginning of this dissertation, I mean one of the most horrific and horrible sexual abuse crimes I've seen on so many levels. Not just because of the, the relationship between the complainants and the defendant because it wasn't just uncle and niece, it was uncle slash religious leader and cultural leader and nieces who were victims of his religious orthodoxy as well as his sexual predatory conduct. And it's just a terrible tragedy that this occurred and that the girls were put through this and that they waited as they did as long as they did until they had the comfort of each other's knowledge that, that they had all been through this together before the, the defendant's acts were finally revealed.
>
> If we were to give the defendant just 25 more points on the offense variables which can easily be calculated with 30 points on OV 4, more points on OV 13, that pushes him solidly into the bottom right-hand cell range of 270 to 450.
>
> I couldn't help but notice that [the prosecutor] suggested [that the] number of a 35 year minimum doesn't quite approach the maximum cell length in the lower right-hand corner. But, but it's close, and as I think an appropriate minimum sentence recognizing that it is a departure, a substantial departure from the guideline range in this case.
>
> But the guidelines here for a variety of reasons that I've already said don't even begin to adequately address the

> heinous nature of the crimes the defendant was convicted of. And I'm adopting the People's suggestion of a 35 to 50 year sentence for each of the ten counts of criminal sexual conduct in the first degree.

The court calculated the minimum period of incarceration for its departure sentences by essentially tripling the applicable guidelines scores to reflect that there were three complainants in this case. This mathematical reasoning does not necessarily comport with the individualized weighing of an offender's personal characteristics, including those that would mitigate a defendant's sentence, and the circumstances of the offense as required by *Milbourn*. But even were we to find that the trial judge's allocution inadvertently satisfied *Milbourn*, we understand *Steanhouse* to nevertheless require remand for a *Crosby* hearing. The Court's language in *Steanhouse* leaves little room for deferential review:

> While the *Lockridge* Court did not explicitly hold that the *Crosby* procedure applies under the circumstances of this case, we conclude that this is the proper remedy when, as in this case, the trial court was unaware of, and not expressly bound by, a reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing. [*Steanhouse*, 313 Mich App at 48.][3]

In accordance with *Steanhouse*, we remand to the trial court for resentencing. We instruct the trial court to specifically justify the *extent* of any departure sentences the court may elect to impose, and to explain why the sentences imposed are proportionate to the seriousness of defendant's convictions, taking into ac-

[3] It bears repeating that defendant preserved an objection to his departure sentences in the trial court. In *People v Stokes*, 312 Mich App 181, 201; 877 NW2d 752 (2015), this Court held that the *Crosby* procedure applies to both preserved and unpreserved errors.

count defendant's background and any mitigating factors brought forward by counsel. Consistent with the *Crosby* procedure, defendant may elect against resentencing if he chooses. See *id*. at 40-41.

VI

The proportionality review dictated by *Steanhouse* is at odds with the review applied to departure sentences by the federal courts. In this section of our opinion we discuss the federal standard and the reasons advanced by the United States Supreme Court for its adoption.

In *Booker*, the United States Supreme Court held that "appellate review of sentencing decisions is limited to determining whether they are 'reasonable.' " *Gall v United States*, 552 US 38, 46; 128 S Ct 586; 169 L Ed 2d 445 (2007). The Supreme Court later expounded, "Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Id*. The Supreme Court first applied the reasonableness standard and abuse-of-discretion review in *Rita v United States*, 551 US 338; 127 S Ct 2456; 168 L Ed 2d 203 (2007).

The defendant in *Rita* argued in the trial court for a sentence below the federal guidelines range, resting his claim on his "[p]hysical condition, vulnerability in prison and . . . military service." *Id*. at 345. The judge imposed a sentence at the bottom of the federal guidelines range, and Rita appealed. *Id*. The first question presented to the United States Supreme Court was "whether a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines." *Id*. at 347. The Supreme Court answered in the

affirmative, but added an important caveat: "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness" for sentences at variance with the advisory guidelines. *Id*. at 354-355.[4]

Several months after issuing *Rita*, the Supreme Court addressed appellate review of *departure* sentences in *Gall*, 552 US 38, and *Kimbrough v United States*, 552 US 85; 128 S Ct 558; 169 L Ed 2d 481 (2007). The defendants in both *Gall* and *Kimbrough* received downward departure sentences. In both cases, federal courts of appeal reversed and remanded for resentencing. In *Gall*, the United States Court of Appeals for the Eighth Circuit held that a sentence outside the guidelines range must rest on a justifica-

[4] Although the Court's holding in *Rita* is relatively straightforward, Justices Stevens and Scalia debated in concurring opinions whether reasonableness review is limited to examining whether a sentencing court has correctly adhered to sentencing *procedures*, or extends to consideration of the *substantive* reasonableness of a defendant's sentence. Justice Scalia opined, "I would hold that reasonableness review cannot contain a substantive component at all. I believe, however, that appellate courts can nevertheless secure some amount of sentencing uniformity through the procedural reasonableness review made possible by the *Booker* remedial opinion." *Rita*, 551 US at 370 (Scalia, J., concurring). Justice Stevens retorted:

> I do not join JUSTICE SCALIA's opinion because I believe that the purely procedural review he advocates is inconsistent with our remedial opinion in *Booker*, which plainly contemplated that reasonableness review would contain a substantive component. After all, a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable. [*Id*. at 365 (Stevens, J., concurring) (citation omitted).]

The Supreme Court has since settled this question, specifically holding in *Gall*, 552 US at 51, that departure sentences are to be reviewed by federal appellate courts for substantive reasonableness.

tion that is proportional to the extent of the departure. *Gall*, 552 US at 45. As discussed later in this opinion, the Eighth Circuit's approach mirrors that adopted in *Milbourn* and now required under *Steanhouse*. In *Kimbrough*, the United States Court of Appeals for the Fourth Circuit held the defendant's sentence unreasonable per se because it was based on the sentencing judge's disagreement with the guidelines' sentencing disparity between crack and powder cocaine offenses. *Kimbrough*, 552 US at 93.

The Supreme Court reversed in both cases, holding that both sentences were substantively reasonable. In *Gall*, the Court began its analysis by sketching the following *procedural* roadmap for sentencing in the federal courts:

> [A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. [*Id*. at 49-50 (citations omitted).]

Like Michigan's sentencing scheme, federal sentencing involves the review and application of guidelines scoring. Unlike Michigan's sentencing procedure, federal law requires district courts to consider all of the sentencing policy factors set forth in 18 USC 3553(a), in addition to the guidelines. Broadly speaking, those factors encompass: (1) the nature and circumstances of the offense and the personal history and characteris-

tics of the offender, (2) the need to deter criminal conduct and to protect the public, (3) the need to provide the defendant with educational or vocational training or other forms of treatment, (4) the alternative types of sentences available, (5) the need to avoid unwarranted disparity among defendants with similar criminal records who have been convicted of similar crimes, and (6) the need for restitution to victims of the crime.[5] We acknowledge that mandatory application of

[5] 18 USC 3553(a) provides:

> **(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
>
> **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> **(2)** the need for the sentence imposed--
>
> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> **(B)** to afford adequate deterrence to criminal conduct;
>
> **(C)** to protect the public from further crimes of the defendant; and
>
> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> **(3)** the kinds of sentences available;
>
> **(4)** the kinds of sentence and the sentencing range established for--
>
> **(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
>
> **(i)** issued by the Sentencing Commission pursuant to [28 USC 994(a)(1)], subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet

the § 3553(a) factors sets federal sentencing apart from Michigan's sentencing process. We return to this important distinction later in this opinion.

After detailing the procedure to be followed by federal district courts when imposing sentence, the Supreme Court in *Gall* addressed the substantive considerations that must inhere in a sentence falling outside the guidelines. If a sentencing court intends to impose a departure sentence, the court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 US at 50. The Court char-

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to be incorporated by the Sentencing Commission into amendments issued under [28 USC 994(p)]); and

(ii) that, except as provided in [18 USC 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [28 USC 994(a)(3)], taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [28 USC 994(p)]);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to [28 USC 994(a)(2)], subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [28 USC 994(p)]); and

(B) that, except as provided in [18 USC 3742(g)], is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

acterized as "uncontroversial" the notion that "a major departure should be supported by a more significant justification than a minor one." *Id*. When imposing sentence, a court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id*. The Supreme Court specifically rejected the notion that a sentence outside the guidelines range could be justified only by "extraordinary circumstances." *Id*. at 47. Similarly, the Court eschewed the use of "a rigid mathematical formula that uses the percentage of a departure" as a yardstick for determining the strength of justifications required for a particular sentence. *Id*.

On appeal in the federal courts, the abuse-of-discretion standard applies to the review of all sentences, including departures. *Id*. at 51. A reviewing court must first ascertain whether a district court committed procedural error, such as improperly calculating the guidelines. *Id*. If the sentence "is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id*. For sentences outside the guidelines, "the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation," but must also defer to the district court's weighing of the § 3553(a) factors. *Id*.

In *Kimbrough*, the Supreme Court reiterated these precepts, emphasizing that a sentencing court must treat the guidelines as "the starting point and the initial benchmark[.]" *Kimbrough*, 552 US at 108 (quotation marks and citation omitted). A departure sentence premised on a judge's view that the guidelines fail to properly reflect the considerations set forth in

§ 3553(a) may merit "closer review" by an appellate court. *Id*. at 109. In *Kimbrough*, the district court found that the applicable sentencing guidelines for a federal cocaine distribution offense created an "unwarranted disparity" between sentences involving crack versus powder forms of the drug. *Id*. at 111. The federal sentencing commission had reached the same conclusion and recommended that Congress "substantially" reduce the inequity. *Id*. at 97-99. This crack/powder disparity, the district court concluded, "[drove] the offense level to a point higher than is necessary to do justice in this case[.]" *Id*. at 111 (quotation marks omitted). The Supreme Court found this reasoning adequate to support a sentence 4½ years below the bottom of the guidelines range, and elucidated: "the District Court properly homed in on the particular circumstances of Kimbrough's case and accorded weight to the Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a)." *Id*.

We distill from this trilogy of Supreme Court cases the following preliminary precepts governing appellate review of departure sentences in a federal forum:

(1) An abuse-of-discretion standard applies;

(2) A departure sentence is not presumptively unreasonable; and

(3) Close scrutiny must be applied when a sentencing judge bases a departure on a policy disagreement with the guidelines, but a sentence fashioned in part on a policy disagreement does not automatically fall outside the realm of substantive reasonableness.

A review of federal caselaw since *Rita*, *Gall*, and *Kimbrough* is also instructive. We focus here on two cases in which the United States Court of Appeals for

the Sixth Circuit analyzed upward departure sentences for substantive reasonableness.[6]

Walter Franklin Vowell pleaded guilty to coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct, and possession of child pornography in violation of 18 USC 2251(a) and 18 USC 2252(a)(4)(B). *United States v Vowell*, 516 F3d 503, 507 (CA 6, 2008). The district court sentenced Vowell to consecutive sentences of 45 years' imprisonment on Count 1 and 20 years' imprisonment on Count 2, followed by a lifetime of supervised release. *Id*. Vowell challenged the substantive reasonableness of his sentence, and the Sixth Circuit affirmed. *Id*.

The Sixth Circuit began by reviewing in detail the heinous nature of the defendant's crimes. Vowell and his girlfriend recorded graphic pornographic videotapes of Vowell sexually abusing the girlfriend's then eight-year-old daughter. *Id*. The child was apparently drugged in two of the videos. *Id*. The sexual abuse included attempted genital and anal penetration, and oral sex. *Id*. The calculated guidelines range for the two charged offenses was 188 to 235 months' imprisonment. *Id*. at 508. Notwithstanding that range, a federal statute required a minimum sentence of 300 months for one of the offenses. *Id*. The district court imposed a sentence 242% beyond the top of the guidelines range and 160% above the applicable 25-year statutory minimum sentence. *Id*. at 511.[7]

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[6] Defendant has not raised an appellate claim consistent with procedural unreasonableness.

[7] Technically, under federal law the Sixth Circuit dealt with a "variance" and not a "departure." *Id*. at 511.

> "A 'departure' is typically a change from the final sentencing range computed by examining the provisions of the Guidelines

The Sixth Circuit explained that when reviewing a sentence for substantive reasonableness, it considers more than the sentence's length:

> That is, we will also look to the factors the district court evaluated in determining its sentence. A sentence may be substantively unreasonable if the district court " 'select[s] the sentence arbitrarily, bas[es] the sentence on impermissible factors, fail[s] to consider pertinent § 3553(a) factors or giv[es] an unreasonable amount of weight to any pertinent factor.' " We do not require a mechanical recitation of the § 3553(a) factors, but "an explanation of why the district court chose the sentence that it did." And we have declared that the district court is entitled to deference in its sentencing decisions because of its "ringside perspective on the sentencing hearing and its experience over time in sentencing other individuals." [*Id*. at 510 (citations omitted; alterations in original).]

A substantively reasonable sentence is proportionate to the seriousness of the offense and the circumstances of the offender, and sufficient, but not greater than necessary, to comport with the purposes of 18 USC 3553(a). *Id*. at 512. In Vowell's case, the Sixth Circuit determined, the district court properly "focused primarily on the seriousness of the offense, the need to protect the community, Vowell's need for treatment, and the impact on the victim." *Id*. at 512. The district court "emphasized that Vowell's pattern of abuse against [the

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> themselves. It is frequently triggered by a prosecution request to reward cooperation . . . or by other facts that take the case 'outside the heartland' contemplated by the Sentencing Commission when it drafted the Guidelines for a typical offense. A 'variance,' by contrast, occurs when a judge imposes a sentence above or below the otherwise properly calculated final sentencing range based on application of the other statutory factors in 18 U.S.C. § 3553(a)." [*United States v Rangel*, 697 F3d 795, 801 (CA 9, 2012), quoting *United States v Cruz-Perez*, 567 F3d 1142, 1146 (CA 9, 2009) (citations omitted).]

This distinction is not relevant to the purposes for which we cite *Vowell*.

child] and the heinous nature of his crimes demonstrated the seriousness of the offense. That Vowell was in a position to care for [the child] makes his crimes significantly worse." *Id*. The Sixth Circuit recounted the district court's conclusion that Vowell "basically [took the child's] life from her" and that "[h]er life is effectively over for all we know." *Id*. (quotation marks omitted). "Certainly," the Sixth Circuit summarized, "the impact on [the child] played a substantial role in the district court's determination." *Id*.

The Sixth Circuit noted that the record created by the district court included the court's conclusion that Vowell "warranted a significant term of incarceration in order to protect the community, to ensure that he never had the opportunity to be around children again, and that he be afforded the extensive treatment that he clearly needs." *Id*. Moreover, the district court articulated that "it needed to assess a significant punishment in order to combat child pornography." *Id*. These facts led the court to conclude that "for Vowell, the statutory minimum is simply not appropriate." *Id*.

The Sixth Circuit commended the district court's reasoning:

> We cannot ask more of a district court, in terms of weighing the § 3553(a) factors and explaining the reasons for its sentence, than the district court did in this case. Clearly, the district court did not arbitrarily choose a sentence, but chose a sentence it considered sufficient but not greater than necessary to comply with the purposes of § 3553(a). That is, the district court selected a punishment that it believed fit Vowell's crimes, and provided sufficient reasons to justify it. [*Id*.]

On review for an abuse of discretion, the Sixth Circuit deferred to the district court's "reasoned . . . decision," declaring the sentence "substantively reasonable." *Id*. at 512-513.

A more recent case provides further guidance. The defendant in *United States v Aleo*, 681 F3d 290, 293 (CA 6, 2012), pleaded guilty to producing child pornography, 18 USC 2251(a), possession of child pornography, 18 USC 2252A(a)(5)(B), and transporting and shipping child pornography, 18 USC 2252A(a)(1). He was sentenced to 60 years' imprisonment, which equated to a sentence almost 2½ times longer than the top of the guidelines range. *Id*. at 300. The Sixth Circuit found Aleo's sentence substantively unreasonable and remanded for resentencing. *Id*. at 302.

Like Vowell, Aleo participated in the production of child pornography. *Id*. at 294-295. Also like Vowell, Aleo sexually penetrated a child (in Aleo's case, his granddaughter) who appeared in the films. *Id*. The district court characterized the matter as " 'perhaps one of the most despicable cases that I have ever been involved in, in 28 years on the bench.' " *Id*. at 297. The sentencing court observed that Aleo had shown no remorse and that his statements at allocution omitted any reference to the fact that his granddaughter and the other victims would be "emotionally scarred for the rest of their lives." *Id*. The district court explicitly rejected the notion that the sentencing guidelines possessed any relevance, as the sentencing guidelines committee had never

> anticipated that a granddaughter would be involved in this kind of—a victim, in this kind of activity and certainly not a grandfather doing it. There's no way they would have been able to even foresee that. So the guidelines . . . certainly is not a guideline for this kind of case . . . . [*Id*. (quotation marks omitted).]

The Sixth Circuit carefully reviewed the sentencing principles set forth in *Gall* and reiterated the applicability of the abuse-of-discretion standard. *Id*. at 299-

300. The Court continued: "Our role is not to usurp the sentencing judge's position as the best interpreter of the facts. However, we must ensure that when there is a variance, the greater the variance from the range set by the Sentencing Guidelines," the more compelling the necessary justification must be. *Id*. The Court then turned its attention to the specific reasons advanced by the district court for the departure sentence, beginning with the district court's "belief that the sentencing guidelines could not have envisioned a crime such as Aleo's. In fact," the Sixth Circuit elaborated, "the Sentencing Guidelines *do* envision a crime such as Aleo's[.]" *Id*. (emphasis added). Under the federal guidelines, Aleo's calculated sentence

> included several enhancements that specifically addressed the unique characteristics of his offense. Four levels were added because Aleo produced child pornography with a minor under the age of twelve. Two levels were added because the offense involved the commission of a sexual act or sexual contact. Two levels were added because Aleo was a relative of the minor and the minor was in his custody, care, or supervisory control. Therefore, the guidelines expressly take into account a defendant who creates child pornography using a relative, when the relative was under the age of twelve, under the individual's supervision, and who the defendant sexually touched during the creation of the pornography. [*Id*. at 300.]

Accordingly, the Sixth Circuit concluded, the district court's belief that the guidelines did not contemplate Aleo's crime was incorrect, and did not serve as a "compelling justification" for the sentence imposed. *Id*. at 301.

The Sixth Circuit then considered the district court's "deterrence" explanation for the sentence, finding it lacking as the sentence imposed "threatens to cause disparities in sentencing, because it provides a top-of-

the-range sentence for what is not a top-of-the-range offense." *Id*. The Court proceeded to review other cases involving defendants convicted of child pornography offenses involving their grandchildren. *Id*. In those cases, the defendants received far lighter sentences. *Id*. The Court observed, "There is no compelling justification for differentiating his offense so dramatically from theirs." *Id*. Aleo's crimes differed meaningfully from Vowell's, the Sixth Circuit elucidated, as Vowell had made three videotapes involving sexual contact with his girlfriend's child (two while she was drugged), engaged in oral-to-genital contact with the child, and attempted anal and genital penetration. *Id*. This was a "significantly worse crime[]," meriting the harsh punishment imposed. *Id*.

Aleo's sentence could not stand, the Sixth Circuit reasoned, because the district court failed to "reasonably distinguish Aleo from other sex offenders who molested young relatives," and neglected to

> take into account why Aleo should receive the harshest possible sentence, even though he had not committed the worst possible variation of the crime. He had, for example, cooperated with authorities, admitted responsibility for his actions, and only committed one known offense involving sexual contact with a minor. There was no evidence that he drugged the child or committed more than brief sexual contact. While we share the district court's outrage at Aleo's acts, the justifications offered by the district court do not support the enormous variance beyond the guidelines range and the disparity with sentences of other, similar offenders. The sentence was substantively unreasonable. [*Id*. at 302.]

We draw from these two cases several helpful analytical guideposts. First, a sentence above or below the guidelines likely does not constitute an abuse of discretion if it is commensurate with the individualized,

highly case-specific reasons supplied by the sentencing court as justifications for the departure. Sentencing courts are not precluded from imposing an above- or below-guidelines sentence based on a disagreement with the guidelines, or by finding that the guidelines range is too severe or too lenient. However, if the sentencing court relies on such a disagreement when imposing sentence, the court must offer reasons "sufficiently compelling" to satisfy an appellate court that application of the guidelines would result in a sentence longer or shorter in length than would be just under the circumstances. *Gall*, 552 US at 50.

We envision that a federal-law-inspired approach to Michigan sentence departures would operate under the following principles. Procedurally, a sentencing court would make underlying factual findings carefully drawn from the record to properly calculate the guidelines, treating the guidelines as advisory only and not mandatory. The court would then consider the fundamental principles that have historically animated sentencing decisions in Michigan and that roughly correspond to the factors listed in 18 USC 3553(a). Drawn from Michigan caselaw, those principles include proportionality, the potential for reformation or rehabilitation of the defendant, deterrence, the protection of society from further crimes by the defendant, and the need to appropriately punish the defendant for the crimes of which the defendant was convicted, while avoiding sentence disparities between similarly situated defendants. This procedure equates with a federal trial court's consideration of 18 USC 3553(a) and the reasonableness principles and requirements articulated in *Gall*. A court's explanation of the reasons for departure must include detail sufficient to facilitate meaningful appellate review. A sentence fulfilling these criteria is procedurally reasonable.

Substantively, we believe that a sentencing court should be governed by the following principles and requirements: (1) the guidelines themselves supply the starting point or initial benchmark of the analysis, (2) extraordinary or exceptional circumstances are not required to justify a sentence outside of the guidelines, (3) no presumption of unreasonableness attends a departure sentence, (4) a rigid mathematical formula is not to be applied, (5) the sentencing court must engage in an individualized assessment on the basis of the facts presented, taking into consideration mitigating or aggravating factors and the totality of the circumstances,[8] (6) the extent of a departure must be considered and sufficiently justified, with a major departure supported by a more significant justification than a minor departure, (7) substantive findings regarding reformation or rehabilitation, society's protection, punishment, and deterrence can potentially support a departure, and (8) if sufficient and sound justification is presented, a court may depart from the guidelines on the basis of a disagreement with the guidelines, or by finding that a guidelines variable is given inadequate or disproportionate weight.[9] Ultimately, the touchstone of the departure analysis is reasonableness.

As in the federal courts, we would anticipate that Michigan's guidelines encompass the vast majority of

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[8] The *Gall* Court observed that because the federal sentencing guidelines are no longer mandatory, the range of sentencing choices is significantly broadened as dictated by the facts of the case. *Gall*, 552 US at 59.

[9] With respect to reformation or rehabilitation, society's protection, punishment, and deterrence, "there is no requirement that the trial court expressly mention each . . . of [them] . . . when imposing sentence." *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). That said, it may be beneficial for a sentencing court to explore these areas on the record in order to facilitate appellate review of a sentencing departure.

typical cases, or the territory referred to by the federal courts as the "heartland." While a court is not precluded from justifying a departure by relying on a fact already taken into account by the guidelines, the court must offer a sound and reasoned explanation for doing so. Such reasons may include, but are not limited to, that the guidelines afford inadequate or disproportionately harsh weight to a fact, or that the Legislature's assessment of the weight given to a factor is flawed for other reasons. A court may not haphazardly disregard or ignore the guidelines, especially given that they represent the benchmark of every sentence. See *Gall*, 552 US at 49. But because the guidelines are now solely advisory, the inherent uniqueness of a case may guide a court seeking to depart. We further note that in *Aleo*, the Sixth Circuit took pains to point out that the district court neglected to consider any of the *mitigating* facts brought to its attention. See *Aleo*, 681 F3d at 302. A reasonable departure sentence—whether upward or downward—would reflect consideration of both aggravating and mitigating facts.

Finally, we reiterate that under the regime we propose, a trial court's careful and detailed articulation of its reasoning when imposing a departure sentence remains important. In this regard, we echo our Supreme Court's admonitions in *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008):

> [T]he trial court's justification "must be sufficient to allow for effective appellate review." . . . [I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear.

Were we free to apply the analysis we have just sketched to the facts of this case, our opinion would read as follows:

Pursuant to *Lockridge*, we review these departure sentences for reasonableness. *Lockridge*, 498 Mich at 392. Informed by *Gall*, 552 US at 46, we apply an abuse-of-discretion standard. An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court that selects a principled outcome has not abused its discretion. *Id*.

Measured against the standards erected in *Gall* and *Kimbrough*, the trial court's explanation for defendant's departure sentences is more than adequate. The court considered the sentence called for under the guidelines and explained in considerable detail why a harsher sentence was needed for someone who had committed the number of serious sex crimes as had defendant. The court highlighted the highly unusual circumstances presented in this case, particularly that defendant had abused three sisters, threatened all of them in different and terrifying ways, and used the complainants' deeply held religious beliefs to both conceal and further his illicit behavior.

The trial court's observation that this was not an ordinary criminal sexual conduct case is well supported by the record, as is the continuing emotional toll of defendant's misconduct endured by the three complainants. The guidelines do not take into account the seriousness of a longstanding pattern of sex crimes committed against three minors living together in the same home, or a defendant who uses his position as a religious and cultural leader and simultaneously, as an instructor in the complainants' family, to perpetrate

his abuse. The record is rife with evidence that defendant's sexual abuse of all three complainants devastated their teenage years and triggered tragic emotional repercussions that have continued into their adulthood. It is obvious to us that in selecting its sentence, the trial court was motivated by the need to impose sentences that truly fit defendant's crimes, rather than to sensationalize the surrounding circumstances or to appease community sentiments. Taking into account the totality of the circumstances, defendant's sentences are reasonable.

One further aspect of defendant's sentences requires discussion. Before *Lockridge*, trial courts were encouraged to justify the extent of a departure sentence by comparing the guidelines score of the defendant against "a hypothetical defendant whose recommended sentence is comparable to the departure sentence[.]" *Smith*, 482 Mich at 310. This exercise could be accomplished by judicial fact-finding to produce heightened offense or prior record variable scores when a court has concluded that the variables inadequately account for the factual circumstances presented. The trial judge in this case followed this path, but then traveled beyond mere recalculation and offered a thoughtful explanation premised on noncontroversial aggravating factors that fully explained why the above-guidelines sentences were reasonable. As such, remand in this case is unnecessary.

In the future, we would caution courts that *exclusive* reliance on a guidelines recalculation approach risks compounding the very problem identified in *Lockridge*: judicial fact-finding that increases a defendant's minimum sentence range violates the Sixth Amendment. The guidelines are simply that—guidelines. And under *Lockridge*, they are purely advisory. *Lockridge*, 498

Mich at 364-365. Rather than relying on judicially found facts to increase offense variable scores, we encourage judges to detail the specific reasons that a case falls outside the mainstream, and that explain why the sentence imposed is more just than a within-guidelines sentence. Moreover, because Michigan's sentencing guidelines omit any provisions for mitigation, a reasonable downward departure sentence need not be rooted in a guidelines recalculation.

As we are bound by *Steanhouse*, however, we may not resolve the issue in this manner.

VII

We respectfully disagree with the analysis set forth in *Steanhouse* for several reasons.

Generally speaking, the "principle of proportionality" plays a role in a reasonableness analysis conducted pursuant to *Gall*. We have no quarrel with the notion that sentencing courts should also consider proportionality before determining the extent of a departure sentence. In our view, however, the principle of proportionality described in *Milbourn* is but one concept that should figure into departure sentencing. Furthermore, applying the principle of proportionality to the exclusion of other concepts erodes a court's sentencing discretion. Finally, we believe that remand for a *Crosby* hearing in cases like that now before us unnecessarily complicates and prolongs the sentencing process.

Before the United States Supreme Court decided *Gall*, a number of federal courts had held that "[a]n extraordinary reduction [from the guidelines range] must be supported by extraordinary circumstances." *United States v Burns*, 500 F3d 756, 761 (CA 8, 2007),

vacated and remanded 552 US 1137 (2008).[10] See also *United States v Johnson*, 427 F3d 423, 426-427 (CA 7, 2005). As articulated in *Burns*: "[O]ur extraordinary reduction/extraordinary circumstances formulation requires circumstances of a strength proportional to the extent of the deviation from reductions envisioned by the guidelines's [sic] structure." *Burns*, 500 F3d at 761-762. "Extraordinary circumstances are infrequently found . . . .' " *Id*. at 763.

The Eighth Circuit's now-discredited approach in *Burns* corresponds to our Supreme Court's opinion in *Milbourn*, in which the Court decreed, "Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty, respectively." *Milbourn*, 435 Mich at 654. In *Milbourn*, the Supreme Court applied proportionality review in a manner strikingly similar to that utilized in *Burns*:

> In our discussion of proportionality, we observed that the Legislature has determined to visit the stiffest punishment against persons who have demonstrated an unwillingness to obey the law after prior encounters with the criminal justice system. Mr. Milbourn was a young man and, at the time the instant offense was committed, he had no criminal record. [*Id*. at 668.]

Respectfully, we observe that in *Milbourn*, the Supreme Court appeared to have weighed the facts de novo, despite having espoused an abuse-of-discretion

[10] After remand from the United States Supreme Court, the United States Court of Appeals for the Eighth Circuit affirmed the district court's use of the presumptive life sentence under the guidelines as its departure point in determining the reduction in the defendant's sentence. *United States v Burns*, 577 F3d 887, 896 (CA 8, 2009).

standard of review. Referring to the appellate application of proportionality analysis, the Supreme Court in *Gall* noted that it "reflect[s] a practice . . . of applying a heightened standard of review to sentences outside the Guidelines range[, which] is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range." *Gall*, 552 US at 49.

In *Gall*, the Supreme Court rejected proportionality review because it inhibited a sentencing court's discretion while simultaneously tethering the range of sentencing choices to the guidelines:

> [A]ppellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines[, but it may not require] "extraordinary" circumstances [or employ] a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.
>
> [*Such*] *approaches . . . come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.* [*Gall*, 552 US at 47 (emphasis added).]

Indeed, proportionality review as applied in *Milbourn* undercuts our Supreme Court's holding in *Lockridge* that the guidelines are now truly advisory and not mandatory. In *Milbourn*, the Supreme Court cabined a sentencing judge's discretion to depart by urging that the guidelines should almost always control:

> The guidelines represent the actual sentencing practices of the judiciary, and we believe that the second edition of the sentencing guidelines is the best "barometer" of where on the continuum from the least to the most threatening circumstances a given case falls.

* * *

> We believe that the gradation of recommended sentencing ranges within the guidelines indicates not only that the full statutory range of possible sentences is being used, but also that the recommended ranges increase as the factors that *are* adequately represented in the guidelines become more serious. For this reason, we believe that it is safe to assume that in the eyes of the vast majority of trial judges who have chosen to impose sentences within the guidelines ranges, the guidelines reflect the relative seriousness of different combinations of offense and offender characteristics. [*Milbourn*, 435 Mich at 656, 658.]

By contrast, the *Lockridge* Court repeatedly highlighted that its decision was rooted in the right to a jury trial enshrined in the Sixth Amendment, *Lockridge*, 498 Mich at 368, 373-374, 378, and that the imposition of a mandatory minimum sentence predicated on judicial fact-finding violates the Sixth Amendment, *id*. at 373-374. Because judge-found facts usually control guidelines scoring, we question whether *Steanhouse* and *Lockridge* can be reconciled.

Additionally, we respectfully disagree with the *Steanhouse* Court's mandate that, pursuant to *Crosby*, this Court must remand cases involving sentencing decisions made pre-*Lockridge*. In our view, this procedure unnecessarily complicates appellate review while unduly burdening trial courts. Given that the guidelines are now merely advisory and that even under *Steanhouse*, an abuse-of-discretion standard applies to appellate review, we suggest that the application of a reasonableness standard as outlined by the federal courts better comports with *Lockridge* and the Sixth Amendment.

VIII

Lastly, we consider defendant's claim that his 35-year minimum sentences constitute unconstitutionally

cruel or unusual punishment, because he will be 86 years old when his minimum sentences are completed. The United States Constitution prohibits cruel *and* unusual punishment, see US Const, Am VIII, and the Michigan Constitution prohibits cruel *or* unusual punishment, see Const 1963, art 1, § 16. "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). Defendant fails to demonstrate that his sentences are cruel or unusual by comparing them to the penalties imposed for other crimes in this state and the same crime in other states.

We affirm defendant's convictions, but remand for further sentencing proceedings, as we are bound to do by *Steanhouse*. We do not retain jurisdiction.

GLEICHER, P.J., and MURPHY, J., concurred.

SAWYER, J. (*concurring in result*). I concur in the result only.

EMPLOYERS MUTUAL CASUALTY COMPANY v
HELICON ASSOCIATES, INC

Docket No. 322215. Submitted October 14, 2015, at Detroit. Decided December 1, 2015, at 9:00 a.m. Leave to appeal sought.

Employers Mutual Casualty Company (EMC) brought a declaratory judgment action in the Wayne Circuit Court against Helicon Associates, Inc., the estate of Michael J. Witucki, and others, including Wells Fargo Advantage National Tax Free Fund, Wells Fargo Advantage Municipal Bond Fund, Lord Abbett Municipal Income Fund, Inc., and Pioneer Municipal High Income Advantage (collectively, the Funds). The Funds had purchased approximately $7 million in bonds issued by a charter school operated by Helicon, which in turn was managed by Witucki. The charter school, however, was not legally authorized to issue its own debt. To avoid having its charter revoked, the school unwound the bond issue, and the Funds accepted $3.2 million in newly issued bonds in lieu of their original $7 million investment. The Funds then brought a federal action against Helicon, Witucki, and others and obtained a consent judgment that acknowledged a violation of Conn Gen Stat 36b-29(a)(2) (part of the Connecticut Uniform Securities Act) and awarded the Funds more than $4 million. EMC had provided a defense for Helicon and Witucki in the federal action, under a reservation of rights. In the present lawsuit, EMC sought a declaratory judgment that indemnity coverage was not available for that defense. While EMC did not dispute that Helicon and Witucki were its insureds, it argued that four separate exclusions in the policies (a return-of-remuneration exclusion, an exclusion for personal profit or advantage, a guarantee-on-bonds exclusion, and a fraud-or-dishonesty exclusion) applied, each of which would independently have precluded coverage. Helicon and Witucki counterclaimed for breach of contract and bad faith. The court, Brian R. Sullivan, J., found that three of the four exclusions applied and granted summary disposition in favor of EMC. The Funds appealed.

The Court of Appeals *held*:

The fraud-or-dishonesty provision in the policy excluded coverage for any action brought against an insured if by judgment or

adjudication that action was based on a determination that the insured committed acts of fraud or dishonesty. The Funds contended that the provision did not apply because the underlying federal securities action had not adjudicated the issue of fraud or dishonesty. However, the consent judgment that concluded the federal action, which became a court judgment when the trial court sanctioned it, was premised on a violation of the Connecticut Uniform Securities Act. Conn Gen Stat 36b-29(a)(2) provides generally that any person who offers or sells, or materially assists in offering or selling, a security by means of any untrue statement of a material fact or any omission to state a material fact and knew or in the exercise of reasonable care should have known of the untruth or omission is liable to the person buying the security. Witucki and Helicon assisted in the offering and sale of bonds to the Funds without the proper authority, resulting in a substantial loss in the value of the investment when the bonds were required to be reissued. The consent judgment, by finding a violation of the Connecticut statute, necessarily found that Witucki and Helicon made untrue statements of a material fact or omitted to state a material fact. Because Helicon's and Witucki's statements and representations were untrue and resulted in the statutory violation, they committed acts of fraud or dishonesty within the meaning of the policy exclusion. Moreover, contrary to the Funds argument, application of the exclusion did not render coverage under the policy illusory. Because the trial court correctly determined that the fraud-and-dishonesty exclusion applied, it was not necessary to consider the remaining policy exclusions.

Affirmed.

Garan Lucow Miller, PC (by *Megan K. Cavanagh*), for Employers Mutual Casualty Company.

Davis & Ceriani, PC (by *Scott W. Wilkinson* and *George R. Lyons*), and *Kitch Drutchas Wagner Valitutti & Sherbrook* (by *Christina A. Ginter* and *Michael J. Watza*) for Wells Fargo Advantage National Tax Free Fund, Wells Fargo Advantage Municipal Bond Fund, Lord Abbett Municipal Income Fund, Inc., and Pioneer Municipal High Income Advantage.

Before: METER, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendants Wells Fargo Advantage National Tax Free Fund, Wells Fargo Advantage Municipal Bond Fund, Lord Abbett Municipal Income Fund, Inc., and Pioneer Municipal High Income Advantage (hereinafter, the Funds) appeal as of right the order granting summary disposition in favor of plaintiff/counterdefendant, Employers Mutual Casualty Company (hereinafter, EMC), in this declaratory judgment action. We affirm.

This case arises out of the outcome of a prior federal suit initiated by the Funds against parties who, in relevant part, were insured by EMC. Briefly, the Funds had purchased approximately $7 million in bonds issued by a charter school operated by Helicon Associates, Inc., which in turn was managed by Michael J. Witucki.[1] The charter school was, however, not legally authorized to issue its own debt. Facing the threat of having its charter revoked, the school "had to 'unwind' the bond issue, and [the Funds] accepted $3.2 million in newly issued bonds in lieu of their original $7 million investment." In the ensuing federal court securities action, the Funds pursued claims pertaining to the bond issuance, including violations of various securities and blue-sky laws, in addition to tort claims. The federal action resulted in a consent judgment acknowledging violation of Conn Gen Stat 36b-29(a)(2), part of the Connecticut Uniform Securities Act (CUSA), and awarding the Funds more than $4 million, including costs and attorney fees.

EMC provided a defense for Helicon and Witucki in the federal action under a reservation of rights, but commenced the instant declaratory judgment action, seeking to establish that indemnity coverage was not

[1] Witucki died in November 2009 and his estate was substituted as a defendant in the federal court action.

available, under its linebacker[2] or umbrella policies with Helicon and Witucki, for the claims asserted in the federal action. EMC did not dispute that Helicon and Witucki are insureds, but argued that four separate exclusions (return of remuneration, personal profit or advantage, guarantee on bonds, and fraud or dishonesty) applied, each of which would independently preclude coverage. Helicon and Witucki counterclaimed for breach of contract and "bad faith." The trial court found that three of the four cited exclusions applied, and it therefore granted summary disposition in favor of EMC.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the nonmoving party. A grant of summary disposition is proper only when the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120.

In addition, questions of contract interpretation are reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Courts enforce contracts in accordance with their terms, giving the contractual words their plain and ordinary meanings. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). "An unambiguous contractual provision reflects the parties['] intent as a matter of law, and '[i]f the language of the contract is unambigu-

[2] According to an EMC brochure, "Linebacker is a public officials policy for the wrongful acts rendered in the performance of organizational duties on behalf of the insured."

ous, we construe and enforce the contract as written.' " *Id*. (citation omitted) (second alteration in original). " 'The primary goal in the construction or interpretation of any contract is to honor the intent of the parties' . . . ." *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 174; 858 NW2d 765 (2014) (citation omitted). Insurance contracts are generally treated the same as any other contract, but it is incumbent on an insured to show coverage and incumbent on the insurer to show that an exclusion applies. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377-378; 836 NW2d 257 (2013).

As noted, EMC asserted that four exclusions in its Linebacker policy preclude coverage: "personal profit or advantage," "return of remuneration," "fraud or dishonesty," and "guarantees on bond issues." The trial court did not specifically address the return-of-remuneration exclusion, but it found the other three to apply. The Funds do not dispute that if any of the exclusions apply, coverage is precluded.

The fraud-or-dishonesty provision excludes coverage for

> [a]ny action brought against an "insured" if by judgment or adjudication such action was based on a determination that acts of fraud or dishonesty were committed by the "insured."

The Funds contend that this provision is not applicable because the underlying securities action did not adjudicate the issue of fraud or dishonesty. Specifically, the Funds argue that the securities action was based on negligence and that fraud was not a necessary component for liability. The Funds further assert that the trial court ignored the language of the provision, which required a judgment or adjudication to effectuate the

exclusion, and that the trial court's ruling rendered the policy illusory. We disagree.

The consent judgment that concluded the federal action was premised on a violation of the CUSA, specifically Conn Gen Stat 36b-29(a)(2). First, although a consent judgment in the abstract is more in the nature of a contract or settlement, it *becomes* a court judgment when the court "sanctions" it. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 354; 852 NW2d 22 (2014). Consequently, a consent judgment may have an exceptional genesis, but "*once entered*, consent judgments are treated the same as litigated judgments in terms of their force and effect." *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 572; 840 NW2d 375 (2013). The Federal Rules of Civil Procedure define a "judgment" as "a decree and any order from which an appeal lies." FR Civ P 54(a). Consequently, the consent judgment here is, for all conceivably relevant purposes, just another judgment.

Second, the specific statute provides, in relevant part:

> *Any person who . . . (2) offers or sells or materially assists any person who offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, who knew or in the exercise of reasonable care should have known of the untruth or omission, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security*, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight per cent per year from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the

> security, upon the tender of the security, or for damages if he no longer owns the security. [Conn Gen Stat 36b-29(a)(2) (emphasis added).]

Witucki and Helicon assisted in the offering and sale of bonds to the Funds without the proper authority, resulting in a substantial loss in the value of the investment when the bonds were required to be reissued. Under the plain language of the Connecticut statute, the consent judgment, by finding a violation of that statute, necessarily found that Witucki and Helicon made "untrue statement[s] of a material fact" or "omi[tted] to state a material fact." *Id*. The word "dishonesty" is defined in *Black's Law Dictionary* (10th ed) as "[d]eceitfulness as a character trait; behavior that deceives or cheats people; *untruthfulness*; untrustworthiness." (Emphasis added.) Because statements and representations made by Helicon and Witucki were "untrue," and those statements and representations resulted in the statutory violation, they committed acts of fraud or dishonesty within the meaning of the policy exclusion.

The Funds further suggest that application of the exclusion renders coverage illusory. As discussed in *Ile v Foremost Ins Co*, 293 Mich App 309, 315-316; 809 NW2d 617 (2011), rev'd on other grounds 493 Mich 915 (2012):

> An "illusory contract" is defined as "[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable." A similar, more specific concept exists in the realm of insurance. The "doctrine of illusory coverage" encompasses "[a] rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured. Courts avoid interpreting insurance policies in such a way that an

> insured's coverage is never triggered and the insurer bears no risk." [Citations omitted; alterations in original.]

"[T]he doctrine of illusory coverage is applicable 'where part of the [insurance] premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally nonexistent.' " *Ile*, 293 Mich App at 320-321 (citation omitted) (second alteration in original). Simply put, we are at a loss to comprehend how an exclusion based on "acts of fraud or dishonesty" renders the policy or coverage illusory absent an argument that fraud or dishonesty is intrinsically necessary to Helicon's and Witucki's operations, which we do not accept. Mere negligence will not trigger the exclusion. Hence, the coverage cannot be construed to be illusory because situations exist or could occur that will permit recovery.

Given our finding that the trial court correctly determined the applicability of the fraud-and-dishonesty exclusion, we need not consider the remaining policy exclusions.

Affirmed.

METER, P.J., and WILDER and RONAYNE KRAUSE, JJ., concurred.

PEOPLE v JACKSON (ON RECONSIDERATION)

Docket No. 322350. Submitted October 7, 2015, at Lansing. Decided December 3, 2015, at 9:00 a.m. Leave to appeal denied 499 Mich 916.

Kevin Raynard Jackson was convicted following a jury trial in the Eaton Circuit Court, Janice K. Cunningham, J., of second-degree home invasion, MCL 750.110a(3). The court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 88 months to 22 years in prison with credit for 259 days served. The case arose out of the invasion of, and theft of household items and money from, a home in Charlotte, Michigan. Defendant appealed and later moved the Court of Appeals to remand the case for resentencing. The Court of Appeals denied the motion without prejudice to the panel's consideration of the issue in the context of the pending appeal. The Court of Appeals initially issued an opinion for publication on October 13, 2015. The prosecution moved for reconsideration. The Court of Appeals granted the motion, vacated its initial opinion, and issued a new opinion on reconsideration.

On reconsideration, the Court of Appeals *held*:

1. MCL 768.32(1) permits the trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense. A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense. A trial court should give a requested instruction on a lesser included offense if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. In this case, defendant was charged with second-degree home invasion, and defense counsel requested, and the jury was additionally instructed on, the lesser offense of third-degree home invasion, MCL 750.110a(4). On appeal, defendant argued that the trial court erred by instructing the jury on third-degree home invasion, suggesting that the instruction allowed him to be convicted of a higher offense than that which the

evidence supported. By requesting the instruction and approving it as read to the jury, defendant waived his right to challenge any error, and, in any event, giving the instruction did not affect defendant's substantial rights. The second element of third-degree home invasion—commission of a misdemeanor while present in the dwelling—is subsumed within the second element of second-degree home invasion—commission of a larceny while present in the dwelling—because every felony larceny necessarily includes within it a misdemeanor larceny. Accordingly, either a misdemeanor or felony larceny may serve as the predicate offense for second-degree home invasion. Consequently, where, as here, the predicate offense for a home invasion charge is a larceny, third-degree home invasion is a lesser included offense of second-degree home invasion. Nonetheless, under the facts of this case, a rational view of the evidence did not support the giving of an instruction on third-degree home invasion. Because either felony or misdemeanor larceny may serve as the predicate offense underlying second-degree home invasion and there was no evidence of any predicate act other than larceny supporting the second-degree home invasion charge, the evidence in this case did not allow for a distinction between second-degree home invasion and third-degree home invasion and, therefore, did not support an instruction on third-degree home invasion. The trial court erred by giving that instruction, but the error did not harm defendant because the instruction allowed defendant the chance to be convicted of a lesser offense than that which the evidence supported.

2. A prosecutor cannot vouch for the credibility of a witness to the effect that he or she has some special knowledge concerning the witness's truthfulness. A prosecutor may, however, make reference to a plea agreement containing a promise of truthfulness, provided that the agreement is not used by the prosecutor to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully. In this case, defendant argued that the prosecutor improperly vouched for the credibility of two witnesses during closing arguments when the prosecutor stated that the witnesses had testified pursuant to a plea agreement and that the plea agreement was still intact and the witnesses had to testify truthfully. In context, the prosecutor's statements were a permissible response to defense counsel's theory of the case—that the witnesses were not credible because of their drug use. Although the prosecutor referred to the plea agreement, the prosecutor did not suggest that the government had some special knowledge, not known to the jury, that the witnesses were testifying truthfully. There was

no error requiring reversal in the prosecutor's statements concerning the witnesses' credibility.

3. Unresponsive answers from witnesses are generally not prosecutorial error. Accordingly, the references, made by a witness, to the content of a text message after the prosecutor told the witness not to refer to the content of the message could not be attributed to prosecutorial error.

4. A defendant has the right to be tried by an impartial jury drawn from a fair cross section of the community. To establish a prima facie case of a violation of the fair-cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a distinctive group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Defendant failed to provide any evidence supporting his assertion that the jury was not drawn from a fair cross section of the community and, therefore, failed to establish his prima facie case.

5. When reviewing defense counsel's performance, the reviewing court must first objectively determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Next, the defendant must show that trial counsel's deficient performance prejudiced his defense—in other words, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. With regard to jury composition and alleged prosecutorial error, defendant failed to establish a factual predicate for the claims that his counsel was ineffective. With regard to defense counsel's alleged failure to adequately investigate the text message, decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy. Further, the record indicated that neither the prosecution nor the police were aware of the text message before a prosecution witness mentioned it during cross-examination by defense counsel. Trial counsel was not ineffective for failing to request purported evidence of which not even the police, let alone the prosecution, was aware.

6. In *People v Lockridge*, 498 Mich 358 (2015), the Supreme Court held that in order to avoid any Sixth Amendment violations, Michigan's sentencing guidelines scheme was to be deemed advisory instead of mandatory. But sentencing judges must still

consult the guidelines and take them into account when sentencing. In determining whether there is any plain error under this new scheme, the first inquiry is whether the facts admitted by the defendant and the facts necessarily found by the jury were sufficient to assess the minimum number of offense variable (OV) points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. In this case, defendant objected to the scoring of OV 16 (value of the stolen property), MCL 777.46. Because the jury was only required to find that defendant intended or did commit a larceny, not a larceny of a specific value, facts supporting this score were not necessarily found by a jury. They also were not admitted by defendant. Accordingly, in considering whether defendant could make a threshold showing of plain error, the 5 points scored for OV 16 had to first be subtracted from defendant's total OV score. Defendant also objected to the scoring of OV 13 (pattern of felonious activity), MCL 777.43. Defendant had pleaded guilty in 2012 to two charges of home invasion related to offenses committed earlier in 2010 and 2011. Defense counsel stipulated the existence of these convictions at sentencing in this case. More significantly, by pleading guilty to those crimes, defendant admitted his commission of those crimes and admitted the factual basis for his guilty pleas to those crimes in proceedings with substantial procedural safeguards. Therefore, the facts underlying the scoring of OV 13 were admitted by defendant, and the points scored for OV 13 did not have to be subtracted in considering defendant's total OV score under *Lockridge*. Reducing defendant's OV score by 5 points (by subtracting the score for OV 16) did not alter defendant's guidelines minimum sentence range. Therefore, remand was not required under *Lockridge*.

Affirmed.

CRIMINAL LAW — HOME INVASION — JURY INSTRUCTIONS — LESSER INCLUDED OFFENSES.

A trial court should give a requested instruction on a lesser included offense if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it; when the predicate offense for a home invasion charge is a larceny, third-degree home invasion is a lesser-included offense of second-degree home invasion, but if there is no evidence of any predicate act other than larceny supporting the second-degree home invasion charge and the evidence does not allow for a distinction between second-degree home invasion and third-

degree home invasion, the evidence does not support an instruction on third-degree home invasion (MCL 750.110a; MCL 768.32).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Brent E. Morton*, Assistant Prosecuting Attorney, for the people.

Kevin Raynard Jackson, *in propria persona*, and *Mary A. Owens* for defendant.

ON RECONSIDERATION

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

BOONSTRA, P.J. Defendant appeals by right his conviction, following a jury trial, of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 88 months to 22 years' imprisonment, with credit for 259 days served. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The case arises out of the invasion of, and theft of household items and money from, Traci Brown's home in Charlotte, Michigan on July 4, 2012. On that day, Brown and her three children left the home to visit her mother. According to Brown, her windows and doors were all locked when she left, and she did not leave her front door open. Brown testified that, other than herself and her children, only her mother and the father of her children knew that she and the children would be away.

Alyson Michelle Hotchkiss, who lived in the house next door to Brown, testified that she was on vacation on July 4 with her husband Randy, three of her

daughters, and her grandson. She had given permission to her oldest daughter, Tashena Waycaster (who does not reside with her), and Dan Pion, to stay at her house while she was away; Hotchkiss testified that she allowed them to stay at her house while she was away because they were heroin addicts and basically homeless. Hotchkiss took her valuables with her when she left for vacation because she did not want the items stolen by Waycaster and Pion (presumably to be sold for drugs).

The backyard of LaVern and Theresa Bailey's house borders both the Brown and Hotchkiss backyards. LaVern said that he was working on his computer around 10:00 a.m. on the morning of July 4, 2012, when he saw a man carrying something and walking from the area of Brown's house to the Hotchkiss house. LaVern was not positive that the man had come from Brown's house, "but [the man] was so close to the house" that "it kind of surprised [him]." While LaVern did not see the man come directly out of Brown's house, he did see him go into the Hotchkiss house. He described the man, who was approximately 40 yards away, as "[a] black man, medium build, short hair, about five eight, five ten." LaVern and his wife saw the same man 15 minutes later walking from the side area of Brown's house toward the Hotchkiss house, carrying a laundry basket filled with "all kinds of stuff," as well as a brown jug or jar. The man put the basket on the deck of the Hotchkiss house, noticed that he was being watched by LaVern and his wife, and walked into the house. The Baileys thought it looked a little suspicious but did not call the police at that time.

Pion and Waycaster admitted that in July 2012 they used heroin, cocaine, crack cocaine, and marijuana; Pion would sometimes steal things to pay for the drugs

and Waycaster would prostitute herself for money to pay for the drugs. Pion and Waycaster testified that defendant was staying with them at the Hotchkiss house while her parents were on vacation around the Fourth of July in 2012. According to Pion and Waycaster, they ran into defendant at the Dairy Queen in town during the daytime and returned to Hotchkiss's home to smoke marijuana and crack cocaine. They testified that after doing drugs with defendant, defendant said that he was going to leave and "hit a lick," which is a slang term meaning that defendant was going to steal something. Pion said that defendant left and returned with a storage tote containing a couple of game systems, movies, and games; he placed the items in the basement of 813 West Lawrence (the address of the Hotchkiss home) and then left and returned with what Pion thought was a 32-inch flat-screen television; according to Waycaster, defendant had socks on his hands. Pion claimed that defendant left the house again and Pion went to bed. Pion testified that Waycaster was with him at her mother's house while defendant was coming and going from the house. Waycaster testified that defendant went in and out of the Hotchkiss house at least four separate times; she saw him carry in a flat-screen television, video game systems, DVDs, and games. Waycaster denied ever entering Brown's house. Waycaster said that she told defendant that she "wanted something out of it," i.e., a cut of the profits from selling the stolen goods, and that, when asked, defendant told her that he had stolen the items and pointed to the next door neighbor's house. According to Waycaster, defendant showed her money in his pocket. Pion thought defendant was going to sell the stolen items so that they could buy drugs. Defendant was sleeping on the couch when Waycaster went to bed; when Pion and Waycaster woke

up the next morning, most of the items defendant had brought into the house were gone, as was defendant. They found some small miscellaneous items taken by defendant still in the house, and hid them under a bed. Pion also discovered that $20 was missing from his car.

Matthew Andrews, a friend of defendant, testified that defendant was with him around noon on July 4, 2012, at a baseball game. According to Andrews, defendant went to Lake Michigan for the day with Andrews's family and defendant's girlfriend. They stayed in Saugatuck for a few hours and purchased fireworks on the way home, returning to Andrews's house in Charlotte around 11:00 p.m. on July 4. Andrews testified that defendant spent the night at Andrews's home. Mindy Dassance, who has a child with defendant, testified that defendant called her on July 5, 2012, asking her to pick him up at Andrews's home; she said that she did so and drove him back to her home. According to Dassance, defendant did not own a vehicle.

The Baileys called the police on July 5, 2012, after Theresa drove by Brown's house and noticed that the front door was open. Charlotte Police Sergeant James Falk arrived at Brown's house around 6:00 p.m. According to Falk, it was clear that the house had been broken into because items appeared to be missing and the rooms had been ransacked. Falk contacted Brown on the telephone at her mother's home and informed her that her house had been broken into and that property had been stolen. Falk testified that after speaking with the Baileys he knocked on the door of the Hotchkiss house. No one answered the door but through a window he could see a green laundry basket lying on the floor in the basement.

Brown drove home after receiving the telephone call from Falk. Brown noted numerous items missing from her home: a 55-inch flat-screen television, an Xbox 360, a Wii, two blue-ray DVD players, over 600 DVDs, 50 Xbox games, 100 Wii games, portable DVD players, a round glass jar partially full of coins, a 32-inch flat-screen television that had been in her bedroom, a candleholder from the kitchen, food items from the refrigerator and freezer, alcohol, a brand new digital camera with a manual, a new computer printer still in the box, prescription medications, handheld personal gaming devices, 100 Game Boy DS games, a Dell laptop computer, a window air conditioner, a GPS device, and a full-size cooler. Brown testified that the dresser drawers had been emptied in her and one of her son's bedrooms, with the clothes strewn everywhere, and that a green laundry basket and $5,500 in cash had also been taken. In addition, she said that a television in another son's bedroom was tipped over and on the floor and a Wii figurine was missing. The original insurance estimate to replace the stolen items, excluding the $5,500, was $24,000.

Falk returned to the Hotchkiss home later that night after the Baileys informed him that someone was home at that house. When questioned, Waycaster indicated that in the preceding five days a woman named "Jamie" had been at the home with them. Waycaster informed Falk that the green laundry basket found in the Hotchkiss house belonged to her mother. According to Pion, he and Waycaster realized during Falk's questioning that the items defendant had brought into the Hotchkiss house had been stolen from Brown's house. Pion and Waycaster testified that they did not tell the police about defendant staying with them because they did not want to get anyone in trouble; Waycaster also testified that she was afraid of getting into trouble

because she felt somewhat responsible for holding stolen items. Pion testified that he did not know who lived at the Brown house or that they would be on vacation on July 4.

Hotchkiss returned with her family to their house on July 6, 2012. When she got home, her landlord told her about the break-in at Brown's house. Hotchkiss found items later identified as stolen from Brown's house under her grandson's bed and in other areas around her house. Hotchkiss said that she called the Charlotte Police Department as soon as she found the items. Hotchkiss spoke to Waycaster on the telephone before the police arrived and told her that she and Pion needed to speak to the police or they would not be allowed to stay in her home. Pion and Waycaster again spoke with police on July 8, 2012. At first, both Pion and Waycaster minimized their knowledge of the robbery, but both identified defendant and described his conduct on July 4. Pion testified that he did not feel pressured by the police to "give up a name" and denied that he named defendant because he was a black male he knew.

Hotchkiss testified that additional items were taken from her home four days after she returned from vacation; Pion and Waycaster were not at the house when it happened. Pion and Waycaster came over to her house and she told them what happened. Pion showed Hotchkiss a text message that he said he had received from defendant; Hotchkiss testified that the content of the text was vindictive and threatening, and that the message

> was pertaining to the fact that he had found out that [Pion] and [Waycaster] had went and talked to the police and that he couldn't believe that [Pion] basically would choose [Waycaster] over him since they were, they had

> grown up and been friends most of their lives. And that since he couldn't get to [Waycaster] then he would have to then basically go after me and my three little ones.

Hotchkiss never reported the text message to the police. Pion testified that he did not remember showing a text message to anyone but knew from the text that defendant was mad about something.

Brown later identified items found in the Hotchkiss home, including a green laundry basket, a change jar, jewelry, one of her son's digital cameras, the Wii figurine, and two fans, as belonging to her. At trial, Brown also identified a missing jar, a Wii steering wheel controller, a DVD, a digital camera with the manual, and a Polaroid camera, all found in the Hotchkiss home, as belonging to her.

During the trial, Pion testified that he had been charged with the felony of receiving and concealing stolen property and that in exchange for his testimony against defendant, the prosecutor's office had agreed to allow him to plead guilty to a misdemeanor charge of receiving and concealing stolen property. Waycaster testified that she had also been charged with felony receiving and concealing stolen property, and that in exchange for her truthful testimony, the charges were reduced to misdemeanor receiving and concealing stolen property.

The jury convicted defendant of one count of second-degree home invasion, MCL 750.110a(3). Defendant was sentenced as stated earlier in this opinion. At sentencing, defendant was assessed 25 points for Offense Variable (OV) 13 (continuing pattern of felonious activity), MCL 777.43, and 5 points for OV 16 (value of stolen property), MCL 777.46.

This appeal followed. After defendant filed his appeal, he moved this Court to remand for resentencing

under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). This Court denied his motion "without prejudice to the panel's consideration of the issue in the context of the pending appeal." *People v Jackson*, unpublished order of the Court of Appeals, entered September 4, 2015 (Docket No. 322350).

II. INSTRUCTION ON LESSER OFFENSE

Defendant argues that the trial court erred by instructing the jury on the lesser included offense of third-degree home invasion. Defendant maintains that, by providing essentially identical instructions on second-degree and third-degree home invasion, the instructions as a whole were confusing and allowed the jury to convict defendant of the higher offense (second-degree home invasion) on no greater proof than would sustain a conviction for the lesser offense (third-degree home invasion), thus lowering the prosecution's burden of proof on the former. The record indicates that defendant's counsel requested that the jury be so instructed, and defendant's counsel affirmatively approved the jury instruction as read. Defendant has thus waived his right to challenge any error in this instruction. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009).[1]

Further, even if defendant had not waived appellate review of this issue, we would find that reversal was not required. "A criminal defendant is entitled to have a properly instructed jury consider the evidence

[1] We reject defendant's assertion that such an alleged instructional error cannot be waived. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Further, for the reasons noted in this opinion, the instructions did not result in manifest injustice or prejudice to defendant. See *People v Carines*, 460 Mich 750, 775; 597 NW2d 130 (1999) (KELLY, J., concurring in part).

against him." *People Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). The jury instructions must include all elements of the charged offenses and any material issues, defenses, and theories if there is evidence to support them. *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). This Court reviews unpreserved challenges to jury instructions for plain error affecting a party's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"MCL 768.32(1) permits the trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense. A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense." *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). The trial court should give a "requested instruction on a necessarily included lesser offense . . . if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

In this case, defendant was charged with second-degree home invasion, and defense counsel requested, and the jury was additionally instructed on, the lesser offense of third-degree home invasion, MCL 750.110a(4). Second-degree home invasion is established when

> [a] person who breaks and enters a dwelling *with intent to commit a felony, larceny, or assault* in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time

> while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault . . . . [MCL 750.110a(3) (emphasis added).]

In relevant part, third-degree home invasion is established when a person

> [b]reaks and enters a dwelling *with intent to commit a misdemeanor* in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor. [MCL 750.110a(4)(a) (emphasis added).]

Our Supreme Court has held that "[t]he second element of the lesser crime, *commission of a misdemeanor while present in the dwelling*, is subsumed within the second element of the greater crime charged, *commission of a larceny while present in the dwelling*, because every felony larceny necessarily includes within it a misdemeanor larceny." See *People v Wilder*, 485 Mich 35, 46; 780 NW2d 265 (2010). This Court had earlier concluded, in *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004), that the language of MCL 750.110a(2) permits a misdemeanor larceny or misdemeanor assault to serve as the predicate offense for first-degree home invasion, rather than requiring *felony* larceny or assault. The Court reasoned that, "because felonies are specifically listed as underlying crimes for first-degree home invasion, it would be redundant to list assault and larceny separately if subsection 110a(2) was referring to only felony assaults and larcenies." *Id*. Although the *Wilder* and *Sands* Courts were considering the first-degree home invasion statute, the relevant language of that statute is the same as that of the second-degree home invasion

statute. See MCL 750.110a(2) and (3).[2] The rationale of those cases is therefore equally applicable to second-degree home invasion, MCL 750.110a(3), and either a misdemeanor *or* felony larceny thus may serve as the predicate offense for second-degree home invasion. Consequently, where, as here, the predicate offense for the home invasion charge was a larceny, third-degree home invasion is a lesser included offense of second-degree home invasion.

Nonetheless, under the facts of this case, a rational view of the evidence did not support the giving of an instruction on third-degree home invasion. See *Cornell*, 466 Mich at 357. In this case, there is no record evidence that defendant entered Brown's home to commit any crime other than a larceny. Specifically, Pion and Waycaster both testified that defendant said he was going to "hit a lick," which is a slang term meaning that defendant was going to steal something, and that he returned to the house later carrying items in a basket. Because either felony or misdemeanor larceny may serve as the predicate offense underlying second-degree home invasion, *Sands*, 261 Mich App at 163, and because there was no evidence of any predicate act other than larceny supporting the second-degree home invasion charge, the evidence in this case did not allow for a distinction between second-degree home invasion and third-degree home invasion, and therefore did not support an instruction on third-degree home invasion. The trial court thus erred by giving that instruction. See *Cornell*, 466 Mich 335, 357.

The trial court and counsel for the parties appeared to struggle with how to instruct the jury that both felony and misdemeanor larceny may serve as the

[2] First-degree home invasion requires proof of additional elements not at issue in this case. See MCL 750.110a(2)(a) and (b).

predicate offense underlying second-degree home invasion. However, if anything, this confusion aided defendant by allowing him a chance to be convicted of a lesser offense based on a predicate offense that would have supported a higher charge. Although defendant argues that the instruction given allowed the jury to convict him of a *higher* offense than that which the evidence supported, it is the converse that is actually true: the instruction allowed defendant the chance to be convicted of a *lesser* offense than that which the evidence supported. Thus, the jury was allowed to consider a lesser charge that it should not have been allowed to consider. Had the jury convicted defendant of the lesser offense, he would have been subject to a lesser sentence. However, the jury convicted defendant of the higher charged offense, second-degree home invasion. We therefore hold that the improper jury instruction did not affect defendant's substantial rights. See *Carines*, 460 Mich at 763-764.[3] We further hold that a defendant may not request such an instruc-

[3] Arguably, our analysis (based on existing caselaw) leads to a somewhat counterintuitive result: while third-degree home invasion is a necessarily included lesser offense of second-degree home invasion involving larceny, cases in which the predicate offense alleged is larceny (or assault, for that matter) will generally not require that an instruction on third-degree home invasion be given. But our analysis is consistent with the oft-repeated mantra that our task is to give fair and natural import to the language of statutes, and not to speculate regarding the intent of the Legislature beyond the language expressed in the statute. See *Chico-Polo v Dep't of Corrections*, 299 Mich App 193, 198; 829 NW2d 314 (2013). Moreover, even if, in construing the home invasion statutory scheme as a whole, we were to interpret the elements of third-degree home invasion to require proof of an intended or committed misdemeanor *apart from* larceny or assault, our conclusion would not be altered. Rather, in that event, a jury instruction on third-degree home invasion still would be improper in this case, because it would be inconsistent with the charges and unsupported by the evidence. And in either event, the instruction, though erroneous, inured to defendant's potential benefit and is not grounds for reversal.

tion, only to later claim resulting confusion in the jury instructions, thus harboring error as an appellate parachute. See *People v Buie*, 491 Mich 294, 299; 817 NW2d 33 (2012).

III. PROSECUTORIAL ERROR[4]

Defendant next argues that the prosecution erred by improperly vouching for Pion and Waycaster's credibility and bolstering their testimony during closing arguments, and additionally in soliciting testimony from Hotchkiss regarding a threatening text message that was not reported to the police. We disagree. Defendant's trial counsel did not object to the prosecution's comments regarding Pion's and Waycaster's testimony, to the specified closing argument comments related to them, or to Hotchkiss's statement regarding the text message. This issue is thus unpreserved and reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id*. at 329-330.

We review claims of prosecutorial error on a case-by-case basis by examining the record and evaluating

[4] As this Court recently noted in *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015), although the term "prosecutorial misconduct" has become a term of art often used to describe any error committed by the prosecution, claims of inadvertent error by the prosecution are "better and more fairly presented as claims of 'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.' "

the prosecution's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "[T]he prosecutor is permitted to argue the evidence and all reasonable inferences arising from it." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). However, the prosecution cannot vouch for the credibility of a witness "to the effect that [the prosecution] has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The prosecution may, however, make reference to a plea agreement containing a promise of truthfulness, provided that the agreement is not "used by the prosecution to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully." *Id*. (quotation marks and citation omitted). Additionally, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Thomas*, 260 Mich App at 455.

In this case, defendant claims that the prosecution improperly vouched for Pion's and Waycaster's credibility during her closing argument by stating that they were testifying truthfully. The prosecution stated that Pion and Waycaster testified pursuant to a plea agreement, and that the "ongoing plea agreement [was] still intact and they ha[d] to testify truthfully." The prosecution further argued that, despite their drug use, Pion and Waycaster had testified truthfully to the best of their ability and that their testimony was supported by other evidence, such as the testimony of neighbors who had seen a black male going between the Brown house and the Hotchkiss house.

Defense counsel repeatedly attacked Pion's and Waycaster's credibility because of their drug use and drug addiction. In context, the prosecution's comments were made in response to defense counsel's theory of the case—that Pion and Waycaster were not credible witnesses because of their drug use. See *Thomas*, 260 Mich App at 454. Further, although the prosecution referred to the plea agreement, it did not "suggest that the government had some special knowledge, not known to the jury, that the witness[es] [were] testifying truthfully." *Bahoda*, 448 Mich at 276. We therefore find no error requiring reversal in the prosecution's statements concerning Pion's and Waycaster's credibility.

Defendant further argues that the prosecution and the police did not have personal knowledge of the "threatening" text allegedly sent by defendant, and that the prosecution's reference to it in closing argument denied him a fair trial. Hotchkiss first referred to the text message during her cross-examination by defense counsel. On redirect, the prosecution questioned Hotchkiss regarding the timing of the text message in relation to the break-in that occurred at her home. In context, it is clear that Hotchkiss gave an unresponsive answer to the prosecution's questions after the prosecution twice instructed her not to discuss the content of the message. Unresponsive answers from witnesses are generally not prosecutorial error. See *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990) (stating that "[a]s a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony"). Further, the prosecution did not question Hotchkiss about the content of the text message, but did make it clear through

its examination that no one was charged for the break-in and that Hotchkiss did not know for sure who took the items; thus, the prosecution further inquired into the incident, not the text message, to minimize the effect of the nonresponsive reference to the content of the text message. Finally, despite defendant's assertion to the contrary, the prosecution did not refer to the text message during its closing argument and thus did not argue facts not in evidence. See *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

IV. JURY COMPOSITION

Defendant argues that his Sixth Amendment right to a fair trial was violated by the jury empaneled to decide his case, because it did not represent a fair cross-section of the community. We disagree. Defendant did not raise this issue in the trial court and we review it for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

A defendant has the right to be tried by an impartial jury drawn from a fair cross section of the community. US Const, Am VI; Const 1963, art 1, § 20; *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012). In *Bryant*, our Supreme Court explained that to establish a prima facie case of a violation of the Sixth Amendment's fair-cross-section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Id.* at 581-582, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

"[W]hen applying the relevant statistical tests, a court must examine the composition of jury pools and venires *over time* using the most reliable data available to determine whether representation is fair and reasonable." *Bryant*, 491 Mich at 599-600. "A systematic exclusion is one that is inherent in the particular jury-selection process utilized." *Id*. at 615-616 (quotation marks and citation omitted).

Defendant argues in this case that his jury was more Caucasian, more educated, and had more ties to law enforcement than a typical cross-section of the Eaton County community. In support of this assertion, defendant refers to the 2010-2011 United States Census of Eaton County, which according to defendant indicates that Eaton County is more than 90% Caucasian, about 6% African-American, and less than 4% Hispanic. Defendant asserts that his jury was "either all White, with no African-Americans present, or had only one member that was not White[.]" However, there is no evidence in the record of the racial makeup of defendant's jury. Further, defendant provides no evidence indicating a "systematic" exclusion of African-Americans from Eaton County jury pools. See *Bryant*, 491 Mich at 615. Defendant has thus failed to establish a prima facie case for violation of the Sixth Amendment's fair-cross-section requirement with regard to race. *Id*. at 597.

With regard to education level and ties to law enforcement, defendant provides no evidence that persons possessing a certain degree of education or ties to law enforcement, or lacking the same, are members of a "distinctive" group in the Eaton County community. *Id*. Further, the record, although it does not reflect the precise education levels of the selected jurors, indicates that the jurors came from a wide variety of professions;

additionally, while four jurors acknowledged ties to law enforcement, no evidence was presented that this was disproportionate compared to the community at large. We thus conclude that defendant has failed to establish a prima facie case for violation of the Sixth Amendment's fair-cross-section requirement with regard to education level or ties to law enforcement. *Id*.

Defendant also makes passing reference to the prosecution's use of preemptory challenges to allegedly excuse one African-American juror. To the extent that defendant seeks to raise a *Batson*[5] challenge to the prosecution's use of preemptory challenges, this issue is also unpreserved and reviewed for plain error. *Carines*, 460 Mich at 763-764. Further, "unless it is clear from the record that the prosecution is using its peremptory challenges in a discriminatory fashion, a defendant who fails to raise the issue or otherwise develop an adequate record of objections forfeits appellate review of the issue." *People v Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993). Our review of the record does not reveal that the challenged juror was, as defendant claims, challenged because of his race. The record is devoid of any evidence regarding the racial makeup of *any* of the prospective jurors, let alone the juror in question.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel was ineffective for failing to object to the jury composition and selection, failing to object to prosecutorial error, and failing to diligently inquire into the prosecution's lack of effort in attempting to obtain from the telephone or telecommunication company information regarding

[5] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

the text message. We disagree. Defendant did not move the trial court for a new trial or a *Ginther*[6] hearing. Our review of defendant's claim is thus limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

It is strongly presumed that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (quotation marks and citation omitted). When reviewing defense counsel's performance, the reviewing court must first objectively "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Next, the defendant must show that trial counsel's deficient performance prejudiced his defense—in other words, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 491 Mich at 669 (quotation marks and citation omitted). The defendant must establish both prongs of this test to prevail on his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). In addition, "to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy . . . ." *Id*. at 6.

With regard to the jury composition and alleged prosecutorial error, defendant has failed to establish a factual predicate for these claims, as discussed earlier in Parts III and IV of this opinion. See *id*. With regard to defense counsel's alleged failure to adequately in-

[6] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

vestigate the text message, "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy . . . ." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In addition, "[d]efense counsel's failure to present certain evidence will only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense." *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). "A substantial defense is one that might have made a difference in the outcome of the trial." *Chapo*, 283 Mich App at 371 (quotation marks and citation omitted). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

The record does not indicate that anyone ever informed the police of the text message Hotchkiss testified to viewing on Pion's cellular telephone; Hotchkiss testified that she did not inform the police of the text after her house was robbed, and Pion testified that he did not show the text to anyone. Moreover, Hotchkiss's original statement regarding the text was elicited by a question by defendant's trial counsel. Trial counsel was not ineffective for failing to request purported evidence of which not even the police, let alone the prosecution, were aware. Therefore, defendant cannot establish that trial counsel's performance fell below an objective standard of reasonableness. See *Strickland*, 466 US at 690. Further, even if trial counsel's performance was deficient on this issue, in light of other testimony incriminating defendant, defendant cannot demonstrate that he was deprived of a substantial defense. See *Dunigan*, 299 Mich App at 589.

VI. SENTENCING

As noted earlier in this opinion, defendant moved this Court to remand for resentencing in light of *Lockridge*, 498 Mich at 358. Our review of the record convinces us that remand is not required.

At the outset, we note that defendant does not argue on appeal that the trial court erred in its scoring of any OVs. That is, defendant does not argue that the court's factual findings in scoring OVs 13 and 16 were clearly erroneous or not supported by a preponderance of the evidence. A trial court's factual determinations in scoring the OVs must be supported by a preponderance of the evidence; we review the trial court's findings of fact for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). But in this case defendant merely argues on appeal that the facts supporting the scoring of OVs 13 and 16 were not found by the jury or admitted by defendant, and that a remand is therefore required by *Lockridge*.

We reiterate that judicial fact-finding remains an important component of Michigan's sentencing scheme post-*Lockridge*. Although the sentencing guidelines are no longer mandatory, "they remain a highly relevant consideration in a trial court's exercise of sentencing discretion." *Lockridge*, 498 Mich at 391. *Lockridge* simply requires that where, as here, a trial court was not aware at the time of sentencing that the sentencing guidelines were advisory, we consider whether OVs were scored based on facts necessarily found by the jury or admitted by defendant, and whether, applying *Lockridge*, a remand is required.[7]

[7] Indeed, sentences imposed by trial courts post-*Lockridge* (knowing of the advisory nature of the sentencing guidelines) will not require the consideration we must give the instant case. See *Lockridge*, 498 Mich at

We conclude that a remand is not required in this case. We do agree that the scoring for OV 16 was not based on facts admitted by defendant or necessarily found by the jury; however, the scoring of OV 13 was based on facts admitted by defendant. Because, as explained later in this opinion, removing the 5 points scored for OV 16 from defendant's OV score would not alter his minimum guidelines range, defendant has not made a threshold showing of plain error.

In *Lockridge*, the Supreme Court held that in order to avoid any Sixth Amendment violations, Michigan's sentencing guidelines scheme was to be deemed advisory, instead of being mandatory. *Id*. at 399. The concern is that when a judge makes findings of fact "beyond facts admitted by the defendant or found by the jury" in a sentencing proceeding and those findings increase the defendant's minimum sentence, this runs afoul of the defendant's right to a jury trial. *Id*. at 364. As a result, the guidelines no longer can be considered mandatory, but sentencing judges must consult the guidelines and " 'take them into account when sentencing.' " *Id*. at 391, quoting *United States v Booker*, 543 US 220, 264; 125 S Ct 738; 160 L Ed 2d 621 (2005).

In determining whether there is any plain error under this new scheme, the first inquiry is whether the facts admitted by the defendant and the facts necessarily found by the jury "were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." *Id*. at 394. If the answer is "yes," then a defendant cannot estab-

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392 ("Because sentencing courts will hereafter not be *bound* by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme . . . . Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence.")

lish any plain error. *Id*. at 394-395. If the answer is "no," then a remand to the trial court is required to allow it to determine whether, now aware of the advisory nature of the guidelines, the court would have imposed a materially different sentence. *Id*. at 397. If the court determines that it would have imposed a materially different sentence, then it shall order resentencing. *Id*.

In this case, defendant objected to the scoring of OV 16 (value of stolen property) at sentencing; further, because the jury was only required to find that defendant intended or did commit a larceny, not a larceny of a specific value, facts supporting this score were not necessarily found by a jury. See MCL 750.110a(3). They also were not admitted by defendant. We thus agree that, in considering whether defendant can make a threshold showing of plain error,[8] the 5 points scored for OV 16 should first be subtracted from defendant's total OV score.

However, we disagree with defendant's contention that the scoring of OV 13 was not based on facts admitted by defendant. A score of 25 points for OV 13 must be supported by facts indicating that the sentencing offense was part of a pattern of felonious activity involving three or more crimes against a person within a five-year period. See MCL 777.43(1)(c). Home invasion is a crime against a person. MCL 777.16f. The United States Supreme Court has recognized that a defendant's admission of a prior conviction satisfies the requirement that a sentencing enhancement be based on facts admitted by a defendant or found by a jury. See

[8] Our review of the record does not indicate, and defendant does not argue on appeal, that the score for OV 16 was clearly erroneous or not supported by a preponderance of the evidence. See *Hardy*, 494 Mich at 438.

Apprendi v New Jersey, 530 US 466, 488; 120 S Ct 2348; 147 L Ed 2d 435 (2000) ("Because Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own—no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court."), citing *Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998). In this case, defendant had pleaded guilty in 2012 to two charges of home invasion related to offenses committed earlier in 2010 and 2011. Defense counsel stipulated the existence of these convictions at sentencing in this case. More significantly, in pleading guilty to those crimes against a person, defendant admitted his commission of those crimes, and admitted the factual basis for his guilty pleas to those crimes, in "proceedings with substantial procedural safeguards of their own . . . ." *Apprendi*, 530 US at 488. Therefore, the facts underlying the scoring of OV 13 were admitted by defendant, and the points scored for OV 13 need not be subtracted in considering defendant's total OV score under *Lockridge*.

Reducing defendant's OV score by 5 points (by subtracting the score for OV 16) would not alter defendant's guidelines minimum sentence range. Therefore, remand is not required under *Lockridge*. *Lockridge*, 498 Mich App at 395.

Affirmed.

SAAD and HOEKSTRA, JJ., concurred with BOONSTRA, P.J.

KYOCERA CORPORATION v HEMLOCK SEMICONDUCTOR, LLC

Docket No. 327974. Submitted October 6, 2015, at Lansing. Decided December 3, 2015, at 9:05 a.m. Leave to appeal denied 500 Mich 892.

Kyocera Corporation, which manufactures solar panels, brought an action in the Saginaw Circuit Court against Hemlock Semiconductor, LLC, which produces polycrystalline silicon. In November 2008, the parties entered into a long-term take-or-pay contract (Agreement IV) that required plaintiff to purchase a certain quantity of polycrystalline silicon annually over a period of years for a fixed price. The agreement contained a force-majeure clause. That clause provided, in part, that neither buyer nor seller would be liable for delays or failures in the performance of its obligations arising out of "acts of the Government." Plaintiff sought a declaratory judgment that certain acts of the Chinese and United States governments, which affected the prices of polycrystalline silicon and solar panels, constituted a force-majeure event under the agreement such that plaintiff was not liable for any delays or failure to perform. Defendant moved for summary disposition. The court, M. Randall Jurrens, J., granted the motion, holding that even if acts of the Chinese or United States governments constituted a force-majeure event, economic hardship caused by market conditions was not sufficient to invoke the clause. Plaintiff appealed.

The Court of Appeals *held*:

Force-majeure clauses are narrowly construed and will only excuse a party's nonperformance if the event that caused the nonperformance is specifically identified. The conduct alleged in this case did not constitute a force-majeure event under the parties' contract. Plaintiff argued that because of a trade war in the solar industry, it could no longer pay defendant the prices negotiated in the agreement. The risk of a deflation of market prices—no matter the cause—was expressly assumed by plaintiff in its take-or-pay contract with defendant. Plaintiff opted not to protect itself with a contractual limitation on the degree of market price risk that it would assume. It could not, through judicial action, manufacture a contractual limitation by broadly interpreting the force-majeure clause to say something that it did

not. Agreement IV stated that plaintiff was absolutely and irrevocably required to pay the agreed price over the term of the agreement. Therefore, applying the force-majeure clause to excuse plaintiff's obligation to pay would nullify a central term of the contract and relieve plaintiff from the very risk it contracted to assume. The fact that plaintiff may not have foreseen the trade war was not relevant to the interpretation of the force-majeure clause in the parties' contract. Certainly, the general notion that markets are volatile and prices may rise and fall was known to both parties and that risk was precisely allocated by the take-or-pay nature of Agreement IV. Plaintiff failed to allege a cognizable claim that a force-majeure event occurred, or that a force-majeure event caused a delay or failure in performance under the contract. The trial court correctly concluded that plaintiff failed to state a claim on which relief could be granted.

Affirmed.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Krista L. Lenart*) and *Morrison & Foerster LLP* (by *David C. Doyle*, *William V. O'Connor*, *Joseph R. Palmore*, and *Ellen N. Adler*) for plaintiff.

Braun Kendrick Finkbeiner PLC (by *Jamie Hecht Nisidis* and *Craig W. Horn*) and *Orrick, Herrington & Sutcliffe LLP* (by *John Ansbro*, *J. Peter Coll, Jr.*, and *Thomas Kidera*) for defendant.

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

BOONSTRA, P.J. Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(8) (failure to state a claim) and dismissing plaintiff's declaratory-judgment action. We affirm.

I. NATURE OF THE CASE

This case involves the interpretation of a force-majeure clause in a contract. Generally, the purpose of a force-majeure clause is to relieve a party from pen-

alties for breach of contract when circumstances beyond the party's control render performance untenable or impossible. See *Erickson v Dart Oil & Gas Corp*, 189 Mich App 679, 689; 474 NW2d 150 (1991). The contract at issue is a take-or-pay contract. A take-or-pay contract obligates a buyer to purchase a specific quantity of product from the seller (usually also the manufacturer of the product) at a fixed price; if the buyer purchases less than that quantity, it is nonetheless obligated to pay the seller for the full specified quantity at the specified price. See, e.g., *Mobil Oil Exploration & Producing Southeast Inc v United Distrib Co*, 498 US 211, 229; 111 S Ct 615, 112 L Ed 2d 636 (1991). The very essence of a take-or-pay contract is to allocate to the buyer the risk of falling market prices by virtue of fixed purchase obligations at a long-term fixed price and to thereby secure for the buyer a stable supply, while allocating to the seller the risk of increased market prices and, by virtue of the buyer's obligation to take or pay for a fixed quantity of product, removing from the seller the risk of producing product that may go unpurchased. See generally Medina, *The Take-or-Pay Wars: A Cautionary Analysis for the Future*, 27 Tulsa L J 283 (1991).

At stake in this case is plaintiff's liability under its take-or-pay contract for the purchase of polysilicon for use in solar panels. If plaintiff is liable under the contract for the full purchase price of all unordered polysilicon for the duration of the contract, plaintiff faces liability of up to $1.74 billion. Plaintiff asserts that such a liability would force it to leave the solar panel industry. Nonetheless, as developed later in this opinion, we conclude that plaintiff contracted for precisely that liability, that plaintiff contractually assumed the very market risks that give rise to that liability, and that the plain language of the force-

majeure clause at issue does not permit relief to plaintiff on the ground that the market for polysilicon has shifted, regardless of the cause of that shift. We therefore affirm the trial court's dismissal of plaintiff's complaint for declaratory relief under MCR 2.116(C)(8).

II. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff is a Japanese company that produces high-quality solar panels. Defendant is a Michigan company and a large manufacturer of polycrystalline silicon (also called polysilicon), which is used in the manufacture of solar panels. Plaintiff alleges that in 2005 there was a worldwide shortage of polysilicon and defendant proposed partnering with plaintiff to provide it with a stable supply of polysilicon. According to plaintiff, defendant intended to significantly expand its manufacturing capacity to meet the increased demand for its product, funding this expansion with long-term contracts for the sale of polysilicon.

Between 2005 and 2008, the parties entered into four long-term contracts requiring plaintiff to purchase a certain quantity of polysilicon annually over a period of 10 years, and allowing defendant to bill plaintiff for the difference between the quantities of polysilicon plaintiff ordered in a year and the expected order for that year. Plaintiff thus contracted to secure a long-term, stable supply of polysilicon, by virtue of which it protected itself from market disruptions that might threaten that supply. The trade-off was a contracted-for fixed price, and an obligation to pay for quantities of polysilicon for which plaintiff anticipated a need, even if that need ultimately proved to be nonexistent. The parties did not (although they could have) negotiate a contractual limitation (e.g., a price floor or ceiling), and

therefore plaintiff assumed all downside price risk (if the market price fell) and defendant assumed all upside price risk (if the market price rose). According to plaintiff, the contracts provided for advance payments to be used by defendant in expanding its polysilicon manufacturing infrastructure. Plaintiff alleges that by 2010, it had made $685 million in advance payments on the contracts toward $2.6 billion in total purchases of polysilicon from defendant. Plaintiff asserts that the advance payments allowed defendant to open a new facility in Tennessee, costing approximately $1.2 billion. Each agreement also contained an acceleration clause that rendered plaintiff liable for the full purchase price of all unordered polysilicon for the entire length of the contract in the event of a default in payment.

At issue in this case is the November 13, 2008 long-term supply agreement between the parties (Agreement IV), which plaintiff alleges is the "last, and by far the largest," agreement between the parties. Pursuant to that agreement, plaintiff was to pay defendant more than $514,848,000 in advance payments for set amounts of polysilicon to be purchased through 2020. The deliveries were scheduled to begin in 2011 and end in 2020. Section 19 of Agreement IV is a force-majeure provision, which states as follows:

> Neither Buyer nor Seller shall be liable for delays or failures in performance of its obligations under this Agreement that arise out of or result from causes beyond such party's control, including without limitation: acts of God; acts of the Government or the public enemy; natural disasters; fire; flood; epidemics; quarantine restrictions; strikes; freight embargoes; war; acts of terrorism; equipment breakage (which is beyond the affected Buyer's or Seller's reasonable control and the affected Buyer or Seller shall promptly use all commercially reasonable efforts to

> remedy) that prevents Seller's ability to manufacture Product or prevents Buyer's ability to use such Product in Buyer's manufacturing operations for solar applications; or, in the case of Seller only, a default of a Seller supplier beyond Seller's reasonable control (in each case, a "Force Majeure Event"). In the event of any such delay or failure of performance by Buyer or Seller, the other party shall remain responsible for any obligations that have accrued to it but have not been performed by it as of the date of the Force Majeure Event. When the party suffering from the Force Majeure Event is able to resume performance, the other party shall resume its obligations hereunder. The Term of this Agreement may be extended for a period not to exceed three (3) years so as to complete the purchase and delivery of Product affected by a Force Majeure Event. The party suffering a Force Majeure Event shall provide the other party with prompt written notice of (i) the occurrence of the Force Majeure Event, (ii) the date such party reasonably anticipates resuming performance under this Agreement and, if applicable, (iii) such party's request to extend the Term of this Agreement.
>
> In addition, if due to a Force Majeure Event or any other cause, Seller is unable to supply sufficient goods to meet all demands from customers and internal uses, Seller shall have the right to allocate supply among its customers in any manner in which Seller, in its sole discretion, may determine.

Plaintiff alleges that after Agreement IV was executed, the Chinese government embarked on a plan to become the world leader in the solar industry. To that end, the Chinese government provided illegal subsidies to Chinese companies, some of which are state owned. Plaintiff further alleges that the Chinese companies engaged in "large-scale dumping," i.e., "when a foreign producer, aided by state support, sells a product at a price that is lower than its cost of production to intentionally manipulate an industry and capture market share." As a result, plaintiff contends that China gained

75% of the global solar-panel market, causing over 20 United States and European manufacturers to go out of business and solar-panel prices to "decline[] precipitously." In 2012, plaintiff asserts, the United States imposed antisubsidy and antidumping import tariffs on Chinese-manufactured components of solar panels.

According to plaintiff, the president and chief executive officer of defendant's majority shareholder, Dow Corning Corporation, issued a response to the tariffs, hoping that the United States and Chinese governments would reach an acceptable compromise to stabilize the industry. However, defendant announced layoffs in January 2013 and reduced production because of the trade problems with China.

Plaintiff alleges that as a result of China's market interference, the price of polysilicon to which the parties agreed in 2008 is significantly higher than the market price as of 2015. Consequently, plaintiff maintains, defendant has reduced its participation in the solar market and focused on enforcing its long-term contract, in many cases accepting cash settlements without having to provide polysilicon, which has caused defendant to remain profitable despite the United States and China's lack of progress toward resolution of the dispute.

In 2011 and 2012, the parties agreed to a series of amendments to Agreement IV, lowering the gross price and applying advance payments to shipments in 2011 and 2012. However, the gross prices from 2013 to 2020 were left unchanged. Plaintiff claims that defendant did not follow through with its additional proposal to amend the long-term pricing to a figure that would be based on market conditions.[1] Plaintiff alleges that after the 2011

[1] Plaintiff points to no authority that would obligate defendant to amend the contracted-for long-term pricing, nor are we aware of any.

and 2012 amendments were signed, defendant's management team changed, and defendant began a strategy of abandoning long-term contracts by refusing amendments to the contracts and keeping its customers' advance payments while charging them double the market prices, resulting in defendant's invocation of the acceleration clauses in the long-term contracts, lawsuits, and settlements. By 2014, defendant insisted that there would be no further amendments to Agreement IV. Plaintiff alleges that in December 2014, after the United States imposed further "anti-dumping duties" on Chinese solar panels and cells, defendant's Tennessee plant was permanently closed because of the "market adversity."

On February 2, 2015, plaintiff sent notice to defendant that it would be exercising its right under the force-majeure clause of Agreement IV to discontinue its contractual obligations because of the actions of the Chinese government. On February 13, 2015, plaintiff filed a complaint for declaratory judgment, seeking a declaration that the acts of the Chinese and United States governments constitute a force-majeure event under Agreement IV, and that it is not liable for delays or failures to perform for as long as the force-majeure event continues. On March 6, 2015, defendant moved for summary disposition under MCR 2.116(C)(8), alleging that plaintiff had failed to state a claim upon which relief could be granted because the force-majeure clause does not apply to changes in financial conditions and no governmental act prevented plaintiff from performing under Agreement IV.

After lengthy oral arguments and supplemental briefing, the trial court granted defendant's motion, holding that the unambiguous language of the force-majeure clause indicated that even if the acts of the

Chinese or United States governments constituted a force-majeure event under the contract, economic hardship caused by market conditions "is simply not sufficient to invoke force majeure," particularly in the context of a take-or-pay contract, and that the force-majeure clause in the parties' contract "does not provide [plaintiff] any potential relief from its obligation to pay merely because the contract price is no longer financially advantageous."

This appeal followed.

III. STANDARD OF REVIEW

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). "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." *Spiek*; 456 Mich at 337; MCR 2.116(G)(5). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (citation and quotation marks omitted). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. However, unsupported statements of legal conclusions are insufficient to state a cause of action. *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

The interpretation of contractual language, as well as the determination of whether that contractual language is ambiguous, is a question of law that we review de novo. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich

App 652, 658; 651 NW2d 458 (2002); *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003).

IV. ANALYSIS

Plaintiff argues that the trial court erred when it determined that the language of the force-majeure clause was unambiguous and that plaintiff had failed to state a claim under the clause. That is, plaintiff contends that it adequately pleaded, in accordance with the terms of the force-majeure clause, that its "delays or failure in performance of its obligations under [the] Agreement" (i.e., plaintiff's inability to pay) "ar[o]se out of or result[ed] from . . . acts of the [Chinese] Government," such that its performance should have been excused. We disagree.

This Court's "main goal in the interpretation of contracts is to honor the intent of the parties." *Mahnick*, 256 Mich App at 158-159. The words used in the contract are the best evidence the parties' intent. *Id*. at 159, citing *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). "When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent." *Mahnick*, 256 Mich App at 159.

The relevant language of the force-majeure clause is as follows: "Neither Buyer nor Seller shall be liable for delays or failures in performance of its obligations under this Agreement that arise out of or result from causes beyond such party's control, including without limitation: . . . acts of the Government . . . ." This Court has previously observed that there is a paucity of Michigan cases interpreting force-majeure clauses, see *Erickson*, 189 Mich App at 686, and that remains the

case today. However, our general rules of contract interpretation, such as the rule that terms used in a contract are to be given their commonly used meanings unless defined in the contract, apply to the interpretation of force-majeure clauses. See *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). Further, contracts must be read as a whole. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). Force-majeure clauses are typically narrowly construed, such that the clause "will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." *In re Cablevision Consumer Litigation*, 864 F Supp 2d 258, 264 (ED NY, 2012), citing *Reade v Stoneybrook Realty, LLC*, 63 AD3d 433, 434; 882 NYS2d 8 (2009); see also *Great Lakes Gas Transmission Ltd Partnership v Essar Steel Minnesota, LLC*, 871 F Supp 2d 843, 854 (D Minn, 2012).[2]

In this case, the trial court assumed[3] that plaintiff had adequately pleaded that the actions of China or the United States in the solar industry market generally constituted "acts of the Government."[4] Plaintiff

[2] Cases from other jurisdictions, although not binding on this Court, may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). Michigan courts have turned to other jurisdictions for guidance in the interpretation of force-majeure clauses. See *Erickson*, 189 Mich App at 688-689.

[3] Plaintiff argues that the trial court "correctly found that [plaintiff] had alleged force majeure events . . . ." That description is inaccurate. The trial court merely *assumed* a force-majeure event, and instead focused its analysis on "whether the alleged effect (i.e. financial hardship) of the assumed force majeure event (i.e., acts of the Government) renders [plaintiff] unable to perform its obligations under the Agreement."

[4] We note that the contractual force-majeure clause in this case used the term "acts of the Government." That is, it referred to "the" Government, and it capitalized the word "Government" without defining the

argues, however, that the trial court erred by determining that plaintiff had not adequately pleaded that its delays or failure in performance under the contract had arisen out of or resulted from the "acts of the Government." We disagree.

At the outset, we note that the bulk of plaintiff's complaint for declaratory relief consists of allegations of bad behavior on the part of defendant. Such conduct, even if true, cannot form the basis for relief under the force-majeure clause, because none of the alleged acts are "acts of God; acts of the Government or the public enemy; natural disasters; fire; flood; epidemics; quarantine restrictions; strikes; freight embargoes; war; acts of terrorism; [or] equipment breakage . . . ." While we appreciate the indulgence granted by the trial court in assuming the occurrence of a force-majeure event, we hold that the conduct alleged in this case did not constitute a force-majeure event under the parties' contract, and that the trial court should have, had it considered the issue, granted summary disposition to defendant on that additional ground. Regardless, however, of whether we analyze whether a force-majeure

term. This is in contrast to the force-majeure clauses at issue in some of the cited cases, some of which use arguably broader terminology, such as " 'acts or restraints of any government or governmental body or authority, civil or military,' " *ANR Pipeline Co v Devon Energy Corp*, unpublished opinion of the United States District Court for the Western District of Michigan, issued February 1, 1989 (Case No. G86-1123 CA), p 2, or " 'any action by governmental authority, including ecological authorities,' " *Sharon Steel Corp v Jewell Coal & Coke Co*, 735 F2d 775, 777 n 2 (CA 3, 1984). Given our disposition of this appeal, however, we need not decide the meaning of the undefined yet capitalized term "Government," or whether the term "the Government" refers to the United States government or the government of the state of Michigan (Michigan law applies to the contract), whether it also includes the government(s) of plaintiff's location (Japan), or whether, though unspecified, it potentially includes all governments at any level throughout the world (including China's).

event occurred, or whether plaintiff's alleged inability to perform its contractual obligations arose out of or resulted from an assumed force-majeure event, our holding is the same: plaintiff failed to state a claim on which relief could be granted, and the trial court properly granted summary disposition to defendant. We will affirm a trial court's decision on a motion for summary disposition if it reached the correct result, even if our reasoning differs. *Washburn v Michailoff*, 240 Mich App 669, 678 n 6; 613 NW2d 405 (2000).

Plaintiff argues that, because of the effect of the "trade war" in the solar industry market, it can no longer pay defendant the prices that the parties negotiated in Agreement IV, and would be forced to leave the solar panel industry if it remained liable under the contract. But these allegations are conclusory and unsupported by allegations of fact. See *ETT Ambulance Serv Corp*, 204 Mich App at 395. Specifically, even taking plaintiff's factual allegations as true and construing them in plaintiff's favor, the allegations of the complaint only indicate that the deflation of the market price for polysilicon has rendered plaintiff's contract with defendant unprofitable. The risk of such a deflation of market prices—no matter the cause—was expressly assumed by plaintiff in its take-or-pay contract with defendant. Plaintiff opted not to protect itself with a contractual limitation on the degree of market price risk that it would assume. It cannot now, by judicial action, manufacture a contractual limitation that it may in hindsight desire by broadly interpreting the force-majeure clause to say something that it does not.

Rather, construing the force-majeure clause narrowly, as we must, see *In re Cablevision Consumer Litigation*, 864 F Supp 2d at 264, the conduct at issue

simply does not constitute a force-majeure event. Plaintiff does not allege any "act[] of the Government" that directly prevented its performance under the contract. It merely alleges that the depression of prices in the solar panel market caused performance by plaintiff to become unprofitable or unsustainable as a business strategy. But plaintiff did not (although, again, it could have) negotiate a contractual force-majeure clause that by its terms would have excused contractual performance resulting from unprofitability due to governmental market manipulation. Having failed to do so, plaintiff cannot now, through judicial action, effectively reform the contract to include a provision that was not negotiated for by the parties.

A similar argument to plaintiff's was presented to, and rejected by, the United States Court of Appeals for the Fourth Circuit in *Langham-Hill Petroleum Inc v Southern Fuels Co*, 813 F2d 1327 (CA 4, 1987). In *Langham-Hill Petroleum*, the defendant argued that action taken by Saudi Arabia, "which led to a dramatic drop in world oil prices, falls within the scope of the contract's *force majeure* or Act of God clause," excusing the party's failure to perform under the contract. *Id*., 813 F2d at 1328. The court rejected that argument, holding as a matter of law that summary disposition in favor of the nonbreaching party was proper because a "[s]hortage of cash or inability to buy at a remunerative price cannot be regarded as a contingency beyond the seller's control." *Id*. at 1330 (citation and quotation marks omitted). The court further reasoned that "[i]f fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated." *Id*.

Further, allowing a force-majeure clause to provide a party with relief from an unprofitable market downturn would defeat the purpose of a take-or-pay contract, under which a party (in this case, plaintiff) obligates itself to purchase a set amount of a product at a set price per year, or pay the other party the difference between the amount of product it purchases and the contractual amount. "The very reason for entering the take-or-pay contracts [is] to insure payment to the producer in the event of substantial change in the marketplace." *Day v Tenneco, Inc*, 696 F Supp 233, 236 (SD Miss, 1988). In this case, Agreement IV states that "Buyer is absolutely and irrevocably required to pay the Net Price per kilogram for the Contract Quantity per calendar year over the Term of this Agreement." Thus, reading the contract as a whole, see *Hastings Mut Ins*, 286 Mich App at 292, we conclude that applying the force-majeure clause to excuse plaintiff's obligation to pay pursuant to the contract's take-or-pay provision would "nullify a central term of the contract," *Northern Indiana Pub Serv Co v Carbon Co Coal Co*, 799 F2d 265, 275 (CA 7, 1986), and relieve plaintiff from the very risk it contracted to assume.

More generally, although in the context of contracts with fixed prices rather than take-or-pay contracts specifically, persuasive authority from other jurisdictions indicates that financial hardship and unprofitability do not constitute the type of delay or failure in performance sufficient to warrant relief under a force-majeure clause. See, e.g., *Great Lakes Gas Transmission Ltd Partnership*, 871 F Supp 2d at 855 (noting that, reading the contract at issue as a whole, the defendant "fail[ed] to connect its invocation of the *force majeure* clause directly with the terms of the Contract" when it alleged that it could not pay under the contract

because of an economic downturn); *Flathead-Mich I, LLC v Peninsula Dev, LLC*, unpublished order of the United States District Court for the Eastern District of Michigan, entered March 16, 2011 (Case No. 09-14043) ("The state of the market is one of the things on which the parties are gambling when the contract . . . is made.") (quotation marks and citation omitted); *Seaboard Lumber Co v United States*, 308 F3d 1283, 1293 (CA Fed, 2002) ("Such acts have only an attenuated effect on the contracts at issue, at most making performance by the timber contractors unprofitable."); *In re Millers Cove Energy Co, Inc*, 62 F3d 155, 158 (CA 6, 1995) (stating that "[c]ourts and commentators generally refuse to excuse lack of compliance with contractual provisions due to economic hardship, unless such a ground is specifically outlined in the contract"); *Coker Int'l, Inc v Burlington Indus, Inc*, 747 F Supp 1168, 1170 (D SC, 1990) ("The force majeure clause applies to objective events which *directly* affect the parties' ability to perform the contract in question, not the ability to make a profit . . . .") (emphasis added); *Langham-Hill Petroleum Inc*, 813 F2d 1328.

Again, plaintiff does not allege any objective event that directly affected its ability to perform under Agreement IV. It merely alleged market events that allegedly make the contract no longer profitable.

Additionally, plaintiff's reliance on *ANR Pipeline Co v Devon Energy Corp*, unpublished opinion of the United States District Court for the Western District of Michigan, issued February 1, 1989 (Case No. G86-1123 CA), is misplaced. In *ANR Pipeline*, the take-or-pay contract at issue contained two inconsistent clauses addressing the force-majeure event at issue (the failure of the plaintiff's customers to purchase gas given the availability of cheaper gas from other sources). *Id*.

at pp 1-12. The trial court thus found the contract ambiguous and inappropriate for summary disposition. *Id*. at 12-13.

In this case, the parties did not argue below that the force-majeure clause or any portion of Agreement IV is ambiguous. "It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). On appeal, plaintiff does not articulate a sufficient basis for this Court to conclude that either a patent or latent ambiguity exists in the contract so as to render summary disposition inappropriate. See *Shay v Aldrich*, 487 Mich 648, 667-668; 790 NW2d 629 (2010). *ANR Pipeline* therefore does not aid plaintiff's case. Further, *Sharon Steel Corp v Jewell Coal and Coke Co*, 735 F2d 775, 779 (CA 3, 1984), while involving a force-majeure clause, centered on a determination of whether the plaintiff's claim of commercial impracticability was arbitrable in light of the strong federal policy favoring arbitration. The *Sharon Steel* court's decision that the plaintiff's claim was arbitrable despite the trial court's holding that a drop in market price would not trigger the contract's force-majeure clause does not aid plaintiff here in light of the substantially different analysis undertaken in that case. See *id*. at 779. Our examination of caselaw from other jurisdictions supports our conclusion that the trial court did not err by granting summary disposition to defendant.

Notwithstanding this analysis, plaintiff argues that the parties did not foresee the alleged illegality of the Chinese government's conduct. Plaintiff relies on *Chang v PacifiCorp*, 212 Or App 14; 157 P3d 243 (2007), and *Cartan Tours Inc v ESA Servs, Inc*, 833 So 2d 873 (Fla Dist Ct App, 2003). *Chang* involved the

common-law doctrine of frustration of purpose, not the interpretation of a contract. *Chang*, 212 Or App at 40-41. Although plaintiff makes much of the trial court's statement in *Chang* that " 'intelligent and informed executives of these corporations' " could not reasonably be expected to anticipate " 'unlawful activity or activity that is so highly manipulative that it totally distorts the market by the use of false or misleading trading practices,' " that statement was made in the context of the plaintiff's assertion of the defense of frustration of purpose, an essential element of which is the occurrence of an unforeseeable event. See *id*. at 22, 38-39, citing Restatement Contracts, 2d (1981), § 265. *Cartan Tours*, 833 So 2d at 874, did involve the interpretation of a force-majeure clause, but did not discuss the foreseeability of illegal activity; rather the *Cartan Tours* court was simply tasked with determining whether an act of "terrorism" interfered with " 'the ability of the Olympic Games to be held . . . .' "

Plaintiff further distinguishes *Langham-Hill Petroleum Inc*, 813 F2d at 1328-1329, on foreseeability grounds, arguing that it was foreseeable that Saudi Arabia could affect the global oil market.[5] The *Langham-Hill* court did not base its conclusion on the foreseeability of Saudi Arabia's conduct, nor limit its holding based on such foreseeability. *Id*. at 1330. Nor has plaintiff provided this Court with any other authority in which a court based the applicability of a force-majeure clause on the foreseeability of a government action. Plaintiff has thus not provided this Court with any authority, and this Court has found none, to

[5] Plaintiff also argues that a force-majeure event need not be foreseeable, thereby undermining its own effort to distinguish *Langham-Hill*.

support a conclusion that the foreseeability of a force-majeure event is relevant to the interpretation of a force-majeure clause.

More importantly, our decision does not rest on foreseeability grounds, but on interpretation of the contract and the risks assumed by both parties. Certainly, the general notion that markets are volatile and prices may rise and fall was known to both parties and such risk was precisely allocated by the take-or-pay nature of Agreement IV. Agreement IV states, and plaintiff does not challenge, that the parties to the agreement were sophisticated business entities with equal bargaining power; thus, if plaintiff had wished to protect itself from artificial market deflation because of government action (or, for that matter, excessive market downturns of any kind), it could have done so. Simply put, plaintiff has failed to allege a cognizable claim that a force-majeure event occurred, or that a force-majeure event caused a delay or failure in performance under the contract.

Finally, plaintiff argues that at a minimum its case should be allowed to proceed to discovery, so that the issue of the foreseeability of China's alleged illegal actions in the solar market and the parties' intent with regard to allocation of risk can be explored. However, as already stated, plaintiff did not argue below, and does not support an argument before this Court, that the contract was ambiguous. Absent ambiguity, interpretation of a contract clause does not require parol or extrinsic evidence to resolve. See *Shay*, 487 Mich at 667-668. Although plaintiff points out that several of the cases from other jurisdictions were not resolved at the pleading stage, we do not discern from the procedural posture of the cases cited by plaintiff a rule that cases involving the interpretation of force-majeure

clauses, even ones that involve allegedly illegal government action, are immune from dismissal under MCR 2.116(C)(8). See *Great Lakes Gas Transmission Ltd Partnership*, 871 F Supp 2d at 851-855, 862 (which applied Michigan law and was decided on the pleadings).

Therefore, construing the force-majeure clause narrowly, see *In re Cablevision Consumer Litigation*, 864 F Supp 2d at 264, we conclude that plaintiff has failed to allege a force-majeure event, or a cognizable delay or failure to perform arising from a force-majeure event, within the meaning of, and so as to trigger the protections of, the force-majeure clause contained in the parties' contract. Rather, plaintiff has merely pleaded unprofitability given the deflation of market prices—a risk plaintiff expressly assumed. Plaintiff has thus failed to plead a claim on which relief can be granted. MCR 2.116(C)(8); see also *ETT Ambulance Serv Corp*, 204 Mich App at 395-396.

Affirmed.

SAAD and HOEKSTRA, JJ., concurred with BOONSTRA, P.J.

PEOPLE v FREDERICK

PEOPLE v VAN DOORNE

Docket Nos. 323642 and 323643. Submitted August 4, 2015, at Grand Rapids. Decided December 8, 2015, at 9:00 a.m. Leave to appeal sought.

Defendants Michael Christopher Frederick and Todd Randolph Van Doorne were each charged in the Kent Circuit Court with various controlled substance offenses arising after members of the Kent Area Narcotics Enforcement Team (KANET) recovered marijuana butter during early-morning searches of each defendant's home. Before searching defendants' homes, KANET officers had executed a search warrant at Timothy Scherzer's home and received information that defendants possessed marijuana butter. KANET learned that Scherzer provided a large amount of marijuana butter to a corrections officer named Timothy Bernhardt, and Bernhardt delivered an unknown quantity of the marijuana butter to each defendant. Both defendants possessed medical marijuana cards and both identified Scherzer as their caregiver. KANET officers decided against obtaining search warrants for defendants' homes. Instead, seven KANET officers went to Frederick's home at approximately 4:00 a.m. and knocked on his door. Frederick answered the door shortly after the officers knocked and invited the officers into his home. The officers asked if they could see his marijuana butter, and Frederick agreed. Frederick signed a form giving KANET officers permission to search his home, the officers informed Frederick of his *Miranda* rights, and Frederick signed a card waiving those rights. Then, at approximately 5:30 a.m., KANET officers went to Van Doorne's home, where the officers similarly engaged Van Doorne in conversation, and Van Doorne invited the officers in so he could retrieve his medical marijuana card. Van Doorne and the officers ultimately spoke outside in a van because Van Doorne's dog would not stop barking. Van Doorne also signed forms waiving his *Miranda* rights and consenting to a search of his home. Each defendant filed a motion to suppress the evidence found during the search of his home, arguing that his consent to search was involuntary, and that the knock-and-talk procedure

conducted at his home violated the Fourth Amendment according to the United States Supreme Court's decision in *Florida v Jardines*, 569 US ___ (2013). After an extensive evidentiary hearing, the trial court, Dennis B. Leiber, J., denied both motions. The court concluded that each defendant voluntarily consented to the search of his home, and that the knock-and-talk procedure used at each defendant's home did not offend the Fourth Amendment. Frederick and Van Doorne filed separate applications for leave to appeal, which were denied. Defendants appealed in the Supreme Court, which ordered that the cases be remanded to the Court of Appeals for consideration as on leave granted. 497 Mich 933 (2015). The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. The knock-and-talk procedures used in these consolidated cases were not "searches" as contemplated by the Fourth Amendment, or as "search" is defined in *Jardines*. Therefore, unlike the outcome in *Jardines*, the evidence recovered at each defendant's home was admissible against each defendant at trial. The officers' intent in these cases and in *Jardines* determined whether the officers conducted a permissible, and thus, a constitutional, knock-and-talk. In *Jardines*, two police officers approached on foot a home suspected of housing a marijuana-grow operation. The officers were accompanied by a drug-sniffing dog, and the dog alerted at the home's front door. Because the officers obtained information by an unlawful physical intrusion on the defendant's property, a "search" within the meaning of the Fourth Amendment occurred. In *Jardines*, the officers' intent was solely to search for information, not to speak with the home's occupants, whereas the officers in the cases at bar intended to speak with Frederick and Van Doorne. That the officers also anticipated discovering and seizing marijuana butter does not establish a violation of the Fourth Amendment as long as the officers operated with the intent to speak to Frederick and Van Doorne. Even though the officers in these cases intended to ask for consent to search defendants' homes, and even though the officers expected to find inculpatory evidence at the homes, their purpose was not solely to gather evidence or information without first obtaining a warrant.

2. Members of the general public have an implied license to approach a home's entrance—generally, the front door—by the front path, knock, wait briefly, and unless an express invitation to linger is extended, leave the property. Police officers have the

same implicit license. They may approach a home and knock because that is "no more than any private citizen might do." When the police comply with the scope of the implied license, no "search" has occurred. However, the implied license is not an invitation to bring a drug-sniffing dog within the protected area of a person's home in an effort to discover evidence of a controlled substance offense. The police officers in *Jardines* exceeded the scope of the implied license. Their presence at the defendant's front door—with a drug-sniffing dog—transformed what was otherwise a lawful entry onto the defendant's property into an unlawful, warrantless search that violated the defendant's Fourth Amendment protections.

3. *Jardines* established the line between permissible and impermissible knock-and-talks. The line is defined by a police officer's intent at the time he or she approaches a home. An officer who has no intention of speaking to the occupant of the home but is only at the home to gather evidence, has crossed the line and engages in an unconstitutional search. An officer who intends to speak with the occupant of the home, even if the officer intends to seek permission to search the home, acts within the scope of the implied license—that is, an officer who intends to speak to the occupant has not crossed the line.

Affirmed.

SERVITTO, J., dissenting, concluded that the knock-and-talks that occurred in these cases violated Frederick's and Van Doorne's Fourth Amendment rights and would have reversed the trial court and remanded the cases to the trial court for entry of an order suppressing the evidence against each defendant. All the circumstances involved in the knock-and-talks at Frederick's and Van Doorne's homes constituted police conduct that offended the Fourth Amendment. Those circumstances include the time of night KANET officers conducted the knock-and-talks, an objective view of the officers' conduct, the number of officers present at the time, and the officers' failure to advance any objectively reasonable explanation why the interactions with defendants could not have occurred in the daytime or why the officers did not obtain a search warrant. The instant case presented an opportunity to address possible constitutional limitations on the knock-and-talk procedure. That is, does a knock-and-talk conducted at a private residence in the middle of the night without evidence that the occupant of the residence extended an explicit or implicit invitation to strangers to visit during those hours constitute an unconstitutional search in violation of the Fourth Amendment? Other jurisdictions have

answered the question, noting that (1) the time of day at which a knock-and-talk is initiated is a significant factor in determining whether the knock-and-talk is really an unreasonable search and (2) the officers' purpose in approaching a person's home is also a significant factor in making that determination. While the time of a knock-and-talk is not the only deciding factor in determining whether an unconstitutional search occurred, it is, along with the totality of circumstances surrounding the knock-and-talk, at least a significant factor to consider.

1. CONSTITUTIONAL LAW — FOURTH AMENDMENT — SEARCHES AND SEIZURES — KNOCK-AND-TALK.

A police officer's intent distinguishes between permissible and impermissible knock-and-talks; a police officer who approaches a person's house with the belief that a controlled substance will be found in the home does not violate the Fourth Amendment of the United States Constitution as long as the officer intended to speak with the occupant of the home and was not there solely for the purpose of gathering evidence or information without a warrant; an officer who knocks on the door to a person's house with no intention of speaking to the person but solely with the intention of collecting information and evidence, violates the Fourth Amendment's prohibition against unreasonable searches and seizures; provided that a police officer intends to speak with the occupant of a house, an officer may approach a house with the intention of asking the occupant for consent to search the house and with the expectation that contraband will be found during the search.

2. CONSTITUTIONAL LAW — FOURTH AMENDMENT — HOUSES — IMPLIED LICENSE TO APPROACH.

Police officers, like members of the general public, have an implied license to approach a home's entrance using the front path, knock on the door, wait briefly, and if not received or expressly invited to linger there, leave the property; as long as a police officer acts within the scope of the implied license, there is no Fourth Amendment violation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

Shaw Law Group, PLC (by *Jeffrey P. Arnson*), for Michael Christopher Frederick.

Bruce Alan Block, PLC (by *Bruce Alan Block* and *Bogomir Rajsic III*), for Todd Randolph Van Doorne.

Before: TALBOT, C.J., and K. F. KELLY and SERVITTO, JJ.

TALBOT, C. J. These consolidated cases are before us on remand from our Supreme Court.[1] On remand, our Supreme Court has directed us to consider "whether the 'knock and talk' procedure[s] conducted in th[ese] case[s are] consistent with US Const, Am IV, as articulated in *Florida v Jardines*, [569 US ___;] 133 S Ct 1409[; 185 L Ed 2d 495] (2013)." For the reasons discussed, we conclude that the knock-and-talk procedures conducted with respect to both Frederick and Van Doorne were consistent with the Fourth Amendment. Accordingly, we affirm the trial court's decision.

I. FACTS

On March 17, 2014, at approximately 10:15 p.m., the Kent Area Narcotics Enforcement Team (KANET) executed a search warrant at the home of Timothy and Alyssa Scherzer. While executing this warrant, the KANET officers learned that the Scherzers, acting as caregivers, had been providing marijuana butter to corrections officers employed by the Kent County Sheriff Department (KCSD). Scherzer informed the KANET officers that he had given 14 pounds of marijuana butter to one corrections officer, Timothy Bernhardt, who acted as a middleman and distributed the

[1] *People v Frederick*, 497 Mich 993 (2015); *People v Van Doorne*, 497 Mich 993 (2015).

butter to other corrections officers. Frederick and Van Doorne were identified as two corrections officers who received marijuana butter through Bernhardt. Both had been issued medical marijuana cards, and both identified Timothy Scherzer as their caregiver.

Based on this information, the KANET officers contemplated whether to obtain search warrants for the homes of the additional suspects, or alternatively, to simply go to the home of each suspect, knock, and request consent to conduct a search. The officers chose the latter approach. The team, composed that night of seven officers,[2] conducted four knock-and-talks in the early morning hours of March 18, 2014. The officers first visited Bernhardt and another corrections officer.[3] At approximately 4:00 a.m., the officers, in four unmarked vehicles, arrived at Frederick's home. Each officer was wearing a tactical vest, and each had a handgun holstered at his or her hip. Four officers approached the front door, knocked, and waited. Within a few minutes, Frederick answered the door and spoke to the officers. The officers informed Frederick that his name had come up in a criminal investigation and asked if they could come inside and speak with him. Frederick invited the officers inside. The officers asked if they could see Frederick's marijuana butter, and he agreed. Frederick signed a form granting his consent to conduct a search. The officers also informed Frederick of his *Miranda*[4] rights, and Frederick signed a card waiving those rights. Officers recovered marijuana butter from Frederick's home.

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[2] A total of eight officers are members of KANET. However, one officer was unavailable on the night of March 17, 2014.

[3] Neither Bernhardt nor this other officer is a party to the instant appeal.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The team arrived at the home of Van Doorne at approximately 5:30 a.m. Because ice made the front door inaccessible, four officers knocked at a side door. Van Doorne awoke and looked outside. Recognizing some of the officers standing outside his home, Van Doorne opened the door and spoke with them. As they had with Frederick, the officers explained the purpose of their visit. Van Doorne, believing that the issue could be resolved by showing the officers his medical marijuana card, invited the officers inside. However, because his dog continued to bark, Van Doorne and the officers decided to speak outside in a van. Once inside the van, Van Doorne signed forms waiving his *Miranda* rights and consenting to a search of his home. Officers recovered marijuana butter from Van Doorne's home.

Frederick and Van Doorne were charged with various controlled substance offenses.[5] Both men filed motions to suppress the evidence obtained during the searches. Each made two arguments: (1) his consent to the search was involuntary, and (2) the knock-and-talk procedure violated the Fourth Amendment under *Jardines*. After an extensive evidentiary hearing, the trial court denied the motions, concluding that the knock-and-talk procedures were not searches or seizures under the Fourth Amendment, and that both men voluntarily consented to the searches. Frederick and Van Doorne filed separate applications for leave to appeal in this Court, which this Court denied.[6] In lieu of granting leave to appeal, our Supreme Court re-

[5] Frederick and Van Doorne were also placed on unpaid leave from their positions with the corrections department.

[6] *People v Frederick*, unpublished order of the Court of Appeals, issued October 15, 2014 (Docket No. 323642); *People v Van Doorne*, unpublished order of the Court of Appeals, issued October 15, 2014 (Docket No. 323643).

manded both cases to this Court to determine whether the knock-and-talk procedures were constitutional in light of *Jardines*.[7]

II. DISCUSSION

A. STANDARD OF REVIEW

"We review for clear error a trial court's findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress."[8] Whether a violation of the Fourth Amendment has occurred is an issue of constitutional law which we review de novo.[9]

B. THE SCOPE OF OUR INQUIRY

We first address the limited scope of our review of the cases before us. The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[10] Under the plain language of the amendment, "[t]he Fourth Amendment is not a guarantee against all searches and seizures, but only against those that are unreasonable."[11] Thus, in any given Fourth Amendment case, there are two general inquiries to be made: (1) whether a "search or seizure" of a person, area, or object protected by the

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[7] *Frederick*, 497 Mich 993; *Van Doorne*, 497 Mich 993.

[8] *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

[9] *Id*.

[10] US Const, Am IV.

[11] *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985). See also *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005) (under the Fourth Amendment, "not all searches are constitutionally prohibited, only unreasonable searches").

amendment occurred, and (2) if so, whether that search or seizure was unreasonable.

In this case, however, our inquiry is limited to the question whether the knock-and-talk procedures used in these cases amounted to a "search" within the meaning of the Fourth Amendment. To understand the scope of our inquiry, we reiterate that our Supreme Court has directed us to consider only whether the knock-and-talk procedures conducted in these cases were consistent with the Fourth Amendment as articulated in *Jardines*. In *Jardines*, the United States Supreme Court's inquiry was "limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment."[12] The Court did not address whether, assuming a search occurred, the search was reasonable, nor did it address whether a seizure had occurred. Thus, we read our Supreme Court's order as directing us to consider a limited question: whether the knock-and-talk procedures used in these consolidated cases were "searches" within the meaning of the Fourth Amendment, as a "search" is defined by *Jardines*.[13] We answer this question in the negative.

C. *FLORIDA v JARDINES*

The starting point of our analysis is the United States Supreme Court's opinion in *Florida v Jardines*. In *Jardines*, two police officers, acting on a tip that a

[12] *Jardines*, 569 US at ___; 133 S Ct at 1414.

[13] Thus, we do not address whether the trial court erred with respect to Frederick's and Van Doorne's contentions that they did not voluntarily consent to the searches of their homes. Nor do we address whether the knock-and-talk procedures became "seizures" under the Fourth Amendment, another argument rejected by the trial court. Such inquiries are outside the limited scope of our review on remand.

home was being used to grow marijuana, approached the home on foot.[14] The officers were accompanied by a dog trained to detect the odor of specific controlled substances.[15] The dog detected the odor of one of these substances and alerted at the base of the home's front door.[16] The officers then used this information to obtain a warrant to search the home.[17] Writing for the majority, Justice Scalia used a property-rights framework to determine whether the officers had conducted a search by approaching the home with the drug-sniffing dog.[18]

First, Justice Scalia explained that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.' "[19] Justice Scalia explained

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[14] *Jardines*, 569 US at ___; 133 S Ct at 1413.

[15] *Id*. at ___; 133 S Ct at 1413.

[16] *Id*. at ___; 133 S Ct at 1413.

[17] *Id*. at ___; 133 S Ct 1413. When the warrant was executed, the officers found marijuana plants, resulting in charges of marijuana trafficking against Jardines. *Id*. at ___; 133 S Ct 1413.

[18] In a concurrence joined by two other justices, Justice Kagan explained that she "could just as happily have decided [the case] by looking to Jardines' privacy interests." *Id*. at ___; 133 S Ct at 1418 (Kagan, J., concurring). Using a privacy-interests framework, Justice Kagan would have simply held that because the officers used a " 'device . . . not in general public use' "—the drug-sniffing dog—"to explore details of the home' . . . that they would not otherwise have discovered without entering the premises," a search occurred. *Id*. at ___; 133 S Ct at 1419, quoting *Kyllo v United States*, 533 US 27, 40; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (Kagan, J., concurring). Justice Scalia found it unnecessary to consider Jardines's privacy interests. Justice Scalia explained that the property-rights framework was the Fourth Amendment's baseline, and that the privacy-interests framework merely added to that baseline. *Id*. at ___; 133 S Ct at 1417. Having concluded that a search occurred under the property-rights framework, Justice Scalia found it unnecessary to consider whether the same conclusion would be reached under a privacy-interests framework. *Id*. at ___; 133 S Ct at 1417.

[19] *Id*. at ___; 133 S Ct at 1414, quoting *United States v Jones*, 565 US ___, ___ n 3; 132 S Ct 945, 950-951 n 3; 181 L Ed 2d 911 (2012).

that a home's front porch was a "classic exemplar of an area adjacent to the home," commonly known as the "curtilage," which is considered part of a home and, thus, is protected by the Fourth Amendment.[20] Because "the officers' investigation took place in a constitutionally protected area," the question became "whether it was accomplished through an unlicensed physical intrusion."[21] To answer this question, Justice Scalia inquired into whether Jardines "had given his leave (even implicitly) for" the officers to set foot on his property.[22] Justice Scalia then explained:

> "A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee* v. *Gratz*, 260 U. S. 127, 136 [43 S Ct 16; 67 L Ed 167] (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard* v. *Alexandria*, 341 U. S. 622, 626 [71 S Ct 920; 95 L Ed 1233] (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." *Kentucky* v. *King*, 563 U. S. [452, 469; 131 S Ct 1849; 179 L Ed 2d 865 (2011)].[23]

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[20] *Jardines*, 569 US at ___; 133 S Ct at 1414-1415.

[21] *Id*. at ___; 133 S Ct at 1415.

[22] *Id* at ___; 133 S Ct at 1415.

[23] *Id*. at ___; 133 S Ct at 1415-1416.

In *Jardines*, the majority concluded that the officers exceeded the scope of this implied license and, thus, conducted a search within the meaning of the Fourth Amendment. This was because while any ordinary citizen might walk up to the front door of a home and knock, an ordinary citizen would not do so while conducting a search of the premises using a specially trained, drug-sniffing dog.[24] As explained by Justice Scalia, "[t]he scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. . . . [T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search."[25] Thus, Justice Scalia concluded that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."[26]

D. *JARDINES* APPLIED

Justice Scalia's implied-license framework has since been used by many courts to analyze the constitutional validity of a knock-and-talk procedure.[27] Using this framework, we conclude that the knock-and-talks conducted in these cases were not "searches" within the meaning of the Fourth Amendment. We begin with the observation that, as *Jardines* makes clear, an ordinary knock-and-talk is well within the scope of the license

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[24] *Id*. at ___; 133 S Ct at 1416 ("But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*.").

[25] *Id*. at ___; 133 S Ct at 1416.

[26] *Id*. at ___; 133 S Ct at 1417-1418.

[27] See, e.g., *United States v Walker*, 799 F3d 1361, 1362-1363 (CA 11, 2015); *Covey v Assessor of Ohio Co*, 777 F3d 186, 192-193 (CA 4, 2015); *United States v Lundin*, 47 F Supp 3d 1003, 1010-1011 (ND Cal, 2014); *JK v State*, 8 NE3d 222, 231-236 (Ind App, 2014).

that may be " 'implied from the habits of the country[]' . . . ."[28] In general terms, *Jardines* explains that there exists "an implicit license . . . to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[29] And generally speaking, that is exactly what occurred in both cases now before us. In each instance, officers approached the home, knocked, and waited to be received. And in each instance, the officers were received by the homeowners. *Jardines* plainly condones such conduct.[30] Indeed, even "Jardines conceded . . . the unsurprising proposition that the officers could have lawfully approached his home to knock on the front door in hopes of speaking with him."[31]

In order to find a Fourth Amendment violation, then, there must be circumstances present that would transform what was otherwise a lawful entrance onto private property into an unlawful, warrantless search. In *Jardines*, such circumstances existed because when the officers set foot on a protected area, they were accompanied by a drug-sniffing dog.[32] Frederick and Van Doorne argue that the time of the knock-and-talks, and the manner in which the officers approached, compel a conclusion that each knock-and-talk was a

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[28] *Jardines*, 569 US at ___; 133 S Ct at 1415, quoting *McKee*, 260 US at 136 (Holmes, J.).

[29] *Jardines*, 569 US at ___; 133 S Ct at 1415.

[30] *Id* at ___; 133 S Ct at 1415.

[31] *Id*. at ___; 133 S Ct at 1415 n 1.

[32] *Id*. at ___; 133 S Ct at 1415-1416 (recognizing that the police may enter private property to conduct a knock-and-talk, "[b]ut introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*."). See also *id*. at ___; 133 S Ct at 1416 n 4 ("[N]o one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.").

search under the Fourth Amendment.[33] For the reasons discussed, we disagree.

1. THE OFFICERS' PURPOSE

Frederick and Van Doorne argue that based on an objective view of the manner in which the officers conducted the knock-and-talks, the KANET officers' purpose in conducting the knock-and-talks exceeded the scope of the implied license discussed in *Jardines*. Frederick and Van Doorne argue that the officers did not intend to speak with them, but rather, intended to conduct a search. We disagree.

First, we clarify that even post-*Jardines*, an officer may conduct a knock-and-talk with the intent to gain the occupant's consent to a search or to otherwise acquire information from the occupant. That an officer intends to obtain information from the occupant does not transform a knock-and-talk into an unconstitutional search. Before *Jardines*, this Court held that the knock-and-talk procedure was constitutional.[34] Our Court explained that one entirely acceptable purpose of a knock-and-talk is to do exactly what the officers did in these cases—obtain an occupant's consent to conduct a search:

> Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some

[33] Relying on Justice Scalia's description of the knock-and-talk procedure in *Jardines*, Frederick and Van Doorne ask us to adopt a three-part test to evaluate these consolidated cases. Under this proposed test, officers would be required to (1) approach a home by the front path, (2) with only the intent to speak with the occupants of the home (and not to conduct a search), and (3) knock promptly, wait briefly, and absent an invitation from the occupant to remain, leave the premises. We find it unnecessary to adopt such a test to decide the matters before us, and thus, we decline to adopt this proposed test.

[34] *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001).

> information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, *and request consent to search for the suspected illegality or illicit items*. . . .
>
> We decline defendant's request to hold that the knock and talk procedure is unconstitutional because defendant points to no binding precedent, nor have we found any, prohibiting the police from going to a residence and engaging in a conversation with a person. We conclude that in the context of knock and talk the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections. It is unreasonable to think that simply because one is at home that they are free from having the police come to their house and initiate a conversation. *The fact that the motive for the contact is an attempt to secure permission to conduct a search does not change that reasoning*. We find nothing within a constitutional framework that would preclude the police from setting the process in motion by initiating contact and, consequently, we hold that the knock and talk tactic employed by the police in this case is constitutional.[35]

Jardines does not hold to the contrary. In his dissenting opinion in *Jardines*, Justice Alito wrote:

> As the majority acknowledges, this implied license to approach the front door extends to the police. See *ante*, at

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[35] *Id*. at 697-698 (citations omitted; emphasis added). See also *People v Galloway*, 259 Mich App 634, 640; 675 NW2d 883 (2003) ("Knock and talk, as accepted by this Court in *Frohriep*, does not implicate constitutional protections against search and seizure because it uses an ordinary citizen contact as a springboard to a consent search."). Federal courts have reached the same conclusion. *Ewolski v City of Brunswick*, 287 F3d 492, 504-505 (CA 6, 2002) (" 'Federal courts have recognized the "knock and talk" strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity.' "), quoting *United States v Jones*, 239 F3d 716, 720 (CA 5, 2001).

> [569 US at ___; 133 S Ct at 1415]. As we recognized in *Kentucky* v. *King*, 563 U. S. [452; 131 S Ct 1849; 179 L Ed 2d 865 (2011)], police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a "knock and talk," *i.e.*, knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence. . . . Even when the objective of a "knock and talk" is to obtain evidence that will lead to the homeowner's arrest and prosecution, the license to approach still applies. In other words, gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach. . . .
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> * * *
>
> The Court concludes that Detective Bartelt went too far because he had the "*objectiv[e] . . . purpose* to conduct a search." *Ante*, at [569 US at ___; 133 S Ct at 1417] (emphasis added). What this means, I take it, is that anyone aware of what Detective Bartelt did would infer that his subjective purpose was to gather evidence. But if this is the Court's point, then a standard "knock and talk" and most other police visits would likewise constitute searches. With the exception of visits to serve warrants or civil process, police almost always approach homes with a purpose of discovering information. That is certainly the objective of a "knock and talk." The Court offers no meaningful way of distinguishing the "objective purpose" of a "knock and talk" from the "objective purpose" of Detective Bartelt's conduct here.[36]

In response to Justice Alito's critique, Justice Scalia explained:

> The dissent argues, citing *King*, that "gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach." *Post*, at [569 US at ___; 133 S Ct at 1423]. That is a false generalization. What *King* establishes is that it is not a Fourth Amendment search to approach the home in order

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[36] *Jardines*, 569 US at ___; 133 S Ct at 1423-1424 (Alito, J., dissenting) (third alteration in original).

> to speak with the occupant, *because all are invited to do that.* The mere "purpose of discovering information," *post*, at [569 US at ___; 133 S Ct at 1424], in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.[37]

We read Justice Scalia's response to the dissent as drawing a line. The police do not violate the Fourth Amendment by approaching a home and seeking to speak with its occupant. Even if the police fully intend to acquire information or evidence as a result of this conversation, the line has not been crossed.[38] However, if the police enter a protected area not intending to speak with the occupant, but rather, solely to conduct a search, the line has been crossed.[39] In that sense, the knock-and-talk procedure cannot be used by the police as a smokescreen. Yet even post-*Jardines*, officers may still approach a home, knock, and if an occupant answers, speak to that occupant. The officers may then ask the occupant for information or for consent to conduct a search.[40]

Several cases help demonstrate when the police have crossed the line from a permissible knock-and-talk to an unconstitutional search or seizure. *Jardines*

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[37] *Id.* at ___ n 4; 133 S Ct at 1416 n 4 (opinion of the Court).

[38] *Id.* at ___ n 4; 133 S Ct at 1416 n 4 ("The mere purpose of discovering information . . . in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment.") (quotation marks omitted).

[39] *Id.* at ___ n 4; 133 S Ct at 1416 n 4 ("But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.").

[40] *Id.* at ___ n 4; 133 S Ct at 1416 n 4. See also *United States v Perea-Rey*, 680 F3d 1179, 1187-1188 (CA 9, 2012) ("[I]t remains permissible for officers to approach a home to contact the inhabitants. The constitutionality of such entries into the curtilage hinges on whether the officer's actions are consistent with an attempt to initiate consensual contact with the occupants of the home.").

is one such example. As discussed, the officers in *Jardines* exceeded the scope of the license because they never attempted to speak with anyone, and instead, approached the home while conducting a warrantless search using a drug-sniffing dog. *United States v Ferguson*,[41] a case cited by Frederick and Van Doorne, is another such example. In *Ferguson*, two police detectives traveled to a home to investigate a complaint of an illegal marijuana grow operation.[42] The detectives had not obtained a search warrant for the residence.[43] As soon as the detectives left their vehicle, "they could smell fresh marijuana and observed surveillance cameras on the garage adjacent to the residence."[44] The defendants appeared, and the detectives introduced themselves.[45] After the defendants claimed to be operating an authorized medical marijuana operation, one detective asked to see the required paperwork.[46] Without asking for consent to search, the other detective asked one defendant "how many marijuana plants he had in the garage . . . ."[47] The detectives then spent the next hour walking around the premises with the defendants, investigating buildings and a recreational vehicle.[48] At the end of this process, the detectives presented the defendants with a written consent-to-search form, which the defendants signed.[49]

The defendants filed a motion to suppress the evidence viewed by the detectives, arguing that the detec-

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[41] *United States v Ferguson*, 43 F Supp 3d 787 (WD Mich, 2014).

[42] *Id.* at 789.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 790.

[48] *Id.*

[49] *Id.*

tives had conducted a warrantless search of their home, and that the later-signed consent form did not remedy this constitutional violation.[50] The prosecutor argued, in part, that what transpired in the hour before the detectives obtained the defendants' written consent "qualified as a permissible 'knock and talk,' claiming that the detectives were 'not searching anything' during that first hour."[51] The trial court rejected the argument. Comparing the case to *Jardines*, the trial court concluded that by spending an hour investigating the premises, the detectives' conduct "objectively reveal[ed] a purpose to conduct a search . . . ."[52] This was because during the hour in which the detectives were ostensibly conducting a knock-and-talk, they were unquestionably obtaining information while in areas protected by the Fourth Amendment.[53]

One federal district court has similarly concluded that the police violate the Fourth Amendment by entering private property with the sole intent to conduct a warrantless arrest of the homeowner. In *United States v Lundin*, another case relied on by Frederick and Van Doorne, officers sought to arrest a suspected kidnapper, but had not obtained a warrant for his arrest.[54] At approximately 4:00 a.m., officers approached the front door of Lundin's home.[55] The officers knocked, and heard a series of crashes from the rear of

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[50] *Id*. at 792.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 792-793. The trial court also concluded that the hour-long search was not conducted with either the express or implied consent of the defendants. *Id*. at 793-794.

[54] *Lundin*, 47 F Supp 3d at 1008.

[55] *Id*.

the home.[56] The officers identified themselves and ordered Lundin to put his hands in the air and slowly leave the home.[57] Lundin exited the backyard of the home and was taken into custody.[58]

In finding a Fourth Amendment violation, the district court relied on *Jardines* for the rule that "the officers' purpose, as revealed by an objective examination of their behavior, is clearly at least an important factor" when evaluating whether the officers exceeded the scope of the implied license.[59] The court explained that

> the behavior of the officers here objectively reveals a purpose to locate [Lundin] so that the officers could arrest him. Deputy Aponte had put out a request that Lundin be arrested; he believed that the officers already had probable cause for such an arrest; and the officers who arrived at the home were responding to Deputy Aponte's BOLO ["be on the lookout"].[60]

The court explained that "[u]nder the circumstances of this case, it is very difficult to imagine why the officers would have been seeking to initiate a consensual conversation with Lundin to ask him questions at four o'clock in the morning."[61] Thus, "[j]ust as the officers' clear purpose in *Jardines*—to search the curtilage for evidence—could not be pursued without a warrant, so too was the officers' clear purpose in this case—to arrest a suspect within his home—a goal whose attainment requires a warrant."[62]

The common thread in *Jardines*, *Ferguson*, and *Lundin* is that in each case, the officers' conduct revealed

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[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*. at 1012.

[60] *Id*.

[61] *Id*.

[62] *Id*. at 1012-1013.

that their intentions went far beyond conducting the type of consensual encounter that constitutes a knock-and-talk. In *Jardines*, the officers searched for evidence without ever speaking to the occupants of the home; in *Ferguson*, the detectives conducted an hour-long investigation of the property before requesting consent to do so; and in *Lundin*, the officers had no reason to set foot on the property other than to arrest its occupant. Thus, in each case, the officers crossed the line, exceeding the scope of the implied license discussed in *Jardines*. But here, the circumstances are far different. After discovering that contraband likely existed in the homes belonging to Frederick and Van Doorne, the officers made a conscious decision to ask each individual for consent to conduct a search rather than obtain a warrant. The officers went to each house, knocked, and made such a request. During the knock-and-talks, the officers did not attempt to conduct a search, as occurred in *Jardines* and *Ferguson*; they waited until obtaining the affirmative consent of each suspect. And unlike the circumstances in *Lundin*, the officers clearly had a legitimate reason to initiate a conversation with both Frederick and Van Doorne.

Frederick and Van Doorne argue that because seven armed officers "in full tactical gear" approached each house in the early morning hours to conduct the knock-and-talks, this Court should conclude that the "officers did not come to talk, but rather, came to search the home for marijuana butter they knew was present, and they were not going to leave until they had accomplished their goal[.]" The record reveals no such intention of the officers. First, it is true that seven officers went to each location. These seven officers represented all but one member of KANET, the absent member being unavailable that night. Further, only four of the

seven officers approached the homes to conduct the knock-and-talks. The record does not demonstrate that the officers used their numerosity to demand entrance or to overcome the will of Frederick or Van Doorne. Rather, the fact that seven officers traveled to each home demonstrates no more than that the entire team, working together on the investigation, traveled together as the investigation continued into the early morning hours.

Contrary to the assertions made by Frederick and Van Doorne, the KANET officers were not wearing "full tactical gear." Rather, the extent of the "tactical gear" worn by the officers were vests which bore the officers' badges and, in some cases, the KANET symbol.[63] That the officers wore these vests conveyed a message similar to the message conveyed by the uniform traditionally worn by an ordinary officer. In the same vein, it is also true that the officers were armed, but only in that each had a handgun holstered at the hip—again, the same as any ordinary police officer. These facts do not convey a purpose to do anything other than speak with the occupants of the homes.

The time of the visits does not demonstrate that the officers intended to conduct a warrantless search without first speaking to, and obtaining the consent of, Frederick and Van Doorne. The officers explained that they proceeded at this time of day because they had only learned that Frederick and Van Doorne were recipients of marijuana butter through a search conducted a few hours before the knock-and-talks. They feared that if they did not act quickly, Frederick and Van Doorne might be informed of the investigation and

[63] Specifically, one officer testified that the vests were "[b]lack nylon with [a] 'Sheriff' logo on one side, [a] badge on the other side and our KANET patch."

destroy evidence. Nothing in the record indicates that the officers chose to proceed at this time of day in order to frighten or intimidate either man, or otherwise use the time of day to gain an advantage. That the officers proceeded in the early morning hours does not demonstrate that the officers intended to conduct a search without first obtaining consent.

Rather, the officers' intent is most clearly demonstrated by their conduct at each home. As in any ordinary knock-and-talk, the officers approached each home, knocked, and waited for a response. When Frederick and Van Doorne responded, the officers explained the purpose of their visits. Both men were informed of their *Miranda* rights and asked to voluntarily consent to a search. The officers made no attempt to search for evidence until obtaining consent to do so. That the officers proceeded in this manner clearly demonstrates that it was their intent to speak with each individual and obtain his consent before proceeding any further. Frederick's and Van Doorne's contention that the officers would have conducted a warrantless search with or without their consent is purely speculation.[64] Thus, we conclude that the officers' purpose did not exceed the scope of the implied license as articulated in *Jardines*.

2. THE TIME OF THE VISITS

Frederick and Van Doorne next argue that the time of the visits exceeded the scope of the implied license to

[64] Rather, from the record before us, it appears equally likely (if not more so) that had Frederick and Van Doorne failed to respond, the officers would have retreated to their vehicles and considered other options. See *Perea-Rey*, 680 F3d at 1188 ("[O]nce an attempt to initiate a consensual encounter with the occupants of a home fails, the officers should end the knock and talk and change their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.") (quotation marks and citation omitted). However, because both Frederick and Van Doorne responded, there was no need for the officers to retreat.

enter their respective properties. They argue that the habits of this country do not allow "uninvited visits" in the early morning hours, "absent some indication that the person accepts visitors at that hour or, where it is clearly observed that someone is awake in the home." We disagree.

Frederick's and Van Doorne's argument stems from Justice Alito's opinion in *Jardines*. In his dissent, Justice Alito opined that the implied license to enter one's property "has certain spatial and temporal limits."[65] As an example of these limits, Justice Alito stated:

> Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation. See *State* v. *Cada*, 129 Idaho 224, 233, 923 P. 2d 469, 478 (App. 1996) ("Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm[.]").[66]

The majority indicated some approval of this statement in a footnote, writing, "We think a typical person would find it a cause for great alarm (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule) to find a stranger snooping about his front porch *with or without* a dog."[67]

Based on Justice Scalia's reference to Justice Alito's comment, the time of a visit by police officers may be relevant when evaluating the constitutional validity of a knock-and-talk.[68] But we do not read *Jardines* as adopting any sort of bright-line rule that prohibits

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[65] *Jardines*, 569 US at ___; 133 S Ct at 1422 (Alito, J., dissenting).

[66] *Id* at ___; 133 S Ct 1422.

[67] *Id*. at ___; 133 S Ct at 1416 n 3 (opinion of the Court) (quotation marks and citation omitted).

[68] See, e.g., *Kelley*, 347 P3d at 1014-1016. This, however, is not necessarily a new requirement found in *Jardines*. Several cases predat-

officers from entering an area protected by the Fourth Amendment at certain times of day. Rather, the basis for finding that the time of a visit is relevant to the scope of the implied license was articulated by the *Jardines* majority when it stated, "a typical person would find it a cause for great alarm (*the kind of reaction* the dissent quite rightly relies upon to justify its no-night-visits rule) to find a stranger snooping about his front porch *with or without* a dog."[69] Thus, it is not simply the presence of an individual at a particular time, but rather, the reaction that a typical person would have to that individual's presence, that determines whether the scope of the implied license has been exceeded. How a typical person would react depends on more than the time of day. For example, the implied license at issue here might not extend to a midnight visitor looking through garbage bins[70] or peeking in windows. But it may well extend to a midnight visitor seeking emergency assistance,[71] or to a predawn visitor delivering the newspaper. Similarly, while a typical person may well find the presence of uniformed police officers on his or her doorstep in the early hours of the morning "unwelcome," we cannot conclude that it is, without more, the type of circumstance that would lead an average person "to—well, call the police."[72]

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ing *Jardines* have discussed the relevance of the time a knock-and-talk is conducted when evaluating the circumstances of a particular case. See *id*. at 1015, 1015 n 14.

[69] *Jardines*, 569 US at ___; 133 S Ct at 1416 n 3 (quotation marks and citation omitted; first emphasis added).

[70] See *Commonwealth v Ousley*, 393 SW3d 15 (Ky, 2013).

[71] See *id*. at 19, 31 ("Absent an emergency, such as the need to use a phone to dial 911, no reasonable person would expect the public at his door" at the time an officer searched the defendant's trash cans on private property, 11:30 p.m. and 12:30 a.m.).

[72] *Jardines*, 569 US at ___; 133 S Ct at 1416.

The case relied on by Justice Alito when stating his "no-night-visits" rule provides an example of when officers conducting an early-morning visit to private property did exceed the scope of the implied license. In *Cada*:

> At about 1 a.m. on June 10, 1993, Agent Thornton returned to the Cada property with Agent Landers. The two walked from the county road up Cada's driveway. While on the driveway both agents smelled growing or freshly cultivated marijuana. The odor appeared to be coming from a garage located about 110 feet from the house. The agents continued on the driveway to an area between the garage and the house. They then set up a thermal imaging device and directed it at the garage. The device is a passive, non-intrusive system that detects the surface temperature of an object. The agents concluded that heat coming from the garage was consistent with the amount of heat which would be necessary to grow marijuana. The agents were on the property approximately ten to fifteen minutes during this entry.
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> The agents returned to the Cada property on June 21, 1993, at approximately 4 a.m. One or both of them wore camouflage clothing. Landers again smelled marijuana coming from the garage. On this visit the agents heard a noise coming from the back of the garage that sounded like an exhaust fan. Agent Thornton testified that in his experience indoor marijuana cultivation operations often have an exhaust system. Thornton set up a motion-activated low light infrared video camera and two infrared sensors in a position hidden among bushes across the driveway from the garage. The camera was focused on the garage. This intrusion onto Cada's property lasted about 45 minutes.[73]

The agents then used the information gleaned from these nighttime intrusions to obtain a warrant.[74] In

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[73] *Cada*, 129 Idaho at 227.

[74] *Id*.

concluding that this conduct exceeded the open-view doctrine, the court explained:

> Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm. As compared to open daytime approaches, surreptitious searches under cover of darkness create a greater risk of armed response—with potentially tragic results—from fearful residents who may mistake the police officers for criminal intruders.
>
> For the foregoing reasons, we conclude that the timing and manner of the two nighttime searches involved in this case place them outside the scope of the open view doctrine articulated in [*State v*]*Rigoulot*[, 123 Idaho 267; 846 P2d 918 (1992),] and [*State v*]*Clark*[, 124 Idaho 308; 859 P2d 344 (1993)]. In those cases, the breadth of permissible police activity was tied to that which would be expected of "ordinary visitors," *Rigoulot*, 123 Idaho at 272, 846 P.2d at 923, and "reasonably respectful citizens." *Clark*, 124 Idaho at 313, 859 P.2d at 349. The clandestine intrusion of Agents Thornton and Landers onto Cada's driveway under cover of darkness in the dead of night exceeded the scope of any implied invitation to ordinary visitors and was not conduct to be expected of a reasonably respectful citizen.[75]

Thus, in *Cada*, it was not simply that the officers entered the premises in the early hours of the morning that created the constitutional problem. Rather, it was that the officers used the "cover of darkness" to conduct a "clandestine intrusion" of the property that caused them to exceed "the scope of any implied invitation to ordinary visitors . . . ."[76] This type of "furtive intrusion late at night or in the predawn hours" is not the type of

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[75] *Id*. at 233.

[76] *Id*.

"conduct that is expected from ordinary visitors[,]" and thus, could lead to "potentially tragic results . . . ."[77]

In nearly every relevant way, the conduct that occurred in this case is the exact opposite of what occurred in *Cada*. Officers did not furtively approach either home; the officers walked directly to the homes and knocked. There was nothing clandestine about their behavior. And rather than refuse to come to the door or call the police, both Frederick and Van Doorne answered the door and spoke with the officers. What occurred in the cases before us was not a " '[f]urtive intrusion late at night or in the predawn hours' " that " 'if observed by a resident of the premises . . . could be a cause for great alarm[.]' "[78] Thus, although the officers visited the homes in the early hours of the morning, that fact does not render the knock-and-talks unconstitutional under the circumstances of these cases.

3. "COMMUNITY STANDARDS"

Finally, Frederick and Van Doorne argue that the officers "failed to follow community standards" by "incessantly" pounding on each door until the officers received an answer. The record simply does not sup-

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[77] *Id*. Other cases have similarly concluded that *clandestine* entries into areas protected by the Fourth Amendment are unconstitutional. See *State v Ross*, 141 Wash 2d 304; 4 P3d 130 (2000) (without attempting to contact a home's occupants, the police entered the property shortly after midnight in plain clothes to check for the odor of marijuana emanating from a garage); *State v Johnson*, 75 Wash App 692; 879 P2d 984 (1994) (the police entered private property via a state park shortly after 1:00 a.m., past signs that said "Private Property" and "No Trespassing," and then used a thermal imaging device to investigate a barn).

[78] *Jardines*, 569 US at ___; 133 S Ct at 1422 (Alito, J., dissenting), quoting *Cada*, 129 Idaho at 233.

port these factual assertions. As found by the trial court, the officers knocked on each door and waited a few minutes for someone to respond. This factual conclusion was supported by the testimony of several officers, all of whom testified to knocking on each door and waiting a matter of minutes for a response. Frederick's and Van Doorne's argument lacks merit.

Affirmed.

K. F. KELLY, J., concurred with TALBOT, C.J.

SERVITTO, J. (*dissenting*). I respectfully dissent.

On remand, our Supreme Court directed us to address "whether the 'knock and talk' procedure conducted in [these cases] is consistent with US Const, Am IV, as articulated in *Florida v Jardines*, [569 US ___;] 133 S Ct 1409[; 185 L Ed 2d 495] (2013)." *People v Frederick*, 497 Mich 993 (2015). *People v Van Doorne*, 497 Mich 993 (2015). The majority interprets this directive to mean that our inquiry is strictly limited to the question whether the knock-and-talk procedure used in these cases amounts to a "search" within the meaning of the Fourth Amendment, indicating its belief that the United States Supreme Court's inquiry in *Jardines* was firmly limited to the question whether the officers' behavior was a search within the meaning of the Fourth Amendment. I disagree that our Supreme Court's directive was so restrictive or narrow, or that the *Jardines* Court's inquiry was so limited.

In *Jardines*, the United States Supreme Court began by stating the basic principle that a search within the meaning of the Fourth Amendment occurs when the government obtains information by physically intruding on persons or houses. *Jardines*, 569 US at ___; 133 S Ct at 1414. According to *Jardines*:

> That principle renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner. [*Id*. at ___; 133 S Ct at 1414.]

The United States Supreme Court then went on, however, to engage in a lengthy analysis of whether Jardines had "given his leave" for the police and the dog to be on his front porch. Thus, the case focused on the scope of an implicit license and the objective reasonableness of what the Court deemed to be an obvious search, and not, as the majority asserts, whether a search had occurred at all. This focus makes sense because the Fourth Amendment protects against unreasonable searches and seizures, not simply searches and seizures. The *Jardines* Court stated that

> the question before the court is precisely *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. [*Id*. at ___; 133 S Ct at 1416-1417.]

According to the *Jardines* Court:

> A license may be implied from the habits of the country, notwithstanding the strict rule of the English common law as to entry upon a close. We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal

> knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. *Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.* [*Id*. ___; 133 S Ct at 1415-1416 (quotation marks and citations omitted; emphasis added).]

The United States Supreme Court further stated that the scope of the license was limited to a particular area *and* to a specific purpose. *Id*. ___; 133 S Ct at 1416. Thus, though it cannot be denied that the final holding of *Jardines* was that a search occurred, the answer to that question required an expansive inquiry into, and analysis of, several factors, including the context of the procedure employed and the reasonableness of the officers' actions.

A knock-and-talk represents one tactic employed by police officers that does not generally contravene the Fourth Amendment. See, e.g., *People v Frohriep*, 247 Mich App 692, 698; 637 NW2d 562 (2001) ("We conclude that in the context of knock and talk the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections."). The *Frohriep* Court also recognized, however, that the knock-and-talk procedure is not entirely without constitutional implications. "Anytime the police initiate a procedure, whether by search warrant or otherwise, the particular circumstances are subject to judicial review to ensure compliance with general constitutional protections. Accordingly, what happens within the context of a knock and talk contact and any resulting search is certainly subject to judicial review." *Id*. at 698.

The majority opinion in *Jardines* did not expressly discuss any spatial or temporal limitations on the implied license to approach a home. The dissent, however, did. See *Jardines*, 569 US at ___; 133 S Ct at 1422-1423

(Alito, J., dissenting). Specifically, the dissent found that the implied license contained the following limitations: (1) "[a] visitor must stick to the path that is typically used to approach a front door, such as a paved walkway"; (2) a visitor may not "come to the front door in the middle of the night without an express invitation"; and (3) "a visitor may not linger at the front door for an extended period." *Id*. at ___; 133 S Ct at 1422. Though the majority opinion did not specifically impose any temporal limits, it favorably referred to the dissent's "no-night-visits rule" in a footnote. See *id*. at ___ n 3; 133 S Ct at 1416 n 3 (opinion of the Court). In that footnote, the majority indicated that a "typical person" would find the use of a drug-sniffing dog "a cause for great alarm," which, it stated, was "the kind of reaction the dissent quite rightly relie[d] upon to justify its no-night-visits rule[.]" *Id*. at ___ n 3; 133 S Ct at 1416 n 3. The majority also stated that the dissent presented "good questions" regarding the scope of the implied license, which included a consideration of "the appearance of things," "what is typical for a visitor," "what might cause alarm to a resident of the premises," "what is expected of ordinary visitors," and "what would be expected from a reasonably respectful citizen[.]" *Id*. at ___ n 2; 133 S Ct at 1415 n 2 (quotation marks omitted).

Recently, in *United States v Walker*, 799 F3d 1361 (CA 11, 2015), the United States Court of Appeals for the Eleventh Circuit determined that the scope of a knock-and-talk is limited in two respects. First, citing *Jardines*, 569 US at ___; 133 S Ct at 1416-1417, the court indicated that this exception to the warrant requirement "ceases where an officer's behavior 'objectively reveals a purpose to conduct a search.' " The second limitation is that "the exception is geographically limited to the front door or a 'minor departure' from it." *Walker*, 799 F3d at 1363.

Based on *Jardines* and our Supreme Court's directive, I would interpret the instant case as presenting the specific question of whether a knock-and-talk procedure conducted at a private residence in the middle of the night (the "predawn hours"), without evidence that the occupant of the residence extended an explicit or implicit invitation to strangers to visit during those hours, is an unconstitutional search in violation of the Fourth Amendment. Michigan courts have yet to address possible constitutional limitations on the knock-and-talk procedure. See *People v Gillam*, 479 Mich 253, 276 n 13; 734 NW2d 585 (2007) (KELLY, J., dissenting) ("This Court has not yet discussed the constitutionality of, or limits to, traditional knock-and-talk encounters."). Other jurisdictions have, however, addressed the limitations of an implicit license with respect to police officers' warrantless approach to homes.

In *Kelley v State*, 347 P3d 1012, 1013 (Alas App, 2015), two Alaska state troopers, acting on an anonymous tip, drove up a defendant's driveway shortly after midnight. The defendant's home was in a rural area and set back from the road a considerable distance. *Id*. The troopers remained in their car for several minutes and rolled down the windows, sniffing the air. *Id*. Detecting an odor of marijuana in the air, the troopers left and obtained a warrant to search the defendant's home, which revealed evidence of a marijuana grow operation. *Id*. The trial court denied the defendant's motion to suppress the evidence seized in the search, reasoning "that the driveway to [the defendant]'s house was impliedly open to public use because it provided public ingress to and egress from her property . . . ." *Id*. The Alaska Court of Appeals directed the parties to brief the recently decided case of *Jardines* with respect to the defendant's appeal of her conviction. *Id*.

The *Kelley* court recognized *Jardines*'s holding "that a police officer has an implicit license to approach a home without a warrant and knock on the front door because this is 'no more than any private citizen might do.' " *Id*. at 1014. It also pointed out, however, that in *Jardines*, the United States Supreme Court recognized that the scope of the "implicit license [wa]s limited not only to the normal paths of ingress and egress, but also by the manner of the visit." *Id*. The *Kelley* court quoted *Jardines*'s statement that " '[t]o find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.' " *Id.*, quoting *Jardines*, 569 US at ___; 133 S Ct at 1416. The *Kelley* Court thus found that the *manner* of the visit was of paramount importance in the *Jardines* decision.

In *Kelley*, the court determined that the search there was *more* intrusive than was the search in *Jardines* because it took place after midnight. *Kelley*, 347 P3d at 1014. In making this determination, *Kelley* referred to Justice Alito's dissent in *Jardines* in which he indicated that a visitor could not come to a home in the middle of the night without express invitation. *Id*. The *Kelley* court further stated that the *Jardines* majority "referred approvingly to the dissent's 'no-night-visits rule.' " *Id*. at 1014-1015. Ultimately, the *Kelley* court found that the officers' conduct constituted an illegal search, that the warrant obtained was tainted by the illegal search, and that any evidence obtained under the warrant must be suppressed. *Id*. at 1016.

We recognize that the *Kelley* majority, in addressing the dissent's position, specifically stated that "the legal principles that govern a 'knock and talk' do not apply

here, because the State never asserted, and the record does not show, that the troopers approached Kelley's residence to engage in a knock and talk." *Id*. However, *Kelley* also pointed out that all the knock-and-talk cases relied on by the dissent considered the lateness of the hour as an important factor to consider "in assessing the overall coerciveness and lawfulness of a knock and talk." *Id*.

In *United States v Lundin*, 47 F Supp 3d 1003, 1007-1008 (ND Cal, 2014), after interviewing a kidnapping victim at a hospital in the early morning hours, a police officer contacted dispatch and requested a BOLO ("be on the lookout") for the kidnapper, Lundin. The officer also requested that Lundin be arrested on several charges. *Id*. at 1008. In response to the BOLO, another officer drove to Lundin's home, saw Lundin's car and light on inside the home, and called for backup. *Id*. At approximately 4:00 a.m. the officers knocked on Lundin's front door. *Id*. The officers heard loud crashing from the back of the home, and they ordered whoever was in the backyard to come out with hands up, at which point Lundin exited the backyard and was taken into custody. *Id*. Officers then searched Lundin's home and backyard, finding two firearms. *Id*. at 1009.

In determining the reasonableness of the search conducted at Lundin's home, the United States District Court for the Northern District of California pronounced that "it is 'a firmly-rooted notion in Fourth Amendment jurisprudence' that a resident's expectation of privacy is not violated, at least in many circumstances, when an officer intrudes briefly on a front porch to knock on a door in a non-coercive manner to ask questions of a resident." *Id*. at 1011. As in *Jardines*, the *Lundin* court noted that the rationale for this is that residents of a home typically extend an

implicit license to strangers to approach the home by the front path, to knock, to linger briefly to be received, and absent invitation to stay longer, to leave. *Id*. at 1011. In *Lundin*, two factors indicated that the officers' conduct exceeded the scope of the recognized implied license: (1) their purpose was to locate Lundin and to arrest him, not to talk to him, and (2) the approach took place at 4:00 a.m. *Id*.

In contemplating the purpose of the officers' visit, the *Lundin* court indicated that whether the officers' conduct constituted an objectively reasonable search depended on whether the officers had an implied license to approach Lundin's home, which depended, in part, on their purpose for doing so. *Id*. at 1012. The court did not hold that the officers' purpose was a dispositive factor in analyzing whether the officers' visit fell within the scope of a lawful knock-and-talk, but that it was at least a significant factor. *Id*. at 1013. The time of the visit, 4:00 a.m., was the other significant factor, it being "a time at which most residents do not extend an implied license for strangers to visit." *Id*. The *Lundin* court concluded that "[b]y entering onto Lundin's curtilage at four in the morning for the purpose of locating him to arrest him, the officers engaged not in a lawful 'knock and talk' but rather in a presumptively unreasonable search." *Id*. at 1014.

While not presented with a situation in which an officer attempted to contact the homeowner,[1] the Kentucky Supreme Court, to determine the reasonableness of such a visit, nonetheless found it necessary to address the time of day an officer visited a home. *Commonweath v Ousley*, 393 SW3d 15 (Ky, 2013). The

[1] An officer removed trash from the curtilage of a home in the late night/early morning hours in order to investigate tips that the homeowner was engaged in illegal drug sales from the home.

Ousley court stated, "Surely there is no reasonable basis for consent to ordinary public access, presumed or otherwise, for the public to enter one's property at midnight absent business with the homeowner. Girl Scouts, pollsters, mail carriers, door-to-door salesmen just do not knock on one's door at midnight . . . ." *Id*. at 30. The court also noted that the time limitation appears in several curtilage cases and that

> [o]ne of the earliest knock-and-talk cases laid out the rule like this:
>
> > Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, *at high noon*, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law. *Davis v. United States*, 327 F.2d 301, 303 (9th Cir.1964), *impliedly overruled on other grounds as suggested in United States v. Perea-Rey*, 680 F.3d 1179, 1187 (9th Cir.2012) (emphasis added).
>
> As *Davis* went on to note, "The time of day, coupled with the openness of the officers' approach to defendant's doorway, rules out the possible dangers to their persons which might have resulted from a similar unannounced call in the dead of night." *Id*. at 304. Numerous other cases mention time of the invasion as a factor in whether the Fourth Amendment is violated. [*Ousley*, 393 SW3d at 30-31.]

Ousley thus concluded that, "just as the police may invade the curtilage without a warrant only to the extent that the public may do so, they may also invade the curtilage only *when* the public may do so." *Id*. at 31.

In a pre-*Jardines* case involving observations made by the police from a defendant's driveway during 1:00 a.m. and 4:00 a.m. visits, an Idaho appellate court indicated that the time of day and openness of the officer's approach have been found to be significant factors in determining whether the scope of the implied invitation to enter areas of a private home's curtilage was exceeded. *State v Cada*, 129 Idaho 224; 923 P2d 469 (1996). "Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors." *Id*. at 233.

In sum, the time of a knock-and-talk visit, while perhaps not the *only* deciding factor in determining whether an unconstitutional (unreasonable) search occurred, is at least a *significant* factor among those to be considered along with the totality of the circumstances surrounding the knock-and-talk. In these consolidated cases, the totality of the circumstances leads me to conclude that both knock-and-talk occurrences constituted unconstitutional searches.

On the night of March 17, 2014, seven officers appeared for the knock-and-talks at defendants' (corrections officers with Kent County) homes. The officers arrived at each house in four unmarked vehicles. Each officer wore a tactical vest with a firearm on his or her hip, but the officers were not in full uniform. The officers went to Frederick's home at approximately 4:14 a.m., and then went to Van Doorne's home at approximately 5:30 a.m. Each defendant was asleep when the officers arrived, and the officers pounded on a door to each home before making contact with each defendant. The officers pounded on Frederick's front door, but had to knock on a door next to the garage at Van Doorne's because icy conditions prevented the officers from approaching Van Doorne's front door.

Considering the circumstances of these cases, it is very difficult to imagine why the officers tried to initiate consensual conversations with Frederick and Van Doorne between 4:00 a.m. and 5:30 a.m. to simply ask questions of each of them. Just as the behavior of the officers in *Jardines* "objectively reveals a purpose to conduct a search," *Jardines*, 569 US at ___; 133 S Ct at 1417, the behavior of the officers in this case objectively reveals a purpose to conduct a warrantless search of these defendants' homes to obtain evidence.

Significantly, at least two of the officers testified that they had enough probable cause to obtain search warrants for the homes but did not do so, instead electing to go to defendants' homes in the early morning hours as a matter of "courtesy" because defendants were officers employed by the same sheriff department. Van Doorne testified that one of the officers told him that they chose to not seek a warrant because the department did not want a public record of the situation at that time. The highest-ranking officer on the scene admitted that at some point, he told Van Doorne that the decision was made to not get a warrant because if a warrant was obtained, the media would get hold of it right away. The testimony supports the conclusion that the primary purpose of conducting the knock-and-talks was to obtain—without a warrant—the evidence that one officer had earlier delivered to defendants. The officers claimed they did not get a warrant because they wished to avoid publicity focused on the Kent County Sheriff's Department. Objectively, according to the testimony, the officers that appeared at defendants' homes in the early morning hours did not seek to ask defendants questions, but rather, they sought to search defendants' homes to obtain perishable evidence before it "disappeared," and to avoid publicity.

The time of day that the officers appeared at defendants' homes also lends support for finding that their conduct violated the Fourth Amendment. As previously indicated, the knock-and-talk exception to the warrant requirement is premised, at its most basic level, on the fact that the police are acting consistently with the implied license a homeowner extends to the public-at-large. *Jardines*, 569 US at ___; 133 S Ct at 1415. There is no evidence that either Frederick or Van Doorne extended an invitation to the public to come to their homes between the hours of 4:00 a.m. and 5:30 a.m. Absent evidence that Frederick or Van Doorne regularly expected or accepted visitors or public company at those hours, the officers cannot rely on the implied consent exception for the knock-and-talks they conducted at 4:00 a.m. and 5:30 a.m., because those are not times "at which most residents extend an implied license for strangers to visit." *Lundin*, 47 F Supp 3d at 1013. Moreover, several of the involved officers, including the lead officer, testified that they could have waited and spoken to defendants several hours later, during daylight hours.

Yet another factor worthy of consideration is the sheer number of officers who appeared at defendants' homes in the early morning hours. By all accounts, seven officers came to defendants' homes, armed and wearing their tactical gear, to, according to the officers, conduct knock-and-talks. It is difficult to conceive of a reason why it would be necessary for seven officers to come to the home of another officer at 4:00 a.m. or 5:30 a.m. to simply ask questions.

I reach my conclusion that the officers' conduct violated the Fourth Amendment on the basis of *all* of the circumstances of this case, including the time of night, an objective view of the officers' conduct, and the

officers' failure to advance any objectively reasonable explanation for why they could not gather their evidence during the day, or proceed with obtaining a warrant. As a result, I would reverse the trial court's order in each case and remand to the trial court for entry of an order granting defendants' motions to suppress the evidence. I reach this conclusion despite the fact that after the officers spoke to defendants, defendants consented to searches of their homes.

"A search preceded by a Fourth Amendment violation remains valid if the consent to search was voluntary in fact under the totality of the circumstances." *United States v Fernandez*, 18 F3d 874, 881 (CA 10, 1994).

> When there has been such a violation, the government bears the heavy burden of showing that the primary taint of that violation was purged. To satisfy this burden, the government must prove, from the totality of the circumstances, a sufficient attenuation or break in the causal connection between the illegal [action] and the consent. No single fact is dispositive, but the so-called "Brown factors" (from *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)) are especially important: (1) the temporal proximity of the illegal [action] and consent, (2) any intervening circumstances, and (3) the purpose and flagrancy of any official misconduct. [*United States v Reyes-Montes*, 233 F Supp 2d 1326, 1331 (D Kan, 2002) (quotation marks and citations omitted; alterations in original).]

In these consolidated cases, as in *Reyes-Montes*, 233 F Supp 2d at 1331, I cannot conclude that there was a sufficient attenuation between the unlawful entries and the defendants' consents. The consent of each defendant came within a few minutes of the officers' entries. *Id*. There were no intervening circumstances present to "break the causal connection" or eliminate

the coercive effects of the unlawful entry. *Id*. With regard to the purpose and flagrancy of the misconduct, "the officers' conduct here may have been well-intentioned, but . . . a warrantless entry into a house is presumptively unreasonable, and the physical entry of the house is the chief evil against which the Fourth Amendment is directed." *Id*. The defendants' purported consent to search directly flowed from the officers' unlawful entry, and thus I cannot find that the searches were permissible under the Fourth Amendment.

Even if the knock-and-talks were viewed as permissible, "[a] knock and talk becomes a seizure requiring reasonable suspicion where a law enforcement officer, 'through coercion, "physical force[,] or a show of authority, in some way restricts the liberty of a person." ' " *United States v Crapser*, 472 F3d 1141, 1150 (CA 9, 2007) (Reinhardt, J., dissenting) (citation and emphasis omitted; alteration in original); see *United States v Chan-Jiminez*, 125 F3d 1324, 1326 (CA 9, 1997). "[F]actors, such as a display of weapons, physical intimidation or threats by the police, multiple police officers questioning the individual, or an unusual place or time for questioning may transform a consensual encounter between a citizen and a police officer into a seizure." *United States v Ponce Munoz*, 150 F Supp 2d 1125, 1133 (D Kan, 2001).

Again, in these cases, seven officers appeared in the very early morning hours at the fellow officers' homes, purportedly to ask them questions. The officers who approached the door, at least two of whom were higher in rank than defendants, knocked for several minutes, aware that no one was awake in the homes. While neither Frederick nor Van Doorne felt "threatened" by the officers, both were in a unique situation—both defendants were employed by the same department as

the officers at their homes. Understandably, Frederick and Van Doorne testified that because members of their own department were at their doors asking to talk to them about an investigation, they felt that they were not free to say no, and that they would be risking their employment if they failed to comply with a departmental request. Seven officers appearing at the home of a fellow officer in the wee hours of the morning, armed and in tactical gear, advising each defendant that his name had come up in a criminal investigation, could be viewed as a show of authority designed to assure that the defendants would not deny their "request" to enter each defendant's home to talk, and/or for permission to search the defendants' homes. "The ordinary remedy in a criminal case for violation of the Fourth Amendment is the suppression of any evidence obtained during the illegal police conduct," *United States v Perez-Partida*, 773 F Supp 2d 1054, 1059 (D NM, 2011), and I would find it to be the appropriate remedy in these cases.

LOWREY v LMPS & LMPJ, INC

Docket No. 323049. Submitted December 1, 2015, at Detroit. Decided December 10, 2015, at 9:00 a.m. Reversed in part and vacated in part 500 Mich 1.

Krystal Lowrey brought an action in the Oakland Circuit Court against LMPS & LMPJ, Inc., after she slipped and fell while descending a stairway at Woody's Diner. Lowrey alleged that she slipped because the stairs were wet as the result of people tracking snow into the establishment. Lowrey subsequently amended her complaint to name KSK Hospitality Group, Inc., doing business as Woody's Diner, as the defendant. KSK moved for summary disposition under MCR 2.116(C)(10). The court, Rudy J. Nichols, J., granted the motion. Lowrey appealed.

The Court of Appeals *held*:

1. A party may test the opposing party's factual support for a claim or defense by making a properly supported motion for summary disposition under MCR 2.116(C)(10). A trial court should grant the motion if, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. In order to invoke the trial court's authority to dismiss a claim under MCR 2.116(C)(10), the moving party must identify the issues about which there is no genuine issue of material fact and present evidence that, if left unrebutted, would establish the moving party's right to summary disposition. Because the burden of production is on the moving party at this point, the moving party risks having the motion rejected if he or she fails to properly support it. Only if the moving party properly supports the motion does the burden shift to the opposing party to establish that a genuine issue of disputed fact exists. To establish a claim of premises liability, the plaintiff must be able to prove that the premises possessor had actual or constructive notice of the dangerous condition at issue—that is, that the premises possessor either knew about the dangerous condition or would have discovered it had he or she conducted a reasonable inspection.

2. To demonstrate that there was no genuine issue that it did not have actual notice, KSK had to present evidence that, if believed, would have established that it did not know that the

stairs were wet or slippery. As an artificial entity, KSK's knowledge consists of the collective knowledge acquired by its employees within the scope of their employment and authority. KSK relied on evidence from three sources to establish that it did not have actual notice. It cited deposition testimony from the manager on duty on the night at issue. She testified that no one made her aware that anyone had fallen on the steps. KSK noted too that its owner did not learn of Lowrey's fall until much later. Finally, KSK relied on testimony tending to establish that Lowrey and her friends did not hear anyone complaining to KSK's employees about the condition of the stairs. None of this testimony was sufficient to allow a reasonable jury to find that KSK did not actually know that the steps were wet and slippery. Because the evidence proffered in support of KSK's motion for summary disposition did not permit an inference that it lacked actual notice of the wet and slippery conditions, KSK failed to properly support its motion on that basis. Consequently, the trial court erred to the extent that it required Lowrey to present evidence to establish a question of fact with regard to whether KSK had actual notice; instead, it should have denied KSK's motion for lack of evidentiary support.

3. Even if the premises possessor does not have actual knowledge of a dangerous condition—as would be the case for a dangerous condition created by some third party or through gradual deterioration—Michigan courts have long recognized that the law will impute knowledge of the dangerous condition to the premises possessor if the premises possessor should have discovered the dangerous condition in the exercise of reasonable care. Generally, the law will impute knowledge of the dangerous condition to the premises possessor if the dangerous condition is of such a character or has existed for a sufficient time that a reasonable premises possessor would have discovered it. Whether the condition was one that a premises possessor would have discovered with a reasonable inspection generally depends in the first instance on the nature of the inspection that a reasonable premises possessor would have made under the circumstances. A premises possessor who moves for summary disposition on the ground that he or she did not have constructive notice of the dangerous condition will normally have to present evidence to establish what constitutes a reasonable inspection under the circumstances to permit an inference that, given the nature of the hazard, he or she would not have discovered the hazard even if he or she had performed that inspection. KSK argued that the undisputed evidence showed that Lowrey could not prove how the liquid at issue got on the stairs or how long it was there. Because

KSK had the initial burden to produce evidence in support of its motion, its belief that Lowrey would be unable to meet her burden at trial was irrelevant and did not establish grounds for dismissing Lowrey's claim under MCR 2.116(C)(10). Moreover, KSK did not proffer any evidence that would permit a reasonable finder of fact to find that it did not have constructive notice. KSK failed to present any evidence that the method it used for inspecting the premises was reasonable under the circumstances of that night. The trial court erred when it granted KSK's motion for summary disposition on the ground that there was no genuine issue of fact that it did not have either actual or constructive notice. KSK failed to support its motion as required under MCR 2.116(G)(3) and (4), and the trial court should have denied the motion on that basis.

4. KSK also argued that it was entitled to summary disposition because Lowrey could not establish causation. In support of its motion, KSK selectively cited testimony by Lowrey that suggested that she was not sure about the cause of her fall. If this testimony had been left unrebutted, KSK would have been entitled to summary disposition. However, in response to KSK's motion, Lowrey cited portions of her testimony in which she clarified that she slipped and fell as a result of liquid on the stairs. Viewing Lowrey's testimony and the other evidence in the light most favorable to her, it was deducible using reasonable inferences that Lowrey slipped as a result of the wet stairs; that is, there was substantial evidence from which a jury might conclude that, but for KSK's failure to rectify the wet condition of the stairs, Lowrey would not have been injured. Thus, there was a question of fact on the issue of causation, and the trial court erred to the extent that it determined that summary disposition was warranted on this ground.

5. KSK also argued that there was nothing about the character, location, or surrounding condition of the steps that made the steps unreasonably dangerous. In making this argument, KSK ignored the evidence that the steps had become wet; instead, it focused on the fact that—under normal conditions—there was nothing particularly dangerous about the steps. Considering the evidence that the steps had become wet, a reasonable jury could find that the risk of harm to invitees was unreasonable. Therefore, there was a question of fact on that issue.

6. A premises possessor has no duty to rectify a dangerous condition that is so obvious that the invitee might reasonably be expected to discover it. Where an otherwise dangerous condition is open and obvious, the open and obvious danger doctrine will cut

off liability. A dangerous condition is open and obvious if an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection. To properly support a motion for summary disposition on the ground that the dangerous condition at issue was open and obvious, the premises possessor must present evidence that the dangerous condition—as it existed at the time the plaintiff encountered it—was such that reasonable people could not disagree that an average user of ordinary intelligence acting under those conditions would have been able to discover the danger and the risk presented by the condition on casual inspection. KSK did not present any evidence to support its contention that the wet stairs were open and obvious; more specifically, it did not present any evidence that an average patron with ordinary intelligence, who was acting under the same conditions as those present when Lowrey encountered the hazard, would have been able to discover the danger and the risk presented by the condition upon casual inspection. The trial court should have denied KSK's motion for summary disposition to the extent that KSK asserted that Lowrey's claim was barred by the open and obvious danger doctrine.

Trial court decision reversed, trial court order granting summary disposition vacated, and case remanded for further proceedings.

The Rasor Law Firm, PLLC (by *Jonathan R. Marko*), for Krystal Lowrey.

Kallas & Henk PC (by *Joseph F. Fazi*) for KSK Hospitality Group, Inc.

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

M. J. KELLY, J. In this suit involving a slip and fall, plaintiff, Krystal Lowrey, appeals by right the trial court's order dismissing her claim against defendant, KSK Hospitality Group, Inc. (KSK), which does business as Woody's Diner (the bar). On appeal, we must determine whether the trial court erred when it

granted KSK's motion for summary disposition under MCR 2.116(C)(10). We conclude that it did. In its motion, KSK failed to present evidence that, if left unrebutted, would establish that it did not have actual or constructive notice of the condition; Lowrey therefore had no obligation to come forward with evidence establishing a question of fact as to that element, and the trial court should have denied the motion. We also conclude that the other bases for dismissal raised in KSK's motion are without merit. Accordingly, we reverse and remand.

I. BASIC FACTS

Lowrey testified at her deposition that she and four friends, including Kelly Dobronski and Samantha Bevins, went to the bar at about 12:30 a.m. on March 17, 2013. After checking their coats, they went upstairs to the dance area.

Bevins testified at her deposition that the stairs were close to the door where guests go outside to smoke. Two or three times during their visit, Bevins said, they went downstairs for a smoke break. At the time, it was snowing and there was snow on the ground. Bevins said that the bar was busy and there was "a lot of traffic" from people going in and out. Dobronski similarly testified at her deposition that it began to snow after they arrived and was snowing "really bad." Bevins said she saw "girls that were wearing like flat shoes . . . sliding" on the steps. She was not sure if all the steps after the landing were wet because "it's darker, you can't see as good, and I didn't inspect the stairs, I'm there to have fun, not to look for safety hazards." Nevertheless, she testified that the steps "were very wet" from the smokers tracking snow inside. There was even some salt on the steps that got tracked in from outside.

Lowrey testified that she and her friends descended the same steps on their way to leave. She could not see clearly because there were "a lot of people like walking down the stairs . . . ." Dobronski also testified that there were a lot of people going down the steps. The steps were narrow; there was enough room for two people to descend side-by-side, but they would be in trouble if somebody were coming up the stairs. After Lowrey had descended about three-quarters of the way down, she suddenly slipped, lost her balance, and fell. She tried to get up, but she couldn't walk; it was later learned that she had broken her tibia and fibula.

Lowrey said a bouncer ordered them to "get out." Bevins similarly stated that there was a bouncer at the bottom of the steps who witnessed the fall; she agreed that that he was controlling traffic coming down the stairs. The bouncer was "rushing" them to get out. Lowrey's friends eventually got her out of the bar without any help from the bouncers.

In June 2013, Lowrey sued LMPS & LMPJ, Inc., for damages arising from her slip and fall. She amended her complaint in July 2013 to name KSK as the defendant instead of LMPS & LMPJ.

KSK moved for summary disposition in May 2014. It argued that Lowrey's claim should be dismissed because Lowrey could not identify what caused her fall and could not prove that KSK had actual or constructive notice of any dangerous condition that may have existed. It also argued that, if there were a dangerous condition, it had no duty to rectify it or warn her because the condition was open and obvious. The trial court agreed that Lowrey failed "to present any evidence that [KSK] had actual or constructive notice" of the condition of the stairs before Lowrey's fall and granted KSK's motion. It also stated, in passing, that it

was dismissing Lowrey's claims for the reasons "further stated" by KSK in its brief. The trial court entered an order dismissing Lowrey's claim under MCR 2.116(C)(10) for the reasons stated on the record in July 2014. After the trial court denied her motion for reconsideration, Lowrey appealed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Lowrey argues that the trial court erred when it granted KSK's motion for summary disposition. 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 the court rules and this state's common law. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

B. THE BURDEN OF PRODUCTION

In its brief in support of its motion for summary disposition, KSK repeatedly asserted its belief that Lowrey would not be able to support the elements of her claim. Likewise, in granting KSK's motion, the trial court emphasized that Lowrey would have the burden to present evidence that KSK had actual or constructive notice of the dangerous condition if her claim were to proceed to trial and, for that reason, concluded that she had an obligation to present evidence after KSK raised the issue in its motion. The trial court appears to have understood that a defendant meets his or her burden of production as the moving party by simply stating a belief that the

plaintiff will be unable to present evidence to establish an element at trial. This understanding is not, however, in accord with our court rules.

The parties to a civil action generally have the right to have a jury hear the evidence and resolve their dispute. See Const 1963, art 1, § 14. Nevertheless, because the plaintiff bears the burden of proof, if the plaintiff fails to present evidence on an element of his or her claim at trial, the trial court properly directs a verdict in the defendant's favor. See *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499-500; 780 NW2d 900 (2009). Courts should grant a motion for a directed verdict only in those cases in which reasonable people could not differ as to whether the plaintiff established the elements of his or her claim; to do otherwise would contravene the constitutional requirement that the right to a jury trial be preserved. *Napier v Jacobs*, 429 Mich 222, 231-232; 414 NW2d 862 (1987). The grant of a motion for summary disposition amounts to—in effect—the grant of a directed verdict in favor of the moving party, and the same standard of review applies to both motions. See *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994).[1] Summary disposition does not violate a party's right to a jury trial because that right extends only to cases in which there are genuine issues of fact for the jury. See *Peoples Wayne Co Bank v Wolverine Box Co*, 250 Mich 273, 281; 230 NW 170 (1930). In considering such motions, courts must still remain "cognizant of the delicate balance between the constitutional right to a jury trial, on the one hand, and the proper judicial exercise of the rules of civil procedure, on the other." *Napier*, 429 Mich at 231.

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[1] *Skinner* was overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2 (1999).

A party may test the opposing party's factual support for a claim or defense by making a properly supported motion for summary disposition under MCR 2.116(C)(10). See *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A trial court should grant the motion if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). In order to invoke the trial court's authority to dismiss a claim under MCR 2.116(C)(10), the moving party must identify the issues about which there is no genuine issue of material fact and present evidence that, if left unrebutted, would establish the moving party's right to summary disposition. See *Barnard Mfg*, 285 Mich App at 369-370. "If the moving party properly supports its motion, the burden 'then shifts to the opposing party to establish that a genuine issue of disputed fact exists.' " *Id*. at 370, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the moving party fails to identify with the requisite specificity the "issues as to which the moving party believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), the nonmoving party cannot be faulted for failing to respond, and the trial court should deny the motion. Similarly, if the moving party fails to properly support his or her motion for summary disposition with affidavits, depositions, admissions, or other documentary evidence, the nonmoving party has no obligation to respond and the trial court should also deny the motion. *Barnard Mfg*, 285 Mich App at 370. It is only after the moving party files a properly *asserted* and *supported* motion for summary disposition that the nonmoving party may no longer "rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set

forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

There is a temptation on the part of busy trial courts to conclude that, because the plaintiff bears the initial burden of production *at trial*, the defendant should be able to challenge the plaintiff's ability to support his or her claim by filing a motion for summary disposition under MCR 2.116(C)(10) and asserting the belief that the plaintiff will be unable to meet his or her burden at trial. However, as our court rules clearly provide, it is the moving party—whether the plaintiff or the defendant—who bears the initial burden of production in a motion for summary disposition; the moving party must not only "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," but also must support the motion "as provided in this rule . . . ." MCR 2.116(G)(4).

The moving party supports his or her motion by presenting affidavits, depositions, admissions, or other documentary evidence to establish the grounds asserted in the motion. MCR 2.116(G)(3). It is only when the moving party properly supports the motion that the burden shifts to the nonmoving party to present evidence sufficient to establish that there is a genuine issue for trial. *Quinto*, 451 Mich at 362. And, because the burden of production is on the moving party at this point, the moving party risks having his or her motion "thrown out of court" if the moving party fails to properly support it. See *Kar v Hogan*, 399 Mich 529, 540; 251 NW2d 77 (1976) (quotation marks and citation omitted), overruled in part on other grounds *In re Estate of Karmey*, 468 Mich 68; 658 NW2d 796 (2003). Consequently, a defendant who moves for summary disposition does not satisfy the

initial burden of production by asserting his or her mere belief that the plaintiff will be unable to make his or her case at trial. Rather, the moving party must present evidence that, if left unrebutted, would permit a reasonable finder of fact to find in the moving party's favor on the element at issue. *Barnard Mfg*, 285 Mich App at 370; see also *Grandberry-Lovette v Garascia*, 303 Mich App 566, 580-581; 844 NW2d 178 (2014). When the defendant is convinced that the plaintiff will be unable to support an element of the claim at trial, but is unwilling or unable to marshal his or her own proofs to support a motion under MCR 2.116(C)(10), the defendant's recourse is to wait for trial and move for a directed verdict after the close of the plaintiff's proofs. See *Napier*, 429 Mich at 229-230.

C. APPLYING THE LAW: NOTICE

To establish a claim of premises liability,[2] the plaintiff must be able to prove that the premises possessor had actual or constructive notice of the dangerous condition at issue—that is, that the premises possessor either knew about the dangerous condition or would have discovered it had he or she conducted a reasonable inspection. See *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 93; 485 NW2d 676 (1992). Because actual or constructive notice is an essential element of Lowrey's claim, if KSK established that there was no question of fact that it did not have actual or constructive notice, it would be entitled to summary disposition. MCR 2.116(C)(10).

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[2] It is undisputed that Lowrey was an invitee of KSK and that it therefore owed her the highest duty of care, including a duty to inspect its premises for dangerous conditions. *Grandberry-Lovette*, 303 Mich App at 573.

1. ACTUAL NOTICE

To demonstrate that there was no genuine issue that it did not have actual notice, KSK had to present evidence that, if believed, would establish that it did not know that the stairs were wet or slippery. As an artificial entity, KSK's knowledge consists of the collective knowledge acquired by its employees within the scope of their employment and authority. See *The Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 213-214, 215 n 14; 476 NW2d 392 (1991). For that reason, a premises possessor is considered to have actual notice of those conditions caused by his or her employees or about which his or her employees know. *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 67; 299 NW 807 (1941). Therefore, to establish that it did not have actual notice that the steps were wet and slippery, KSK had to present evidence from an employee whose duties included addressing dangerous conditions on the property during the time at issue, as those conditions might arise or become known.

In the present case, KSK relied on evidence from three sources to establish that it did not have actual notice. It cited deposition testimony from the manager on duty on the night at issue, Jenna Evans. She testified that no one made her aware that anyone had fallen on the steps. KSK noted too that its owner, Tony Kasab, did not learn of Lowrey's fall until much later. Finally, KSK relied on testimony tending to establish that Lowrey and her friends did not hear anyone complaining to KSK's employees about the condition of the stairs. None of this testimony was sufficient to allow a reasonable jury to find that KSK did not actually know that the steps were wet and slippery.

Although knowledge that someone had fallen down the stairs at issue would be evidence that Evans or

Kasab knew that the stairs might have been wet and slippery, it does not follow from that testimony that no customer or employee reported that the steps were wet and slippery, nor, for that matter, that the employees themselves did not know about the condition of the stairs. Knowledge that a hazard has not yet caused a fall is distinct from knowledge that the hazard exists in the first place. Likewise, the fact that Lowrey and her companions did not hear anyone complain to one of KSK's employees does not establish that no one brought the wet and slippery condition of the stairs to the attention of its employees. It is highly unlikely that Lowrey and her companions were privy to every conversation between every customer and KSK's employees during the time at issue. Because the evidence proffered in support of KSK's motion for summary disposition did not permit an inference that it lacked actual notice of the wet and slippery conditions, KSK failed to properly support its motion on that issue. Consequently, the trial court erred to the extent that it required Lowrey to present evidence to establish a question of fact as to whether KSK had actual notice; instead, it should have denied KSK's motion for lack of evidentiary support. See *Barnard Mfg*, 285 Mich App at 370.

2. CONSTRUCTIVE NOTICE

A premises possessor owes a duty to inspect his or her premises for conditions that might pose a danger to invitees and this duty is linked to the concept of constructive notice:

> The duty to inspect one's premises to ensure that the premises are safe for invitees is inextricably linked to the concept of constructive notice. Even if the premises possessor does not have actual knowledge of a dangerous

> condition—as would be the case for a dangerous condition created by some third party or through gradual deterioration—Michigan courts have long recognized that the law will impute knowledge of the dangerous condition to the premises possessor if the premises possessor should have discovered the dangerous condition in the exercise of reasonable care. [*Grandberry-Lovette*, 303 Mich App at 573.]

Generally, the law "will impute knowledge of the dangerous condition to the premises possessor if the dangerous condition is of such a character or has existed for a sufficient time that a reasonable premises possessor would have discovered it." *Id*. at 575. However, whether the condition was one that a premises possessor would have discovered with a reasonable inspection generally depends in the first instance on the nature of the inspection that a reasonable premises possessor would have made under the circumstances. See *id*. at 576-584; see also *Gerlach v Detroit United R*, 171 Mich 474, 485; 137 NW 256 (1912) (stating that a reasonable inspection includes not only visual inspection, but also all those tests that a reasonably prudent man would ordinarily use to ascertain the condition of the property at issue).

In *Grandberry-Lovette*, the plaintiff was injured while visiting a group home. *Grandberry-Lovette*, 303 Mich App at 570. On appeal, this Court considered whether the trial court properly dismissed the plaintiff's claim against the defendant on the ground that he did not have constructive notice of the dangerous condition. *Id*. at 572.

The Court first explained that the defendant was incorrect when he argued that his duty to inspect for hazards was no different than the plaintiff's duty to avoid hazards that are open and obvious. "The premises possessor's duty to inspect," the Court observed,

"is not invariably limited to 'casual' observation." *Id*. at 577. This is so because the "premises possessor must take reasonable care to know the actual conditions" on his or her property. *Id*. at 578 (quotation marks and citation omitted). And what amounts to reasonable care depends on the type of inspection that a reasonably prudent premises possessor would perform under like circumstances: "The duty to take reasonable care to know the actual condition of the premises requires the premises possessor to undertake the type of inspection that a 'reasonably prudent' premises possessor would exercise under similar circumstances to protect his or her invitees." *Id*. "[I]f under the totality of the circumstances a reasonably prudent premises possessor would have employed a more vigorous inspection regime that would have revealed the dangerous condition, the fact that the condition was not observable on casual inspection would not preclude a jury from finding that the premises possessor should have discovered the hazard in the exercise of reasonable care notwithstanding its latent character." *Id*. at 579.

After rejecting the notion that a premises possessor's duty to inspect was *invariably* the same as an invitee's duty to avoid open and obvious hazards,[3] this Court examined the evidence that the defendant proffered in support of his motion and concluded that he did not properly support it; specifically, the Court determined that he failed to offer any evidence as to what would constitute a reasonable inspection under like circumstances:

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[3] Notably, the Court left open the possibility that a casual inspection might be reasonable under some circumstances. See *Grandberry-Lovette*, 303 Mich App at 580-581.

> He did not discuss or present any evidence concerning his actual inspection regime and whether that regime would have revealed the dangerous condition. He also did not discuss or present any evidence that the hazard might have developed within such a short time that, even with a reasonable inspection regime, he would not have discovered that the bricks had come loose. He essentially relied on [the plaintiff's] inability to discover the hazard on casual inspection to establish that he too, as a reasonably prudent premises possessor, would not have discovered that the bricks had come loose. This evidence, even if left unrebutted, was insufficient to establish that a reasonably prudent premises possessor would not have discovered the step's condition. [*Id*. at 580.]

As is evident from the Court's analysis, a premises possessor who moves for summary disposition on the ground that he or she did not have constructive notice of the dangerous condition will normally have to present evidence to establish what constitutes a reasonable inspection under the circumstances to permit an inference that, given the nature of the hazard, he or she would not have discovered the hazard even if he or she had performed that inspection. *Id*.; see also *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977) (stating that, in negligence cases, the general standard of care is a question of law for the court, but the specific standard of care is a question of fact for the jury). In the absence of evidence concerning what would constitute a reasonable inspection, a jury would in most cases be left to speculate as to whether the premises possessor would have discovered the hazard at issue had he or she conducted a reasonable inspection.

The proper context for evaluating whether a condition was discoverable with a reasonable inspection depends *both* on the nature of the hazard and the nature of the inspection that a reasonable premises

possessor would employ under like circumstances.[4] See, e.g, *Merryman v Hall*, 131 Mich 406, 407; 91 NW 647 (1902) (holding that it was error to exclude testimony concerning the construction of a boiler because the jury needed to understand the construction of the boiler and the ordinary practices for inspecting the boiler before it could determine if ordinarily prudent and careful men would have removed the flues to ascertain whether the braces had become defective). In most cases, a premises possessor cannot adequately support his or her motion for summary disposition on the ground that he or she did not have constructive notice without presenting evidence as to what constitutes a reasonable inspection under the circumstances. Once the premises possessor presents evidence concerning what constitutes a reasonable inspection, the premises possessor can link the evidence concerning the inspection with the evidence concerning the nature of the hazard in a way that would permit a jury to infer that the premises possessor did not have constructive notice.

[4] For example, with regard to a liquid spilled on the floor of a supermarket when there was evidence that the liquid was not visible on casual inspection, but showed signs of evaporation on close examination, whether the premises possessor could have discovered the spill would depend on the type of inspection that a reasonable premises possessor would have undertaken under like circumstances. If there was evidence that the fall occurred during a busy shopping period and that a reasonable premises possessor under those circumstances would have had an employee run a dust mop across the retail areas of the store every hour, which would have revealed the spill, and that the evaporation would not have occurred in less than an hour, then the jury could find that the retailer would have discovered the spill notwithstanding its latent character. Conversely, if there was evidence that the fall occurred late at night when there are few customers and when a reasonable premises possessor would not have run a dust mop, but would instead have relied on casual inspection by its employees, the jury could find that the retailer would not have discovered the spill.

If the evidence showed that the premises possessor actually performed a reasonable inspection, but did not discover the dangerous condition, the premises possessor could cite that evidence to establish that the reason he or she did not discover the hazard was because the hazard formed in such a short interval that it could not even be discovered with a reasonable inspection; in such a case, he or she would have no liability. See *Goldsmith v Cody*, 351 Mich 380, 387-389; 88 NW2d 268 (1958). Even if the evidence showed that the premises possessor failed to conduct a reasonable inspection, he or she could proffer evidence concerning the nature of the hazard and demonstrate that, given the nature of the hazard, even if he or she had conducted a reasonable inspection, the hazard would not have been discovered. In both cases, the burden would then shift to the nonmoving party to come forward with evidence to establish a question of fact. *Quinto*, 451 Mich at 362.

In this case, KSK argued that the undisputed evidence showed that Lowrey could not prove how the liquid at issue got on the stairs or how long it was there. KSK also noted that its manager, Evans, testified that either "a waitress or one of the staff will see it [a spill] and report it, or [that she] will see it on the security cameras." KSK then concluded that this evidence demonstrated that Lowrey would not be able to prove that KSK had constructive notice of the wet stairs at trial:

> It is possible that the water got on the stairs only five minutes or five seconds before [Lowrey's] fall. Someone walking down the stairs immediately in front of [Lowrey] could have spilled a drink right in front of her. As [Lowrey] cannot meet her burden of demonstrating that [KSK] had actual or constructive notice, [it] is not liable.

We do not agree that KSK supported its motion for summary disposition with evidence that, if left unrebutted, would establish that it did not have constructive notice of the wet and slippery condition of the stairs. Because KSK had the initial burden to produce evidence in support of its motion, its belief that Lowrey would be unable to meet her burden at trial was irrelevant and did not establish grounds for dismissing Lowrey's claim under MCR 2.116(C)(10). Moreover, KSK did not proffer any evidence that would permit a reasonable finder of fact to find that it did not have constructive notice.[5]

Although KSK briefly cited Evans's testimony about how spills are normally discovered and handled, it did not present any evidence indicating that particular method for inspecting the premises was reasonable under the circumstances of that night. It did not cite any evidence concerning the weather conditions (there was testimony that it was snowing heavily and that snow was being tracked into the bar and onto the stairs), how busy the bar was at the time (there was testimony that there were normally a couple hundred or more patrons), and did not even cite evidence that the bar's employees actually used the stairs at issue.[6] In the absence of evidence tending to show that casual

[5] As this Court has stated, we must review a motion for summary disposition by considering only the evidence and arguments actually made before the trial court. *Barnard Mfg*, 285 Mich App at 380-381. We are not, therefore, at liberty to consider new arguments or evidence on appeal.

[6] There was evidence that would permit an inference that the bar's patrons tracked snow onto the stairs and that the stairs had become slippery for some time before Lowrey's fall. If the jury were to find the testimony concerning the presence of bouncers near these stairs to be credible, it could infer that the bouncers had actual notice of the dangerous condition or, in the exercise of reasonable care, would have discovered the dangerous condition.

inspection by the employees while working was reasonable and that the employees actually used the stairs, a jury confronted with this evidence would be left to speculate as to whether KSK conducted a reasonable inspection under the circumstances and, if it did not, whether it could have discovered the wet conditions with a reasonable inspection. Thus, KSK failed to support its motion with evidence that, if left unrebutted, would establish that there was no genuine issue of material fact as to whether it had constructive notice. See MCR 2.116(G)(3) and (4). At best, the evidence established that it was theoretically possible that it did not have constructive notice. See *Skinner*, 445 Mich at 164-166. By failing to discuss the evidence concerning the nature of the condition at issue—steps that were wet with snow tracked in from outside, a condition that may have formed over the course of an hour or more—KSK failed to establish that the condition might have occurred in such a short interval that a reasonable inspection regime would not have revealed it. Without discussing the evidence, its claim that the condition might have arisen mere seconds before Lowrey's fall is nothing more than conjecture. Because KSK did not support its motion for summary disposition with evidence that would, if believed, establish that it did not have constructive notice of the wet stairs, the burden never shifted to Lowrey to establish a question of fact on that issue. *Quinto*, 451 Mich at 362.

The trial court erred when it granted KSK's motion for summary disposition on the ground that there was no genuine issue of fact that it did not have either actual or constructive notice. KSK failed to support its motion as required under MCR 2.116(G)(3) and (4), and the trial court should have denied the motion on that basis alone. *Grandberry-Lovette*, 303 Mich App at 581.

Because of our resolution of this issue, we need not address Lowrey's evidence that KSK actually knew through its agents that the steps were wet and slippery.[7]

D. ALTERNATE GROUNDS

The trial court also determined that KSK was entitled to summary disposition on the basis of the other arguments that it made in its motion. KSK had argued that Lowrey's claim should be dismissed for three additional reasons: (1) Lowrey could not establish that a liquid caused her fall, (2) the stairs do not amount to a dangerous condition, and (3) it had no duty to warn or rectify the condition because it was open and obvious.

1. CAUSATION

To prove her claim at trial, Lowrey had to show that the dangerous condition was both the cause in fact and the proximate cause of her injury. *Skinner*, 445 Mich at 162-163. It would not be sufficient for Lowrey to present evidence that it was plausible that the wet stairs caused her fall; there must be evidence from which a reasonable jury could conclude that it is more likely than not that the wet stairs caused her fall. *Id*. at 164-165.

In support of its motion, KSK selectively cited testimony by Lowrey that suggested that she was not sure about the cause of her fall. If this testimony had been

[7] As noted, there was testimony that one or more bouncers were stationed near the stairs and may have observed that the steps were wet. KSK, however, has been unable to identify its bouncers, did not apparently keep records of their service, and claimed to have no contact information for them.

left unrebutted, KSK would have been entitled to summary disposition. However, in response to KSK's motion, Lowrey cited portions of her testimony in which she clarified that she slipped and fell as a result of liquid on the stairs. She agreed that she saw the "liquid that caused [her] foot to slip" after she fell and, when asked, she stated that "[l]iquid" caused her foot to slip. Although her testimony seemed inconsistent, any inconsistencies were a matter of weight and credibility that could not be assessed on a motion for summary disposition. *Id*. at 161. This Court, like the trial court, must view Lowrey's testimony in the light most favorable to her when determining whether there is a genuine issue of fact. *Id*. at 162; see also *Quinto*, 451 Mich at 362. Viewing Lowrey's testimony and the other evidence in the light most favorable to her, it was deducible using reasonable inferences that Lowrey slipped as a result of the wet stairs; that is, there was substantial evidence from which a jury might conclude that, but for KSK's failure to rectify the wet condition of the stairs, Lowrey would not have been injured. See *Skinner*, 445 Mich at 164-165. Thus, there was a question of fact on the issue of causation, and the trial court erred to the extent that it determined that summary disposition was warranted on this ground.

2. DANGEROUS CONDITION

KSK also argued that there was nothing about the character, location, or surrounding condition of the steps that made the steps unreasonably dangerous. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). In making this argument, KSK ignored the evidence that the steps had become wet; instead, it focused on the fact that—under normal conditions—there was nothing particularly dangerous

about the steps. Considering the evidence that the steps had become wet, a reasonable jury could find that the risk of harm to invitees was unreasonable. Therefore, there was a question of fact on that issue. *Id*. at 617.

3. THE OPEN AND OBVIOUS DANGER DOCTRINE

A premises possessor has no duty to rectify a dangerous condition that is so obvious that the invitee might reasonably be expected to discover it. *Grandberry-Lovette*, 303 Mich App at 576. Where an otherwise dangerous condition is open and obvious, the open and obvious danger doctrine will cut off liability. *Id*.

The threshold issue of whether KSK owed a duty to Lowrey is a question of law to be decided by the court. *Riddle*, 440 Mich at 95. Because the open and obvious danger doctrine is an integral part of the definition of the duty owed by a premises possessor, whether the open and obvious danger doctrine will cut off liability will often be a question of law. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). Nevertheless, there may be circumstances in which there is a factual dispute that must be resolved before it can be determined whether there was a duty of care. See *Bertrand*, 449 Mich at 617. In *Bonin v Gralewicz*, 378 Mich 521, 526-527; 146 NW2d 647 (1966) (opinion by SOURIS, J.), our Supreme Court explained the distinction between the role of the jury and the role of the trial court when determining whether a defendant has a duty to the plaintiff:

> Usually, in negligence cases, whether a duty is owed by the defendant to the plaintiff does not require resolution of fact issues. However, in some cases, as in this one, fact issues arise. When they do, they must be submitted to the

> jury, our traditional finders of fact, for ultimate resolution and they must be accompanied by an appropriate conditional instruction regarding defendant's duty, conditioned upon the jury's resolution of the fact dispute.

Hence, when the facts necessary to make a determination regarding the duty owed by a defendant to a plaintiff are not disputed, it is the trial court's responsibility to decide the legal import of those facts. If there are disputed facts, which, depending on how those facts are resolved, could alter the determination that the defendant owed a duty to the plaintiff, those facts must be submitted to the jury with an appropriate instruction. *Id*.

"A dangerous condition is open and obvious if an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection." *Grandberry-Lovette*, 303 Mich App at 576-577 (quotation marks and citation omitted). To properly support a motion for summary disposition on the ground that the dangerous condition at issue was open and obvious, the premises possessor must present evidence that the dangerous condition—as it existed at the time the plaintiff encountered it—was such that reasonable people could not disagree that an average user of ordinary intelligence acting under those conditions would have been able to discover the danger and the risk presented by the condition on casual inspection. *Id*.; see also *Napier*, 429 Mich at 231-232. It is only after the moving party presents such evidence that the burden shifts to the nonmoving party to present evidence to establish a question of fact as to whether an average user of ordinary intelligence would not have been able to discover the hazard on casual inspection. *Quinto*, 451 Mich at 362.

KSK did not present any evidence to support its contention that the wet stairs were open and obvious; more specifically, it did not present any evidence that an average patron with ordinary intelligence, who was acting under the same conditions as those present when Lowrey encountered the hazard, would "have been able to discover the danger and the risk presented by the condition upon casual inspection." *Grandberry-Lovette*, 303 Mich App at 576-577 (quotation marks and citation omitted). There was testimony that the stairs were wet and slippery and that the stairwell was dark and crowded with patrons who were attempting to leave. Yet KSK did not present any evidence that an average person acting under those conditions would have discovered the danger and risk presented on casual inspection. Instead, KSK relied on the fact that courts have held that steps and water—under other circumstances—amounted to open and obvious hazards. That, however, was insufficient to establish that reasonable people could not differ as to the character of the hazard at issue in this case. *Grandberry-Lovette*, 303 Mich App at 576-577; see also *Napier*, 429 Mich at 231-232. Because KSK failed to present any evidence to support its contention that an average patron "with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection," *Grandberry-Lovette*, 303 Mich App at 576-577 (quotation marks and citation omitted), the trial court should have denied the motion to the extent that KSK asserted that Lowrey's claim was barred by the open and obvious danger doctrine.

III. CONCLUSION

KSK failed to present evidence that, if left unrebutted, would establish that it did not have actual or

constructive notice of the hazard at issue or that the hazard was open and obvious. Consequently, the burden to establish a question of fact did not shift to Lowrey and the trial court erred when it concluded otherwise. The trial court also erred to the extent that it determined that there was no question of fact as to whether wet stairs constitute an actionable hazard or on the issue of causation. For these reasons, the trial court should have denied KSK's motion.

Accordingly, we reverse the trial court's decision, vacate its order granting summary disposition in KSK's favor, and remand for further proceedings consistent with this opinion. Given our resolution of the issues, we decline to address Lowrey's arguments concerning the spoliation of evidence. We do not retain jurisdiction. As the prevailing party, Lowrey may tax her costs. MCR 7.219(A).

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

PEOPLE v GREEN

Docket No. 321669. Submitted October 8, 2015, at Petoskey. Decided October 20, 2015. Approved for publication December 10, 2015, at 9:05 a.m.

Gabriel L. Green was tried in the Emmet Circuit Court and convicted of three counts of third-degree criminal sexual conduct (CSC-III) involving force or coercion, MCL 750.520d(1)(b), against JG and one count of fourth-degree criminal sexual conduct (CSC-IV) involving force or coercion, MCL 750.520e(1)(b), against JB. Defendant was a Children's Protective Services (CPS) worker for the Department of Human Services (now the Department of Health and Human Services). His convictions arose out of his sexual relations with JG and sexual contact with JB while working as the CPS worker assigned to the respective neglect or abuse complaints filed against them. The court, Charles W. Johnson, J., sentenced defendant to concurrent terms of 5 to 15 years in prison for each CSC-III conviction and 12 months in prison for the CSC-IV conviction, and defendant appealed.

The Court of Appeals *held*:

1. Defendant argued that there was insufficient evidence at the preliminary examination to support his bindover on the charges. A defendant may not appeal that issue, however, if he or she was fairly convicted at trial. Given that there was no merit to the issues that defendant raised on appeal, the Court of Appeals concluded that he had been fairly convicted at trial and that reviewing whether the evidence at the preliminary examination was sufficient to warrant a bindover would have been improper.

2. Defendant argued that the trial court abused its discretion by restricting cross-examination of JG at trial and not admitting JG's purportedly inconsistent preliminary examination testimony as substantive evidence under MRE 801(d)(1)(A), which provides that a prior statement of a declarant is not hearsay if (1) the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and (2) the statement is inconsistent with the declarant's sworn testimony at a trial, hearing, or other proceeding. Defendant's counsel, however, was allowed to use JG's preliminary examination testimony to

impeach her trial testimony on one point, asking JG about her discussion with defendant regarding why she did not think the sexual activity was a good idea and making clear that at the preliminary examination JG had not used defendant's CPS status as one of the reasons.

3. JG testified at trial that she had never said that defendant asked her whether she wanted him to step down as her caseworker because he was in a position of authority. At the preliminary examination, JG had testified that defendant asked her if she wanted to keep seeing him because it was up to her since he was in a position of authority. The trial court did not abuse its discretion by concluding that JG's trial testimony was not inconsistent with her preliminary examination testimony. Inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position. The two statements were not diametrically opposed, evasive, or a change of position. Instead, JG's denial at trial that she had made such a statement was consistent with her preliminary examination testimony. For the same reasons, the trial court did not abuse its discretion by permitting defense counsel to cross-examine JG about another part of her preliminary examination testimony (concerning when defendant made the statement about leaving JG's case open so he could continue to see her) but not admitting it as substantive evidence.

4. The trial court did not abuse its discretion by concluding that JB's statements to her stepdaughter on the day JB and defendant had sexual contact were admissible under MRE 803(2) as excited utterances. JB made her first statement after defendant, while investigating alleged neglect or abuse, massaged JB's shoulders, back, and inner thighs. She made the second statement after sexual contact that involved oral sex and sexual intercourse. While she did not allege physical coercion or violence in either occurrence, both occurred in the context of defendant investigating JB for child abuse and neglect. The stepdaughter testified that complainant JB was very upset and crying during both conversations. Given the circumstances surrounding both events, they were startling events. Both statements were made within a few minutes of defendant's leaving the apartment, so there was no time to contrive and misrepresent his actions. Finally, JB's statements were clearly related to the circumstances surrounding defendant's actions, which were startling events. JB's statements to her mother on the same day as her contacts with defendant were also admissible under MRE 803(2) for the same reasons.

5. Defendant's convictions were not against the great weight of the evidence. MCL 750.520d(1)(b) provides that a person is guilty of CSC-III if he or she engages in sexual penetration with another person and force or coercion is used to accomplish the sexual penetration. Under MCL 750.520e(1)(b), a person is guilty of CSC-IV is he or she engages in sexual contact with another person and force or coercion is used to accomplish the sexual contact. MCL 750.520b(1)(f) defines the phrase "force or coercion" as including several circumstances, but the Legislature did not limit the definition to the examples enumerated in the statute. The existence of force or coercion must be determined in light of all the circumstances and is not limited to acts of physical violence. Coercion may be actual, direct, or positive, as when physical force is used to compel an act against one's will, or implied, legal, or constructive, as when one party is constrained by subjugation to another to do what the party's free will would refuse. Further, force or coercion exists whenever a defendant's conduct induces a victim to reasonably believe that the victim has no practical choice because of a history of child sexual abuse or for some other similarly valid reason. A defendant's conduct constitutes coercion when the defendant abuses his or her position of authority to constrain a vulnerable victim by subjugation to submit to sexual penetration or contact. Defendant was in a position of authority over the complainants because he was the CPS worker assigned to investigate the abuse or neglect complaints filed against them. Testimony established that CPS has the authority to provide services to rectify the risk to a child and petition the court for removal of a child or termination of parental rights. CPS may also petition to have a child removed from a home if a mother fails to protect her child from an abusive father or boyfriend, which was the situation that caused the complaint to be filed in JG's case. Fear of losing one's child through neglect or abuse proceedings would produce an extreme reaction in most parents. Defendant informed JG on the first day that if she did not leave her fiancé her child would be taken away. JG testified that she knew defendant would not stop until he got what he wanted. With respect to JB, defendant isolated her by requesting her stepdaughter to leave the room and then confided facts about his sister's murder as a result of domestic violence, which upset JB, who had just discussed her marriage and domestic violence with defendant. Both complainants were in a position of special vulnerability with respect to defendant, and his actions as a CPS worker were unprofessional, irresponsible, and an abuse of authority. In light of all the circumstances, the evidence established that defendant used his position of authority to manipulate and

coerce the complainants to perform the sexual acts with him, and the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Affirmed.

CRIMINAL SEXUAL CONDUCT — USE OF FORCE OR COERCION — ABUSE OF A POSITION OF AUTHORITY — CHILDREN'S PROTECTIVE SERVICES WORKER.

A person may be guilty of criminal sexual conduct in various circumstances in which he or she engages in sexual penetration or sexual contact with another person and force or coercion is used to accomplish the penetration or contact;. MCL 750.520b(1)(f) defines the phrase "force or coercion" as including several circumstances, but the definition is not limited to the examples enumerated in the statute; the existence of force or coercion must be determined in light of all the circumstances and is not limited to acts of physical violence; coercion may be actual, direct, or positive, as when physical force is used to compel an act against one's will, or implied, legal, or constructive, as when one party is constrained by subjugation to another to do what the party's free will would refuse; force or coercion exists whenever a defendant's conduct induces a victim to reasonably believe that the victim has no practical choice because of a history of child sexual abuse or for some other similarly valid reason; a defendant's conduct constitutes coercion when the defendant abuses his or her position of authority to constrain a vulnerable victim by subjugation to submit to sexual penetration or contact; a Children's Protective Services worker assigned to investigate a complaint of abuse or neglect filed against an individual is in a position of authority over that individual.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *James R. Linderman*, Prosecuting Attorney, and *Cheri L. Bruinsma*, Assistant Attorney General, for the people.

Duane J. Beach for defendant.

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

PER CURIAM. A jury acquitted defendant of six counts of third-degree criminal sexual conduct (CSC-III) involving force or coercion, MCL 750.520d(1)(b), but

convicted defendant of three counts of that crime against complainant JG and one count of fourth-degree criminal sexual conduct (CSC-IV) involving force or coercion, MCL 750.520e(1)(b) against complainant JB (collectively referred to as the "complainants"). The trial court sentenced defendant to concurrent terms of 5 to 15 years in prison for each of the CSC-III convictions and 12 months in prison for the CSC-IV conviction. Defendant appeals by right. We affirm.

Defendant was a Children's Protective Services (CPS) worker for the Department of Human Services (DHS).[1] His convictions arise out of his sexual relations with JG and sexual contact with JB while working as the CPS worker assigned to the respective neglect or abuse complaints filed with the DHS against the individual complainants. The prosecution's theory of the case was that defendant coerced the complainants to agree to his behavior because he was in a position of authority at the time of the acts. Defendant argued that the sexual relations and contact were consensual.

Defendant first argues that there was insufficient evidence at the preliminary examination to support his bindover on the CSC-III and CSC-IV charges. A defendant may not appeal whether the evidence at the preliminary examination was sufficient to warrant a bindover if the defendant was "fairly convicted of the crimes at trial." *People v Wilson*, 469 Mich 1018 (2004). See also *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990) (holding that "the evidentiary error committed at the preliminary examination stage of this case does not require automatic reversal of the subsequent conviction absent a showing that defendant was prejudiced at trial"). As discussed fully in this opinion, we find no merit in the issues raised by

[1] The DHS is now the Department of Health and Human Services.

defendant on appeal. Thus, we conclude that defendant was fairly convicted at trial, and we may not review whether the evidence at the preliminary examination was sufficient to warrant a bindover.

Defendant next argues that the trial court abused its discretion by restricting cross-examination of JG at trial and not admitting JG's purportedly inconsistent preliminary examination testimony as substantive evidence under MRE 801(d)(1)(A). Defendant preserved this issue by seeking to impeach her with certain preliminary examination testimony, arguing that her trial testimony was inconsistent. MRE 103(a)(2). We review for an abuse of discretion a preserved challenge to the admission of evidence. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id*. at 588-589.

In general, hearsay—an out-of-court statement offered to prove the truth of the matter asserted—may not be admitted into evidence. MRE 801; MRE 802. MRE 801(d)(1)(A) provides that a prior statement of a declarant is not hearsay if (1) "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement" and (2) the statement is "inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . ." The word "inconsistent" is defined as " 'marked by incompatibility of elements,' 'not in agreement with each other.' and 'not consistent in standards of behavior.' " *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999), overruled in part on other grounds by *People v Williams*, 475 Mich 245, 255; 716 NW2d 208 (2006), quoting *Random House Webster's*

College Dictionary (1997). " '[I]nconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.' " *Chavies*, 234 Mich App at 282 (citation omitted). The word "consistent," however, is defined as " 'agreeing or accordant; compatible; not self-contradictory,' 'constantly adhering to the same principles, course, form, etc.,' and 'holding firmly together; cohering.' " *Id*. at 282 n 3, quoting *Random House Webster's College Dictionary* (1997).

Defendant initially notes the following trial testimony that was purportedly inconsistent with JG's preliminary examination testimony:

> *Q* [by the prosecutor on direct examination]. So what happened next?
>
> *A*. We continued light conversation. He asked if [I] could move my shorts so he could get in better towards me -- and my legs. And at this point, I was rolled over onto my -- I was laying on my back. And he moved my shorts over and started over and started massaging my groin area and I asked him at that point, "Are we still on a professional level?" And he looked at me and said, "Do you want to be?" At that point, I told him, "You know, this probably is not a good idea. You're married. I have a fiancé and you're my CPS worker and you're investigating me. This isn't a very good idea.["] At that --
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> * * *
>
> *Q*. So, you actually spoke up and said something?
>
> *A*. Yes, I did.
>
> *Q*. How did he respond?
>
> *A*. He said, "Okay, let's just -- it's up to you." And he continued on with his massage and we were making light conversation. I'm not exactly -- I don't exactly remember certain things that were said.

Contrary to defendant's argument, his trial counsel was allowed to use JG's preliminary examination testimony to impeach this trial testimony. Counsel asked JG about her discussion with defendant regarding why she did not think the sexual activity was a good idea, bringing out that at the preliminary examination she did not use his CPS status as one of the reasons:

> *Q*. Okay. You were asked on direct examination about your protesting or discussion or however you characterize it, with regards to [defendant] initially engaging in sexual conduct. Do you remember being asked questions about what you said?
>
> *A*. Yes.
>
> *Q*. Okay, do you remember that same exact issue being addressed back at the preliminary examination, back in October of last year?
>
> *A*. What exact issue?
>
> *Q*. The exact issue of what you said to [defendant]?
>
> *A*. What exactly did I say to [defendant]?
>
> *Q*. I'm asking. I'll show you, but I want to ask you if you remember being asked the same question, the same line of questioning.
>
> *A*. Somewhat similar, yes.
>
> *Q*. Okay at the preliminary examination, on page 63, lines four, five, six and seven, you were on direct examination and being asked questions by the same prosecutor, do you remember that exchange?
>
> *A*. (No Audible Response).
>
> *Q*. Once again, 63, four, five, six, and seven.
>
> *A*. Yes, I remember being asked that question.
>
> *Q*. Okay. Is that the same answer that you gave today?
>
> *A*. Yes.
>
> *Q*. Back in October, you were asked the question by [the prosecutor], "So, after the digital, what happened next?"

> Answer at line five, do you remember making the statement, "And then I asked if we were still being professional and he asked me, 'Do you want to be?' And at that point, I explained that I had a fiancé and he was married." That's the end of your answer, correct?
>
> *A*. So, I didn't go into full detail of what I said today?
>
> *Q*. No, that's what I was asking you.

Because defendant was allowed to use the preliminary examination testimony during cross-examination, there was no error related to this testimony.

Next, defendant appears to argue that the trial court abused its discretion by not allowing trial counsel to introduce preliminary examination testimony that was purportedly inconsistent with JG's trial testimony regarding whether defendant gave her the option of his stepping down as her caseworker before having sex. The trial court did not abuse its discretion by concluding that trial testimony—that JG never said defendant asked her whether she wanted him to step down as her caseworker because he was in a position of authority—was not inconsistent with her preliminary examination testimony. At the preliminary examination, JG testified that defendant asked her if she wanted to keep seeing him because it was up to her since he was in a position of authority. These two statements are not diametrically opposed, evasive, or a change of position. *Chavies*, 234 Mich App at 282. Instead, her denial at trial of making such a statement is consistent with her preliminary examination testimony. *Id*. at 282 n 3. Because the preliminary examination testimony was not inconsistent with JG's trial testimony, we conclude that the trial court did not abuse its discretion. See *Orr*, 275 Mich App at 588.

Defendant next argues that the trial court abused its discretion by precluding trial counsel from admit-

ting JG's preliminary examination testimony regarding the chronology of when defendant made the statement about leaving her case open so he could continue to see her. Defendant asserts that at trial JG testified that it was made before her statement that she wanted to continue seeing defendant, but that at the preliminary examination she said the opposite. We have reviewed the record and conclude that the trial court did not abuse its discretion by permitting counsel to cross-examine JG about her prior testimony but not admitting it as substantive evidence. At the preliminary examination, JG testified that defendant told her he was going to keep her case open as long as possible so he could continue to see her. She did not testify about when defendant made that comment in relation to her decision to continue the sexual relationship. Thus, the two statements are not diametrically opposed or evasive and do not constitute a change in her position. *Chavies*, 234 Mich App at 282. Instead, her two statements are consistent with each other. *Id*. at 282 n 3.

To the extent defendant argues that the prosecution improperly bolstered JG's credibility and in-court testimony because trial counsel was "not permitted to impeach" her, we consider this issue abandoned. "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).

Defendant next argues that the trial court abused its discretion by concluding that JB's statements to her stepdaughter and mother on the day she and defendant had sexual contact were admissible under MRE 803(2)

as excited utterances. We review for an abuse of discretion the trial court's evidentiary ruling. *Orr*, 275 Mich App at 588.

We find no abuse of discretion in the admission of two statements to the stepdaughter, one after each contact with defendant, under MRE 803(2). The first statement was made after defendant, while investigating alleged neglect or abuse, massaged JB's shoulders, back, and inner thighs. The second statement was made after the sexual contact that involved oral sex and sexual intercourse. While neither physical coercion nor violence was alleged in either occurrence, both occurred in the context of defendant's investigating JB for child abuse and neglect. The stepdaughter testified that JB was very upset and crying during both conversations. Given the circumstances surrounding both events, we conclude that they were startling events. See *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998) (noting that sexual assault is a startling event). Both statements were made within a few minutes of defendant's leaving the apartment, so there was no time to contrive and misrepresent his actions. Finally, her statements were clearly related to the circumstances surrounding defendant's actions, which were startling events. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). According the trial court wide discretion regarding its determination that JB was still under the stress of the startling events when she made the statements, see *Smith*, 456 Mich at 552, we find no abuse of discretion.

Similarly, we conclude that JB's statements to her mother on the same day as her contacts with defendant were admissible under MRE 803(2). The statements were made after defendant first massaged her shoul-

ders, back, and inner thighs and later had oral sex and sexual intercourse. Again, while physical coercion or violence was not alleged, both contacts occurred in the context of defendant's investigating JB for child abuse and neglect. Her mother testified that JB was very upset and crying when she related the events over the telephone. The statements were made within hours of defendant leaving the apartment, so there was little time to contrive and misrepresent his actions. Finally, her statements were clearly related to the circumstances surrounding defendant's actions, which were the startling events. *Straight*, 430 Mich at 424. Thus, giving the trial court wide discretion, we conclude that it did not abuse its discretion by finding the statements admissible as excited utterances.

Defendant next argues that reversal is required because of cumulative evidentiary errors. However, "[a]bsent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). See also *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995) (stating that "only actual errors are aggregated to determine their cumulative effect").

Finally, defendant argues that his convictions are against the great weight of the evidence. We disagree. We review a great-weight claim to determine whether "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (quotation marks and citation omitted). A trial court's denial of a motion for new trial is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

Defendant was convicted of CSC-III and CSC-IV. A person is guilty of CSC-III "if the person engages in

sexual penetration with another person and . . . [f]orce or coercion is used to accomplish the sexual penetration." MCL 750.520d(1)(b). As directed by that statute, the phrase "force or coercion" is defined in MCL 750.520b(1)(f) and

> includes, but is not limited to, any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
>
> (*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
>
> (*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.
>
> (*v*) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

A person is guilty of CSC-IV if he or she engages in sexual contact with another person and . . . "[f]orce or coercion is used to accomplish the sexual contact." MCL 750.520e(1)(b). For purposes of CSC-IV, the phrase "force or coercion" is defined in the same manner as for CSC-III. MCL 750.520e(1)(b)(*i*) to (*v*). We conclude that the facts and circumstances surrounding defendant's sexual penetration of JG and sexual contact with JB establish the element of force or coercion as defined by these statutes.

The statutes expressly provide that the list of circumstances in which force or coercion may be proved is not exhaustive. In *People v Premo*, 213 Mich App 406, 410; 540 NW2d 715 (1996), a panel of this Court explained that "the Legislature did not limit the definition of force or coercion to the enumerated examples in the statute. Furthermore, the existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence." (Citations omitted.) "Coercion," the Court noted, " 'may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse.' " *Id*. at 410-411, quoting *Black's Law Dictionary* (5th ed). Further, " 'force or coercion' exists whenever a defendant's conduct induces a victim to reasonably believe that the victim has no practical choice because of a history of child sexual abuse or for some other similarly valid reason." *People v Eisen*, 296 Mich App 326, 335; 820 NW2d 229 (2012).

There is no statutory provision or case that addresses the situation of a CPS worker using his position to coerce a parent he is investigating for abuse or neglect into sexual acts. However, this Court has determined that "force or coercion" was established in a teacher-student relationship. In *Premo*, 213 Mich App at 407-410, this Court concluded that the conduct of the defendant, a teacher who pinched the buttocks of three high school students, constituted coercion for purposes of former MCL 750.520e(1)(a).[2] This Court reasoned:

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[2] MCL 750.520e(1)(a), as amended by 1988 PA 86, was the predecessor of current MCL 750.520e(1)(b).

> We believe that defendant's actions constituted implied, legal, or constructive coercion because, as a teacher, defendant was in a position of authority over the student victims and the incidents occurred on school property. Defendant's conduct was unprofessional, irresponsible, and an abuse of his authority as a teacher. Accordingly, we conclude that defendant's conduct in this case is sufficient to constitute coercion under MCL 750.520e(1)(a). [*Premo*, 213 Mich App at 411 (citation omitted).]

In *People v Knapp*, 244 Mich App 361; 624 NW2d 227 (2001), the defendant, a practitioner of Reiki—an ancient healing art that involves energy centers in the body called chakras and uses various hand positions to activate internal healing powers in patients—instructed the 14-year-old complainant alone in a bedroom, resulting in the complainant's touching the defendant's testicles and placing one hand on his stomach. The defendant then placed his hands on the complainant to demonstrate a position. Later, the defendant talked to the complainant about the hand positions and discussed male sexual energy. The defendant asked the complainant to take off his underwear and he did so; the defendant then did the same. The complainant then manipulated the defendant's testicles at the defendant's request (purportedly to promote healthier semen), and the defendant then masturbated while talking about sexual energy and Reiki. *Id*. at 366-367. In discussing what constitutes coercion for purposes of second-degree criminal sexual conduct, the Court held that "a defendant's conduct constitutes coercion where, as here, the defendant abuses his position of authority to constrain a vulnerable victim by subjugation to submit to sexual contact." *Id*. at 369. The Court reasoned that the defendant was in a position of authority over the complainant because he was involved in a teacher-student relationship and the

complainant was in a position of special vulnerability with respect to the defendant. *Id*. at 371.

Although the coercion in *Premo* and *Knapp* involved teacher-student relationships, the reasoning in those cases is instructive and applicable to this situation. Like the defendants in *Premo* and *Knapp*, defendant was in a position of authority over the complainants because he was the CPS worker assigned to investigate the abuse or neglect complaints filed against them individually. Testimony established that CPS has the authority to provide services to rectify the risk to a child and petition the court for removal of a child or termination of parental rights. CPS may also petition to have a child removed from a home if a mother fails to protect her child from an abusive father or boyfriend, which was the situation that caused the complaint to be filed in JG's case. Fear of losing one's child through neglect or abuse proceedings would produce an extreme reaction in most parents. As such, the complainants were " 'in a position of special vulnerability with respect to the defendant[]'." *Knapp*, 244 Mich App at 371 (citation omitted). Moreover, in light of all the circumstances, defendant's actions as a CPS worker, like those of the teacher in *Premo*, were "unprofessional, irresponsible, and an abuse of authority . . . ." *Premo*, 213 Mich App at 411.

With respect to JG, the testimony established that defendant informed her on the first day that if she did not leave her fiancé, her child would be taken away. Defendant rubbed her shoulders and then performed a full body massage that included her groin area. Although defendant asked her if she wanted him to still operate on a professional level and that it was up to her, he continued the massage, pulled up her sports bra, pulled her shorts down, and digitally penetrated

her. JG testified that she knew he would not stop until he got what he wanted. They then performed oral sex on each other and had intercourse. In light of all the circumstances, see *Premo*, 213 Mich App at 409-411, the evidence established that defendant used his position of authority to manipulate and coerce JG to perform the sexual acts with him. Thus, the evidence did not preponderate heavily against the verdict, *Lemmon*, 456 Mich at 641, and the trial court did not abuse its discretion by denying defendant's motion for a new trial.

With respect to JB, we note that the jury only convicted defendant of the CSC-IV charge, which arose from the sexual contact with her during their initial meeting, and acquitted him of the CSC-III charges, which arose from conduct after the initial meeting. Defendant identified himself to JB as a CPS worker and explained the complaint process. Defendant isolated JB, like the defendant in *Knapp*, by requesting her stepdaughter to leave the room. Defendant confided facts about his sister's murder as a result of domestic violence, which upset JB, who had just discussed her marriage and domestic violence with defendant. Defendant then hugged her and rubbed her shoulders and then her thighs and inner thighs, telling her to let him help her relax. In light of all the circumstances, see *Premo*, 213 Mich App at 410, the evidence established that defendant used his position of authority and JB's emotional response to his domestic-violence comments to manipulate and coerce her to allow the sexual contact; defendant came in contact with her only because of his status as her CPS worker. Thus, the evidence does not preponderate heavily against the verdict, *Lemmon*, 456 Mich at 641, and the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Defendant's reliance on *People v Perkins*, 468 Mich 448; 662 NW2d 727 (2003), is misplaced. In *Perkins*, the defendant "was prosecuted for acts arising from his sexual relationship with the complainant, a sixteen-year-old girl." *Id*. at 450. The defendant, who was a friend of the complainant's family and whose wife was the complainant's basketball coach, was also a deputy sheriff. At the time the complainant and the defendant began having sexual relations, "the complainant [had] regularly babysat for defendant's children, attended church with the family, and, for a time, resided with them." *Id*. On the date of the charged incident, the defendant was on duty in a marked police cruiser when the complainant got into the car with him, talked with him, and then fellated him. *Id*. at 451. The prosecutor argued at the preliminary examination that the defendant was guilty of first-degree criminal sexual conduct through coercion because he was an authority figure and a child can be psychologically subjugated in that manner. However, the Court noted that "no evidence was presented at the preliminary hearing to support the prosecutor's assertion that the complainant was coerced, in any sense of that term, to fellate defendant on the occasion in question." *Id*. at 454. The Court concluded that the district court had not abused its discretion by dismissing the first-degree criminal sexual conduct charge because the unrebutted facts indicated that on the date in question the relationship was consensual.

Unlike *Perkins*, in which there was no evidence that the defendant had used his position as a deputy sheriff to coerce the sexual act, defendant's initial contacts with the complainants here were the result of his position as the CPS worker assigned to investigate the abuse or neglect complaints filed in their respective cases. Moreover, while there was no evidence intro-

duced in *Perkins* that the complainant had been coerced, in this case both complainants testified that they only "consented" to the sexual contact or acts because of their fear that defendant would otherwise take their children away. Thus, *Perkins* does not support defendant's position.

We affirm.

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

PEOPLE v MABEN

Docket No. 321732. Submitted December 2, 2015, at Detroit. Decided December 10, 2015, at 9:10 a.m. Leave to appeal denied 499 Mich 929.

James R. Maben pleaded guilty in the St. Clair Circuit Court to assault by strangulation or suffocation, MCL 750.84(1)(b), as the result of an altercation with his brother. The court, Cynthia A. Lane, J., sentenced defendant as a fourth-offense habitual offender to serve 6 years and 4 months to 20 years in prison. Defendant appealed by delayed leave granted, and the Court of Appeals granted the application with respect to issues relating to the scoring of the sentencing guidelines variables and the accuracy of information in his presentence investigation report (PSIR). On appeal from this order, the Supreme Court remanded the case to the Court of Appeals for consideration of these issues and one additional issue related to the then-pending decision in *People v Lockridge*, 498 Mich 358 (2015), for which the Court of Appeals was ordered to hold defendant's appeal in abeyance. 497 Mich 927 (2014). After the Supreme Court decided *Lockridge*, defendant elected not to pursue his appeal of the *Lockridge* issue on remand.

The Court of Appeals *held*:

1. The sentencing court did not err when it scored Prior Record Variable 5 at 20 points. Although defendant argued that he had only six prior misdemeanor convictions that constituted an offense against a person under MCL 777.55(2)(a), the court properly concluded that defendant's convictions for malicious use of a telecommunications device under MCL 750.540e constituted offenses against a person because that provision specifically prohibits certain types of communications directed at another person.

2. The sentencing court did not err by scoring Offense Variable 3 at 10 points to reflect that bodily injury requiring medical treatment occurred to a victim under MCL 777.33(1)(d). Defendant acknowledged that he had placed his hands around his brother's neck and throat and applied pressure such that his brother suffered injury, and he did not dispute the information in the PSIR that officers observed redness around his brother's neck area and that his brother complained of soreness to his neck and

throat. Although defendant's brother refused an ambulance, the phrase "requiring medical treatment" in MCL 777.33(3) refers to the necessity for treatment and not the victim's success in obtaining treatment. Therefore, it was not necessary to establish that defendant's brother actually went to the hospital to support the score of 10 points. Moreover, defendant's description of the manner in which he strangled his brother and undisputed information by the police officers who responded to the incident provided independent support for the court's finding. Defendant's observation that his brother's statements concerning whether he lost consciousness were inconsistent does not require an evidentiary hearing because, regardless of whether his brother lost consciousness, a preponderance of the evidence supported the court's 10-point score.

3. The sentencing court abused its discretion when it refused to consider defendant's challenges to his PSIR. Under MCR 6.425(E), a defendant must be given an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report. When information is challenged, the sentencing court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information. However, if the court chooses to disregard the challenged information, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence, and if the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections. Defendant filed a 2-page, 15-item list of objections to the contents of the PSIR, with most objections pertaining to statements attributed to his brother. At the start of the sentencing proceeding, the court commented that because defendant's objections involved the word of one party against another, it did not need to respond to them, further stating that it had no authority to strike allegations in the PSIR because it was presumptively accurate. Although the court later agreed to strike two of the allegations, the court erred to the extent that it believed it was not required to resolve defendant's remaining challenges. The court also erred by refusing to consider defendant's challenges to factual information in the victim impact statement, which was included in the PSIR. Although a court is not required to strike a victim's subjective statements about the impact of a defendant's crime merely because a defendant disputes those statements, in this case the information went beyond describing the impact of defendant's conduct to include factual allegations about other uncharged crimes, and defendant was entitled to challenge the

accuracy of this information. The case was remanded to the sentencing court for proper consideration of defendant's challenges in accordance with MCR 6.425(E) and MCL 771.14(6), with instructions for the court to determine whether any information found to be inaccurate or irrelevant affected the court's sentencing decision and, if so, to resentence defendant. Otherwise, the court was instructed to make only those changes to the PSIR that it deemed to be warranted.

Affirmed in part and remanded for further proceedings.

1. SENTENCES — SENTENCING GUIDELINES — PRIOR RECORD VARIABLE 5 — OFFENSES AGAINST A PERSON — MALICIOUS USE OF A TELECOMMUNICATIONS DEVICE.

A conviction under MCL 750.540e for malicious use of a telecommunications device constitutes an offense against a person for purposes of scoring Prior Record Variable 5 of the sentencing guidelines (MCL 777.55(2)(a)).

2. SENTENCES — PRESENTENCE INVESTIGATION REPORTS — VICTIM IMPACT STATEMENTS — CHALLENGES TO ACCURACY.

A defendant is entitled to challenge the accuracy of information in a victim impact statement that is included in a presentence investigation report when the information includes factual allegations about other uncharged crimes (MCR 6.425(E)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people.

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

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

PER CURIAM. Defendant, James Robert Maben, pleaded guilty to assault by strangulation or suffocation, MCL 750.84(1)(b), for which the trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to serve 6 years and 4 months to

20 years in prison. On appeal by leave granted, Maben raises several claims of sentencing error.[1] We conclude that the trial court did not err when it scored Maben's sentencing variables; however, we agree that the trial court abused its discretion when it refused to consider Maben's challenges to his presentence investigation report (PSIR). For that reason, we remand for a hearing to address those challenges.

Maben's conviction arises out of an altercation with his brother. As a factual basis for his plea, Maben stated that he became involved in a verbal altercation with his brother, who worked for him. He admitted that he placed his hands around his brother's throat and began to strangle him by applying pressure and impeding his ability to breathe.

According to the author of the PSIR, police officers observed red marks on Maben's brother's neck, and took photographs. Additionally, his brother reported to officers that he nearly lost consciousness and defecated during the assault; however, he told the probation officer who prepared the PSIR that he in fact lost consciousness. Maben's brother refused to be transported to a hospital, but related that he would obtain treatment on his own. Maben objected to several portions of the PSIR and the scoring of his sentencing variables. The trial court rejected most of the challenges, but agreed to strike references to a prior sexual assault against a child and to a personal protection order.

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[1] In addition to the claims addressed in this appeal, Maben challenged the trial court's use of facts not found by the jury to score his sentencing variables. However, after our Supreme Court issued its decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), Maben filed a notice in this court indicating that, after consulting with his appellate lawyer, "he has elected not to pursue this particular issue on appeal." We have limited our review accordingly.

Maben first argues that the trial court erred in scoring Prior Record Variable (PRV) 5 and Offense Variable (OV) 3. A trial court's findings of fact at sentencing must be supported by a preponderance of the evidence; this Court reviews a trial court's findings of fact for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). This Court reviews de novo whether the facts are adequate to satisfy the statutory criteria for scoring the variable. *Id*.

The trial court assessed 50 points for Maben's PRVs and 30 points for his OVs, which put his recommended minimum sentence range at 19 to 38 months in prison. See MCL 777.65. After doubling the maximum of the range to reflect his status as a habitual offender, see MCL 777.21(3)(c), Maben's recommended minimum sentence range was 19 to 76 months.

Maben first argues that the trial court erred when it scored PRV 5 at 20 points; specifically, he argues that he only has six qualifying prior misdemeanor convictions, not seven or more. The trial court had to score PRV 5 at 20 points if, in relevant part, Maben had seven or more prior misdemeanor convictions. MCL 777.55(1)(a). A prior misdemeanor conviction may be scored only "if it is an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a). Maben argues that the trial court erred when it determined that his convictions for malicious use of a telecommunications device constituted offenses against a person as required by MCL 777.55(2)(a).

A person is prohibited from maliciously using "any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy *another person*, or to disturb the peace and quiet of *another person*"

through various types of communications. MCL 750.540e(1) (emphasis added). The Legislature has not adopted classifications for misdemeanor offenses such as this one. See MCL 777.5; *People v Bonilla-Machado*, 489 Mich 412, 422; 803 NW2d 217 (2011) (noting that the offense categories stated under MCL 777.5 apply to felonies).

Maben contends that analogous felony offenses have been categorized as offenses against public order or public safety, and therefore, the misdemeanor offense should not be classified as an offense against a person or property, citing MCL 750.540 and MCL 750.167d. However, those offenses and another offense, which Maben describes but does not cite, do not proscribe activity directed at a particular individual. By contrast, the malicious use of a telecommunications device specifically addresses communications directed at "another person." MCL 750.540e(1). Therefore, the trial court correctly determined that it is an offense against a person and scored PRV 5 accordingly.

Next, Maben argues that the trial court erred by scoring 10 points under OV 3. The trial court had to score OV 3 at 10 points if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). Maben maintains that there was no evidence that his brother actually suffered a bodily injury that required medical treatment.

The author of the PSIR wrote out Maben's brother's victim impact statement. Maben's brother said "he took himself to the River District Hospital after the attack," "suffered back injuries," and would be "seeing a specialist to get a CAT Scan to see if he has any permanent damage." His brother also related that "he was choked unconscious and his brain was denied oxygen." Although Maben's brother's statement plainly

supports the trial court's score, Maben argues that, because he disputed at sentencing that his brother actually went to the hospital, the trial court erred by scoring 10 points for OV 3 without independently verifying the report.

The trial court may rely on reasonable inferences arising from the record evidence to support a particular score. *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012). In providing a factual basis for his guilty plea, Maben acknowledged that he placed his hands around his brother's neck and throat, and applied pressure such that his brother suffered injury. In addition, Maben did not dispute the information in the PSIR that officers "observed redness" around his brother's "neck area" and that his brother "complained of soreness to his neck and throat area." The author of the PSIR also indicated that Maben's brother refused an ambulance, but told the officers that he "would seek treatment on his own."

The phrase "requiring medical treatment" for purposes of OV 3 "refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). Therefore, it was not necessary to establish that Maben's brother actually went to the hospital. Moreover, Maben's description of the manner in which he strangled his brother, and the undisputed information that the officers observed redness around his brother's neck, that his brother defecated during the assault, that he reported soreness to his neck and throat, and that he told the officers that he intended to seek treatment, provided independent support for the trial court's finding. Although Maben notes that his brother's statements concerning whether he lost consciousness were inconsistent, the inconsistencies do not require an evidentiary hearing. Regardless of

whether his brother lost consciousness, a preponderance of the evidence supports the trial court's 10-point score.[2]

Next, Maben argues that he is entitled to resentencing or correction of the PSIR because the trial court failed to adequately address several of his challenges to it. "This Court reviews a trial court's response to a defendant's challenge to the accuracy of a PSIR for an abuse of discretion." *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). "A trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes." *Id*.

In *Morales v Parole Bd*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003), this Court discussed the purpose and scope of a presentence report and explained that the PSIR was intended to assist the parole board in making release decisions and to enhance public safety:

> The presentence investigation report is an information-gathering tool for use by the sentencing court. Therefore, its scope is necessarily broad. A judge preparing to sentence a defendant may consider comments made by the defendant to the probation officer during the presentence interview in addition to evidence adduced at trial, public records, hearsay relevant to the defendant's life and character, and other criminal conduct for which the defendant has not been charged or convicted.
>
> The Michigan Court Rules provide that the presentence investigation report must include "a complete description of the offense and the circumstances surrounding it, . . . information concerning the financial, social, psychological, or physical harm suffered by any victim of

[2] Maben also argues that his trial lawyer was ineffective for conceding that five points could be scored under OV 3. However, given our resolution of this scoring issue, it is unnecessary to address whether his trial lawyer's concession amounted to ineffective assistance.

> the offense, . . . any statement the defendant wishes to make . . . [and] any other information that may aid the court in sentencing." To ensure accuracy, the defendant must be given an opportunity to review his presentence investigation report before sentencing. [Citations omitted.]

As this Court observed in *People v McAllister*, 241 Mich App 466, 477 n 3; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001), the presentence report "follows the defendant to prison"; it "may have ramifications for purposes of security classification" or parole consideration when appropriate. Accordingly, a defendant must be given an "opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report . . . ." MCR 6.425(E)(1)(b). "If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing." MCR 6.425(E)(2). "If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to" correct or delete the challenged information. MCR 6.425(E)(2)(a). The Legislature has also recognized that a defendant has the right to challenge the accuracy of the information in a PSIR. See MCL 771.14(6).

It is presumed that unchallenged information in the PSIR is accurate, and a judge is entitled to rely on the information unless a defendant raises an effective challenge. *People v Harper*, 479 Mich 599, 642 n 72; 739 NW2d 523 (2007). When information is challenged, the sentencing court has wide latitude in how to respond to the challenged information. *People v*

Spanke, 254 Mich App 642, 648; 658 NW2d 504 (2003). "The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id*. However, if the court chooses to disregard the challenged information, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence. *Id*. at 649. "If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections." *Id*.

Maben filed a 2-page, 15-item list of objections to the contents of the PSIR, with most objections pertaining to statements attributed to his brother. At the start of the sentencing proceeding, the trial court noted that it would not expend an hour on sentencing and commented that Maben's objections involved the word of one party against another. For that reason, it stated, "I don't know that there's really any need to respond to them[.]" It did, however, later agree to strike an allegation involving a personal protection order and allegations that Maben had sexually assaulted a 12-year-old child. The trial court also denied Maben's postsentencing motion challenging the accuracy of the PSIR. The court commented that the PSIR is "presumptively accurate" and stated that it had "no authority" to strike allegations in a victim's impact statement.

We agree that the trial court failed to adequately resolve Maben's challenges to the accuracy of the PSIR. The trial court erred to the extent that it believed it was not required to resolve his challenges because the PSIR is presumptively accurate. The presumption of accuracy applies only to unchallenged information. *Harper*, 479 Mich at 642 n 72. The trial

court also erred by refusing to consider his challenges to factual information related in the impact statement. The Legislature "has determined the contents of the PSIR and has given victims the discretion to determine whether their victim impact statements may be included in the PSIR . . . ." *McAllister*, 241 Mich App at 476-477. We agree that a trial court is not required to strike a victim's subjective statements about the impact of a defendant's crime merely because a defendant disputes those statements. This Court has recognized that the sentencing standards for ensuring that the goals of sentencing are met, along with the court's knowledge that victim impact statements are the subjective opinions of victims, are sufficient protections to ensure that a defendant is not sentenced in response to emotional pleas. *Id*. at 476 n 2. In this case, however, the information went beyond describing the impact of Maben's conduct. It included factual allegations about other uncharged crimes, including that Maben had killed cats in front of children, had a "bodyguard/hit man," and had "informed people" that he was going to kill the prosecutor, rape his wife, and kill his family. These allegations did not involve the offense or Maben's brother's subjective statements about the impact of Maben's crime. Moreover, the statement was not written by Maben's brother, but was recorded by the author after interviewing Maben's brother. To the extent that the impact section of the PSIR contained factual allegations unrelated to Maben's crime, and which did not involve Maben's brother's subjective statements, Maben was entitled to challenge the accuracy of the information, particularly considering that the content could have consequences in prison and with the parole board. *Id*. at 477 n 3.

Because the trial court failed to adequately resolve Maben's challenges, we remand this case for proper

consideration of his challenges. It is unclear to what extent the trial court may have relied on the challenged information in sentencing. Therefore, on remand, the trial court shall resolve Maben's challenges in accordance with MCR 6.425(E) and MCL 771.14(6), and also clarify whether any information found to be inaccurate or irrelevant affected the trial court's sentencing decision. If it is determined that information found to be inaccurate or irrelevant played a role in the trial court's sentencing decision, the trial court shall resentence him. Otherwise, the trial court need only make such changes to the PSIR that it deems in its discretion to be warranted. See *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991).

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

RONAYNE KRAUSE, P.J., and MARKEY and M. J. KELLY, JJ., concurred.

TEDDY 23, LLC v MICHIGAN FILM OFFICE

Docket Nos. 323299 and 323424. Submitted December 8, 2015, at Lansing. Decided December 15, 2015, at 9:00 a.m. Leave to appeal sought.

Teddy 23, LLC, and Michigan Tax Credit Finance, LLC, brought an action in the Court of Claims against the Michigan Film Office (MFO) and the Department of Treasury, challenging the MFO's decision to deny Teddy 23 a postproduction certificate under MCL 208.1455 for a movie it had filmed. The decision was based on a finding that Teddy 23 had substantially and intentionally misstated its expenditures. Defendants moved to dismiss plaintiffs' case under MCR 2.116(C)(4) for lack of subject-matter jurisdiction. Six weeks later, plaintiffs filed a delayed application for leave to appeal in the Ingham Circuit Court, arguing that they had been improperly denied a postproduction certificate of completion and explaining that they had not filed a circuit court action sooner because defendants had induced them to believe that the Court of Claims had jurisdiction to review the MFO's decision. The circuit court, Rosemarie E. Aquilina, J., denied plaintiffs' delayed application for leave to appeal under MCR 7.105(G)(1), and the Court of Claims, MICHAEL J. TALBOT, J., granted defendants' motions for summary disposition under MCR 2.116(C)(4) and (7). Plaintiffs appealed the circuit court's decision in Docket No. 323299 and the Court of Claims decision with respect to MCR 2.116(C)(4) in Docket No. 323424.

The Court of Appeals *held*:

1. The Court of Claims did not err by dismissing plaintiffs' case for lack of subject-matter jurisdiction. The Court of Claims did not have subject-matter jurisdiction under the revenue act, which provides that a taxpayer aggrieved by an assessment, decision, or order of the department may appeal to the court of claims, because the revenue act defines "department" to mean the Department of Treasury and it was the MFO, not the Department of Treasury, that issued the decision denying Teddy 23's request for a postproduction certificate of completion. Although the MFO is within the Department of Treasury, the MFO and the Department of Treasury are two separate entities that operate indepen-

dently. The Court of Claims also did not have subject-matter jurisdiction over the case under the Court of Claims Act. While MCL 600.6419(1)(a) gives the Court of Claims jurisdiction to hear and determine any claim or demand against the state, MCL 600.6419(5) indicates that this statute did not deprive the circuit court of exclusive jurisdiction over appeals from administrative agencies as authorized by law. A litigant seeking judicial review of an administrative agency's decision has three potential avenues of relief: (1) the method of review prescribed by the statutes applicable to the particular agency, (2) the method of review prescribed by the Administrative Procedures Act (APA), MCL 24.201 *et seq*., and (3) an appeal under MCL 600.631. Because there was no specific statutory procedure for appealing a decision of the MFO denying a postproduction certificate of completion, plaintiffs' judicial appeal options were limited to the methods prescribed in the APA or under MCL 600.631, which also did not confer subject-matter jurisdiction over plaintiffs' appeal on the Court of Claims.

2. The circuit court did not abuse its discretion under MCR 7.105(G)(1) by denying plaintiffs' delayed application for leave to appeal. Defendants did not mislead plaintiffs to believe that the Court of Claims had jurisdiction over their appeal, either through the Department of Treasury's "Taxpayer Rights Handbook," which addressed final determinations made by the department itself and not the MFO and stated that it did not take the place of the law, or by an e-mail from a department employee that referred to a 60-day appeal period, given that appeals from department decisions in the Court of Claims have a 90-day appeal period. Plaintiffs' contention that they were diligent in filing an application for leave to appeal in the circuit court after learning that defendants did not believe the Court of Claims had subject-matter jurisdiction over their case was weakened by the fact that they waited six weeks to file their application after defendants moved for summary disposition in the Court of Claims.

3. The circuit court's decision to deny plaintiffs' delayed application for leave to appeal was not the result of an abdication of discretion. Although the court did not provide any specific analysis with its denial, plaintiffs filed a motion for reconsideration, which the court stated it denied because it concluded that the motion merely presented the same issues it had already ruled on. This indicated that the circuit court was familiar with the issues in plaintiffs' delayed application, even if it did not explain

its analysis on the denial form. Plaintiffs offer no evidence suggesting that the circuit court was unaware of or did not consider the issues involved.

4. The Court of Claims did not err by granting defendants' motions for summary disposition under MCR 2.116(C)(4) because, even if a valid argument for applying the doctrine of equitable estoppel existed, subject-matter jurisdiction cannot be conferred by estoppel. Equitable estoppel also did not obligate the circuit court to grant plaintiffs' delayed application for leave to appeal; rather, the circuit court had discretion under MCR 7.105(G) to consider the length of and the reasons for plaintiffs' delay in deciding whether to grant the application.

Affirmed.

ADMINISTRATIVE LAW — TAXATION — TAX CREDITS — MICHIGAN FILM OFFICE — POSTPRODUCTION CERTIFICATES — APPEALS — COURT OF CLAIMS — SUBJECT-MATTER JURISDICTION.

The Court of Claims does not have subject-matter jurisdiction over appeals from decisions of the Michigan Film Office under MCL 208.1455; although the Michigan Film Office is within the Department of Treasury, they are two separate entities that operate independently.

Bloom Sluggett Morgan, PC (by *Jack L. Van Coevering*, *Crystal L. Morgan*, and *Scott A. Noto*), and *Miller Canfield Paddock & Stone, PLC* (by *Gregory A. Nowak*, *Clifford W. Taylor*, and *Michael P. Coakley*), for Teddy 23, LLC, and Michigan Tax Credit Finance, LLC.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Christina M. Grossi* and *Joshua O. Booth*, Assistant Attorneys General, for the Michigan Film Office.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jessica A. McGivney* and *Eric M. Jamison*, Assistant Attorneys General, for the Department of Treasury.

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

GADOLA, P.J. In these consolidated appeals, plaintiffs appeal the order of the Court of Claims granting defendants' motion for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and the order of the Ingham Circuit Court denying their delayed application for leave to appeal. Both cases arise from plaintiffs' attempt to appeal the decision of the Michigan Film Office (MFO),[1] denying Teddy 23, LLC (Teddy 23) a postproduction certificate of completion that would have enabled it to receive a tax credit from the Michigan Department of Treasury (the Department). Plaintiffs first filed a complaint challenging the MFO's decision in the Court of Claims. After defendants moved for summary disposition in the Court of Claims, plaintiffs filed a delayed application for leave to appeal in the Ingham Circuit Court. The Court of Claims concluded that it lacked subject-matter jurisdiction over plaintiffs' claims, and the circuit court rejected plaintiffs' delayed application for leave to appeal. We affirm with respect to both decisions.

I. FACTUAL BACKGROUND

The MFO is an entity within the Michigan Strategic Fund (MSF). MCL 125.2029a(1). At the time the Court of Claims and the Ingham Circuit Court issued their decisions, the MSF was "a public body corporate and politic" located within the Department, but its "powers,

[1] The Michigan Film Office is now known as the Michigan Film & Digital Media Office. Michigan Film & Digital Media Office, *Michigan Film Office 2015 Fourth Quarter Report* <http://www.michiganfilmoffice.org/MFO%20Fourth%20Quarter%202015%20Report.pdf> (accessed December 1, 2015) [https://perma.cc/GTG2-GF7T], p 4.

duties, and functions" were to be exercised independently from the Department.[2] MCL 125.2005. MCL 208.1455(1) provides that the MFO, "with the concurrence of the state treasurer, may enter into an agreement with an eligible production company" to allow such a company to receive a tax credit provided certain requirements are met.[3] These requirements include entering into an agreement under MCL 208.1455(3) and obtaining a "postproduction certificate of completion" from the MFO under MCL 208.1455(5). The MFO will only issue a postproduction certificate of completion if it determines that the eligible production company complied with the terms of the agreement. MCL 208.1455(5). If an eligible production company receives a postproduction certificate of completion, it must submit the certificate to the Department, which will issue the applicable tax credit. MCL 208.1455(8).

Teddy 23 is a production company that obtained preliminary approval for a tax credit in connection with the production of a movie titled "Scar 23." Teddy 23 used the expected tax credit as security to obtain a loan from Michigan Tax Credit Finance, LLC. Teddy 23 ceased production of the film in April 2011, and submitted a request to the MFO for a postproduction certificate of completion. Teddy 23 also submitted an

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[2] On December 18, 2014, the Governor signed Executive Order No. 2014-12, which transferred the Michigan Strategic Fund from the Department of Treasury to the Department of Talent and Economic Development.

[3] Recently, the Legislature enacted 2015 PA 117, effective July 10, 2015, which provides that "[b]eginning on the effective date of the amendatory act that added this sentence, the Michigan film office and the fund shall not provide funding under a new agreement, or increase funding through an amendment to an existing agreement, for direct production expenditures, Michigan personnel expenditures, crew personnel expenditures, or qualified personnel expenditures under this section." MCL 125.2029h(1).

independent auditor's report, which concluded that with the exception of a $196,843 overstatement of qualified expenditures, Teddy 23 had fairly represented its Michigan expenditures. Department employee Sara Clark Pierson reviewed Teddy 23's expenditures and concluded that "the production company and its principals acted in concert to substantially misstate expenditures." Pierson further reported that "[t]he misstatements affected almost every area of the production and were on a scale that was so large and pervasive that we can only conclude that it was intentional." Thereafter, the MFO denied Teddy 23's request for a postproduction certificate of completion.

The accounting firm Plante Moran reviewed the report and concluded that defendants' determinations were based on "erroneous assumptions and incomplete analyses." Nonetheless, the MFO reiterated its denial of the postproduction certificate of completion in letters dated October 14, 2013, and December 11, 2013. The December 11, 2013 letter stated that "any rights of appeal begin as of December 11, 2013, the date of this notice." Pierson sent an e-mail to plaintiffs' counsel on January 14, 2014, stating that the MFO had extended the appeal period by issuing the December 11, 2013 letter, and that "based on [her] informal count of the 60 day period," the appeal period was set to expire on February 10, 2014. Pierson later explained in an affidavit that her reference to the "60 day period" was in response to a conversation that she had with plaintiffs' counsel, who suggested that he had 60 days to file an appeal. She asserted that at no time did she advise plaintiffs regarding issues of jurisdiction or appeals periods.

On February 10, 2014, plaintiffs filed an action against both the MFO and the Department in the

Court of Claims. Six weeks after defendants filed motions in the Court of Claims to dismiss plaintiffs' case for lack of subject-matter jurisdiction, plaintiffs filed a delayed application for leave to appeal in the Ingham Circuit Court, arguing that they were improperly denied a postproduction certificate of completion and that they did not file a circuit court action sooner because defendants induced them to believe that the Court of Claims had jurisdiction to review the MFO's decision. On June 17, 2014, the circuit court entered an order denying plaintiffs' delayed application for leave to appeal.

Thereafter, the Court of Claims entered an order granting defendants' motions for summary disposition under MCR 2.116(C)(4). The Court of Claims concluded that because Teddy 23 did not obtain a postproduction certificate of completion, it could not have made a valid request to the Department for a tax credit; therefore, the decision that aggrieved plaintiffs was the MFO's denial of the postproduction certificate of completion. The Court of Claims concluded that the Department made no "assessment, decision, or order," which was required to vest the Court of Claims with subject-matter jurisdiction under the revenue act, MCL 205.1 *et seq*. The Court of Claims further noted that the Court of Claims Act, MCL 600.6401 *et seq*., explicitly states that the Court of Claims has no jurisdiction to review an administrative agency's decision. Finally, the Court of Claims determined that plaintiffs' remaining claims involving fraud, equal protection, and due process would require it to review the process by which the MFO denied the postproduction certificate of completion, and would thus be an administrative agency review within the exclusive jurisdiction of the circuit court.

II. STANDARD OF REVIEW

"[W]e review jurisdictional questions under MCR 2.116(C)(4) de novo as questions of law." *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002). Questions of statutory interpretation are also reviewed de novo. *Bukowski v Detroit*, 478 Mich 268, 273; 732 NW2d 75 (2007). We review a circuit court's decision denying a delayed application for leave to appeal for an abuse of discretion. *People v Melotik*, 221 Mich App 190, 196-197; 561 NW2d 453 (1997). A trial court does not abuse its discretion unless it chooses an outcome outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. ANALYSIS

A. COURT OF CLAIMS DECISION

"Subject-matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of a case." *Harris v Vernier*, 242 Mich App 306, 319; 617 NW2d 764 (2000). The Michigan Constitution and the Legislature define the class of cases over which courts have subject-matter jurisdiction. *Id*. "Subject-matter jurisdiction is not subject to waiver because it concerns a court's 'abstract *power* to try a case . . . .' " *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001), quoting *Campbell v St John Hosp*, 434 Mich 608, 613; 455 NW2d 695 (1990) (emphasis in *Travelers*). Nor can subject-matter jurisdiction be conferred by the consent of the parties. *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001). "Subject-matter jurisdiction is so critical to a court's authority that a court has an independent obligation to

take notice when it lacks such jurisdiction, even when the parties do not raise the issue." *Id*. at 166-167. Plaintiffs contend that the Court of Claims had jurisdiction to hear their case under the revenue act and the Court of Claims Act. Each will be examined in turn.

1. THE REVENUE ACT

The revenue act provides: "A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order." MCL 205.22(1). The revenue act defines "department" to mean "the department of treasury." MCL 205.1(3)(a). "[W]hen a statute specifically defines a given term, that definition alone controls." *Tryc v Mich Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

Again, the MFO is an entity within the Michigan Strategic Fund, which was within the Department. MCL 125.2005 and MCL 125.2029a(1). Throughout MCL 208.1455, the terms "office" and "department" are referred to separately, indicating that although the MFO was within the Department, the two are separate entities. This understanding is consistent with the distinct and separate responsibilities assigned to the MFO and the Department when it comes to film tax credits. Specifically, the MFO is responsible for determining whether "an eligible production company has complied with the terms of an agreement" entered into under MCL 208.1455, such that it can issue a postproduction certificate of completion. MCL 208.1455(5). Once an eligible production company receives a postproduction certificate of completion, it must then sub-

mit the certificate to the Department, which issues the tax credit. MCL 208.1455(8).

In this case, the MFO, not the Department, issued the decision denying Teddy 23's request for a postproduction certificate of completion. Therefore, Teddy 23 did not receive an adverse "assessment, decision, or order" from the Department, and the revenue act did not confer subject-matter jurisdiction over plaintiffs' claims on the Court of Claims.

Plaintiffs make much of the fact that the MFO was housed within the Department at all times relevant to this appeal. However, plaintiffs' analysis ignores the nature of the relationship between the MSF, the MFO, and the Department. As previously noted, the MSF is a "body corporate and politic" that was to exercise its powers, duties, and functions independently from the Department. MCL 125.2005. The MSF and the MFO were housed within the Department strictly for administrative purposes pursuant to the requirement that each agency of the executive branch of state government be allocated within not more than 20 principal departments. Const 1963, art 5, § 2. But as far as substantive decision making of the sort involved in this appeal was concerned, the MSF and, by extension, the MFO were legally required to operate independently from the Department. Indeed, the MSF and the MFO have since been allocated to another principal department of state government, illustrating the fact that the MFO is not and never was equivalent to the Department.

2. THE COURT OF CLAIMS ACT

The Court of Claims Act states that the Court of Claims has jurisdiction

> [t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. [MCL 600.6419(1)(a).]

However, § 6419 also states that "[t]his chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law." MCL 600.6419(5). Regarding administrative agency appeals, this Court has stated that "[a] litigant seeking judicial review of an administrative agency's decision has three potential avenues of relief: (1) the method of review prescribed by the statutes applicable to the particular agency; (2) the method of review prescribed by the [Administrative Procedures Act (APA), MCL 24.201 *et seq*.]; or (3) an appeal under MCL 600.631[.]" *Jackson Community College v Dep't of Treasury*, 241 Mich App 673, 678-679; 621 NW2d 707 (2000).

There is no specific statutory procedure for appealing a decision of the MFO denying a postproduction certificate of completion; therefore, plaintiffs' judicial appeal options were limited to the methods prescribed in the APA or under MCL 600.631. *Jackson Community College*, 241 Mich App at 678-679. The APA's procedure for judicial review of an agency's decision states that "a petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county." MCL 24.303. Additionally, the APA states that judicial review is available when a person "is aggrieved by a final decision or order in a contested case . . . ." MCL 24.301. The APA defines

"contested case" as "a proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203. In the present case, no evidentiary hearing was ever held, so an appeal under the APA was not available to plaintiffs. Moreover, even if such an appeal were available, plaintiffs were required to file their claim in the circuit court, not the Court of Claims. MCL 24.303(1). Likewise, MCL 600.631 states the following:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, *to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county*, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court. [Emphasis added.]

Therefore, MCL 600.631 did not give the Court of Claims subject-matter jurisdiction over plaintiffs' appeal, and the Court of Claims did not err by dismissing plaintiffs' case.

B. CIRCUIT COURT DECISION

Plaintiffs next argue that the circuit court abused its discretion by denying their delayed application for leave to appeal. MCR 7.105(G)(1) states the following:

> When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed under subrule (B) accompanied by a statement of facts explaining the delay. The answer may challenge the claimed reasons for the delay. The circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application.

Plaintiffs' argument that the circuit court abused its discretion is based in large part on the contention that defendants misled them to believe that the Court of Claims had jurisdiction over their appeal. Plaintiffs first cite the Department's "Taxpayer Rights Handbook"[4] to support their decision to file suit in the Court of Claims. The handbook states that "[t]axpayers have the right to appeal any final determination made by Treasury including a reduced or denied refund or credit" to the Michigan Tax Tribunal or the Court of Claims. *Taxpayer Rights Handbook*, p 4. Again, however, this case does not involve a decision by the Department, but rather by the MFO. Moreover, the handbook explicitly states that although its purpose is to "help taxpayers understand their rights and responsibilities[,] it does not take the place of the law." *Id*. at 1. Plaintiffs also argue that Pierson misled them, but Pierson's reference to a 60-day appeal period could not reasonably have led plaintiffs to conclude that jurisdiction was proper in the Court of Claims because appeals from Department decisions in the Court of Claims have a 90-day appeal period. MCL 205.22(1). It is more likely that Pierson's mention of a 60-day appeal period referred to the 60 days provided for appeals to the circuit court under the APA, as opposed to the 90-day appeal period under the Court of Claims Act. See MCL 24.304(1).

Additionally, plaintiffs argue that they were diligent in filing an application for leave to appeal in the circuit court after learning that defendants did not believe the Court of Claims had subject-matter jurisdiction over their case. Plaintiffs' contention is weakened by the fact that they waited six weeks to file their application after

[4] State of Michigan, Department of Treasury, *Taxpayer Rights Handbook* <https://www.michigan.gov/documents/taxes/TBOR_199483_7.pdf> (accessed December 1, 2015) [https://perma.cc/4PXR-3JLY].

defendants filed their motions for summary disposition in the Court of Claims. The circuit court could consider this delay when deciding whether to grant plaintiffs' application for leave to appeal. Further, although plaintiffs provided numerous copies of filings of film tax credit cases from the Court of Claims, nothing suggests that defendants provided these filings to plaintiffs, as opposed to plaintiffs' having obtained them through their own research.

Plaintiffs also argue that the circuit court abused its discretion because it failed to exercise any discretion, which was evidenced by the fact that the court denied plaintiffs' delayed application for leave by simply checking a box on a form without further analysis. Although there is support for plaintiffs' contention that an abdication of discretion can be an abuse of discretion, *People v Stafford*, 434 Mich 125, 134; 450 NW2d 559 (1990), the circuit court's decision in this case was not the result of an abdication of discretion. Although the court did not provide any specific analysis with its denial, plaintiffs filed a motion for reconsideration, which the court stated it denied because it concluded that the motion merely presented the same issues already ruled on. This indicates that the circuit court was familiar with the issues in plaintiffs' delayed application, even if it did not explain its analysis on the denial form. Plaintiffs offer no evidence suggesting that the circuit court was unaware of or did not consider the issues involved; thus, plaintiffs have not shown that the circuit court's decision denying their delayed application for leave to appeal was the result of an abdication of discretion.

C. EQUITABLE ESTOPPEL

Finally, plaintiffs argue that the doctrine of equitable estoppel applied because defendants repeatedly referred to a 60-day appeal period. Generally, the applica-

tion of an equitable doctrine such as equitable estoppel is reviewed de novo. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 582; 458 NW2d 659 (1990). However, because plaintiffs did not raise this issue below, we review it under the plain-error rule. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred, (2) the error must have been "plain, i.e., clear or obvious," and (3) the plain error must have affected substantial rights. *Id*. (quotation marks and citation omitted).

"Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994). The Court of Claims did not err by granting defendants' motions for summary disposition under MCR 2.116(C)(4), because even if a valid equitable-estoppel argument existed, subject-matter jurisdiction cannot be conferred by estoppel. *In re AMB*, 248 Mich App at 166. Neither did the possible application of the doctrine obligate the circuit court to grant plaintiffs' delayed application for leave to appeal. Rather, the circuit court had discretion to consider the length of and the reasons for plaintiffs' delay in deciding whether to grant the application. MCR 7.105(G). Therefore, even if equitable estoppel could be applied in this case, this fact alone does not compel us to reverse the decisions of the Court of Claims and the circuit court.

Affirmed.

K. F. KELLY and FORT HOOD, JJ., concurred with GADOLA, P.J.

FORD MOTOR COMPANY v DEPARTMENT OF TREASURY

Docket No. 322673. Submitted December 9, 2015, at Lansing. Decided December 15, 2015, at 9:05 a.m. Leave to appeal denied 500 Mich ___.

Ford Motor Company and Ford Parts and Services Division brought an action against the Department of Treasury in the Court of Claims in 2006, challenging the department's assessment of approximately $10.7 million in taxes and interest under the Use Tax Act (UTA), MCL 205.91 *et seq*., after an audit that covered the period of July 1, 1993 through November 30, 2001. On January 28, 1999, while the audit was ongoing, Ford sent two letters to the department, asserting that the vehicles it manufactured or purchased from competitors for test purposes were exempt from use tax under former MCL 205.94(g)(*i*) and that it intended to file for a refund of any tax accrued and paid on the use of these vehicles. In June 2009, Ford brought a second action in the Court of Claims, challenging a second tax assessment that the department issued in December 2008 for approximately $29 million in use taxes and $15 million in interest covering the same years at issue in the audit. The department moved for summary disposition in the 2009 action, arguing that the Court of Claims lacked subject-matter jurisdiction. Ford also moved for summary disposition under MCR 2.116(I)(2), asking the Court of Claims to declare that it had subject-matter jurisdiction over the action and that the department lacked authority to issue a second tax assessment. While the motions in the 2009 action were pending, Ford filed two motions for partial summary disposition under MCR 2.116(C)(10) in the 2006 action, one with respect to the department's assessment of use tax for automotive parts that Ford dealers supplied to consumers under extended service plans (ESPs), the other with respect to the department's assessment of use tax on its test vehicles under former MCL 205.94(g)(*i*). The Court of Claims, Rosemarie E. Aquilina, J., granted Ford's motion with regard to the use-tax assessment and ordered the department to refund Ford approximately $1.6 million plus interest. The court further ordered the department to pay Ford's costs and attorney fees pursuant to MCR 2.114 and MCR 2.625 after ruling that the department had relied on a frivolous defense. Ford requested $152,140.92 in attorney fees and $5,014.95 in costs, to which the department objected. In

January 2011, the court awarded Ford $112,256.73 plus interest. In November 2011, Ford moved for a show-cause order regarding the department's failure to pay the attorney-fee award and the tax refund. The court ordered the department to issue the required payments by November 23, 2011, and it awarded Ford attorney fees and costs associated with the motion to show cause. The court also granted Ford's motion for summary disposition with respect to the use-tax assessment on its test vehicles, concluding that a manufacturer's license plate was not a "license" under former MCL 205.94(g)(*i*) because it could be used interchangeably among test vehicles and was issued to the manufacturer rather than to a specific vehicle. The court ordered the department to refund Ford the use tax and deficiency interest paid under protest with regard to Ford's test vehicles. Ford then filed an emergency ex parte motion to prevent the department from sending its multimillion-dollar refund checks by mail. The court granted Ford's motion and awarded Ford associated attorney fees and costs. In December 2011, the court held a hearing on Ford's and the department's motions for summary disposition in the 2009 action. At the hearing, the department explained that it had reduced the second tax assessment from $44 million to $13 million based on information that the department had obtained in the other matter that was being litigated, and it admitted that the tax issues in the case were basically identical to those litigated in the 2006 action, which had been decided in Ford's favor. The court then granted Ford's motion to consolidate the 2009 case with the 2006 case, and denied the department's motion for summary disposition. Thereafter, Ford filed a motion under MCR 2.114(E) and (F), MCR 2.625(A), and MCL 600.2591 for costs and attorney fees incurred in the 2009 action. The court found that the department's actions were frivolous and vexatious and ruled that the department was liable for actual and exemplary damages, including Ford's costs and attorney fees. In January 2014, Ford moved for partial summary disposition regarding the date on which interest on its test vehicle refund claim began to accrue. Ford contended that it filed its refund claim on January 28, 1999, when it sent two letters asking the department to credit the refunds against any deficiencies in the then ongoing tax audit. The department argued that the letters were inadequate notice of a claim for a refund to start the 45-day period after which interest would accrue. The Court of Claims, MICHAEL J. TALBOT, J., concluded that the January 1999 letters constituted adequate notice of a claim and granted Ford's motion for partial summary disposition under MCR 2.116(C)(10). The

department filed a motion for reconsideration, which the court denied. The department appealed.

The Court of Appeals *held*:

1. The court erred by concluding that Ford's test vehicles, which were titled and driven under manufacturer's license plates, were exempt from use tax under former MCL 205.94(g)(*i*). Before the 1999 amendment of the UTA took effect, former MCL 205.94(g)(*i*) provided that property used or consumed in industrial processing did not include vehicles licensed and titled for use on public highways. Ford's test vehicles were licensed because they were driven under manufacturer's license plates that authorized their use on public highways. The Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., provides in MCL 257.244(1) that a manufacturer owning a vehicle of a type otherwise required to be registered under this act may operate or move the vehicle upon a street or highway primarily for the purposes of transporting or testing if the vehicle displays, in the manner prescribed in MCL 257.225, one special plate approved by the secretary of state. A manufacturer's license plate is a physical representation that a vehicle is authorized to operate on public highways. Therefore, when a manufacturer's license plate is affixed to a test vehicle, the vehicle becomes licensed for use on public highways under MCL 205.94(g)(*i*). The fact that a manufacturer's license plate may be legally interchanged among test vehicles has no effect on the fact that a vehicle displaying a plate becomes licensed for use on public highways. Ford contends that a vehicle is only licensed if it meets the registration and certificate of title provisions of MCL 257.216; however, under MCL 257.216(a), Ford's test vehicles driven under manufacturer's license plates are exempt from the MVC's registration provisions. Ford argues that its test vehicles were not licensed for use on public highways because Ford could not lawfully sell, lease, or lend a test vehicle to a third party or use a test vehicle for any purpose other than testing. The UTA defines "use" in MCL 205.92(b) as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." Under MCL 257.244(1), manufacturer's license plates specifically authorized Ford to operate or move the vehicles on a street or highway. The fact that Ford could not sell or lease the vehicles, or use them for purposes other than testing, does not mean that they were not licensed for use.

2. The Legislature's 1999 amendment of the UTA, 1999 PA 117, did not apply retroactively. Generally, statutory amendments are only applied prospectively unless the Legislature expressly or

impliedly identified its intention to give the amendment retrospective effect. An amendment may apply retroactively when the Legislature enacts an amendment to clarify an existing statute. The first enacting section of 1999 PA 117 listed several clarifications of the UTA, but it did not mention the tax exemption for vehicles displaying manufacturer's license plates. Therefore, it was not clear that the Legislature intended to clarify the industrial processing exemption with regard to vehicles using a manufacturer's license plate. Moreover, MCL 205.94o, as added by 1999 PA 117, which contained the manufacturer's license plate provision, provides that tax levied under the UTA did not apply to property sold after March 30, 1999, indicating that the Legislature intended this portion of the amendment to apply prospectively.

3. The court did not err by concluding that the department's defense of its assessment of use tax for automotive parts provided under extended service plans was frivolous. Under MCL 600.2591(3)(a), a court may find that a party's action is frivolous if (1) the party initiated the suit for purposes of harassment, (2) the party's legal position was devoid of arguable legal merit, or (3) the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true. The court made sufficient factual findings on the record, as required by MCR 2.517(A), to justify its determination that the department's defense was frivolous because it lacked factual and legal support. Although the court's explanation was stated in relation to a separate motion, it was adequate to facilitate appellate review.

4. The court's award of $112,256.73 was not unreasonable. To evaluate whether an attorney fee is reasonable, courts begin by determining the fee customarily charged in the locality for similar legal services by using reliable surveys or other credible evidence of the legal market. Then, the reasonable hourly rate should be multiplied by the reasonable number of hours expended to reach a baseline figure for a reasonable attorney fee, which should be adjusted using the factors from MRPC 1.5(a) and *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573 (1982). Although the court stated that it had presumed that the fees for Ford's attorneys were reasonable by comparing them to those of Ford's lead attorney, the court also stated that it had reviewed the fees and hours for the other attorneys in preparation for the evidentiary hearing, so its decision was based on evidence. Further, the court found that the department had conceded the reasonableness of the time spent on affidavits, the brief, and the motion and argument, and that Ford's request for 25% of the time it spent on

various categories such as the amended complaint, research, and discovery was appropriate because the ESP issue increased the amount of time spent in those categories. The court further found that the time spent on some categories, such as depositions and documents, was not reasonable because Ford would have incurred those expenses regardless of whether the ESP issue was in dispute. Therefore, the court did not fail to consider the reasonableness of the hours billed.

5. The court abused its discretion by awarding Ford attorney fees for time spent on the amended complaint because those fees were awarded for time spent in relation to the motion for partial summary disposition.

6. The department did not show that the court abused its discretion in determining that the rates charged by Ford's lead attorney were reasonable. Although the department claimed that his hourly rate was contradicted by a survey conducted by the State Bar of Michigan, Ford submitted other surveys demonstrating that the fee was reasonable. Because the lead attorney worked with Ford through his firm's Detroit office, the court did not abuse its discretion by determining that Detroit was the appropriate locality on which to base the rates. Ford was not subject to MCL 600.2421c(4), which caps attorney fees against the state at $75 per hour, because, as a corporation with more than 250 employees, it was not a "party" as defined in MCL 600.2421b(2). Furthermore, the court awarded Ford attorney fees under MCL 600.2591, not MCL 600.2421c(4).

7. The court did not clearly err by finding that the department's defense of the $44 million dollar second tax assessment was frivolous. The court's order specifically stated that the award of attorney fees was appropriate under MCR 2.114(E) and (F), MCR 2.625(A)(2), and MCL 600.2591 because the department's actions were frivolous and vexatious. There was no dispute that the department's $44 million second tax assessment was improper because the department acknowledged that it should not have been assessed, and evidence supported Ford's contention that the department had issued the second tax assessment to harass Ford.

8. The court did not abuse its discretion by awarding attorney fees for Ford's emergency ex parte motion to prevent the department from sending its multimillion-dollar refund checks through the mail. Although the court did not specify the grounds on which it awarded the fees, it was clear from the context of the ex parte motion and Ford's arguments that the court agreed that the department's refusal to let Ford's counsel personally pick up the

multimillion-dollar checks was unreasonable. Given the amount at issue, this was a sound conclusion, and the court had the inherent authority to impose sanctions on the basis of a party's misconduct.

9. The court did not abuse its discretion by awarding attorney fees for Ford's motion to show cause regarding the department's failure to pay the tax refund on the ESP issue in accordance with the court's order. Litigants are required to obey court orders, regardless of their propriety, until the orders are dissolved, and MCL 600.1721 grants courts the power to order a party in contempt of court to indemnify the injured party for any actual loss or injury caused by the misconduct.

10. The court did not err by granting summary disposition with regard to Ford's claim that it was entitled to interest on its tax refund. In order to trigger the 45-day waiting period after which interest would begin to accrue on a tax refund under MCL 205.30, a taxpayer must have actually paid the tax at issue; must have made a petition for a refund or a claim for refund by demanding, requesting, or asserting a right to a refund of tax payments that the taxpayer made that the taxpayer asserts are not due; and must have filed the claim or petition by submitting it to the department, thereby providing notice of the claim. The record indicated that Ford had paid the tax at issue, and Ford's January 28, 1999 letters to the department asserted a right to a refund and gave the department adequate notice of the claim.

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

Bush Seyferth & Paige PLLC (by *Stephanie A. Douglas*) and *Schiff Hardin LLP* (by *Joanne B. Faycurry*, *Samuel J. McKim*, and *Jackie J. Cook*) for Ford Motor Company.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Zachary C. Larsen*, Assistant Attorney General, for the Department of Treasury.

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

GADOLA, P.J. This case arises from a challenge by Ford Motor Company and Ford Parts & Services Division (collectively "Ford") to an assessment by the Department of Treasury (the Department) under Michigan's Use Tax Act (UTA), MCL 205.91 *et seq*.[1] On June 25, 2014, the Court of Claims issued an order closing the case, which the Department appeals as of right. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS

This case began when the Department conducted a tax audit of Ford for the period of July 1, 1993 through November 30, 2001. During part of the audit period, the UTA provided a use-tax exemption for eligible property used or consumed in industrial processing, but stated that such property did not include "vehicles licensed and titled for use on public highways." MCL 205.94(g)(*i*), as amended by 1989 PA 141. In 1999, the Legislature amended the UTA to provide that the industrial-processing exemption excluded "[v]ehicles . . . required to display a vehicle permit or license plate to operate on public highways, *except for a vehicle bearing a manufacturer's plate* . . . ." MCL 205.94o(5)(g), added by 1999 PA 117 (emphasis added).

On January 28, 1999, Ford sent two letters to the Department, asserting that the vehicles it manufactured or purchased from competitors for test purposes, which displayed manufacturer's license plates when operated on public highways, were exempt from use tax under former MCL 205.94(g)(*i*). Ford stated that it

[1] "[U]se tax is a tax imposed 'for the privilege of using, storing, or consuming tangible personal property in this state . . . .' " *WMS Gaming, Inc v Dep't of Treasury*, 274 Mich App 440, 442-443; 733 NW2d 97 (2007), quoting MCL 205.93(1).

intended "to file for a refund of any tax accrued and paid (if any) on the use of such vehicles in Michigan." The Department took the position that Ford's test vehicles purchased or manufactured before the 1999 amendment took effect were subject to use tax as vehicles "licensed and titled for use on public highways."

The Department completed its audit and issued a final tax assessment of approximately $10.7 million for unpaid taxes and accrued interest, which Ford paid under protest. In July 2006, Ford filed suit against the Department, asserting that its test vehicles were exempt from use tax under former MCL 205.94(g)(*i*). Ford later amended its complaint to add a claim challenging the Department's assessment of use tax on automotive parts that independent Ford dealers sold to consumers under extended service plans (ESPs). Ford argued that it was not liable to pay use tax on the automotive parts because it did not own, possess, use, store, or consume the parts.

In June 2009, Ford filed a complaint seeking a declaratory judgment in a separate action, alleging that in December 2008, the Department issued a second tax assessment for approximately $29 million in use taxes and $15 million in interest covering the same years at issue in the audit. The Department moved for summary disposition, arguing that the Court of Claims lacked subject-matter jurisdiction for several reasons including Ford's failure to exhaust administrative remedies. Ford also moved for summary disposition under MCR 2.116(I)(2), asking the Court of Claims to declare that it had subject-matter jurisdiction over the action and that the Department lacked authority to issue a second tax assessment.

A. SUMMARY DISPOSITION REGARDING EXTENDED SERVICE PLANS AND ASSOCIATED SANCTIONS

While the motions in the 2009 action were pending, Ford filed two motions for partial summary disposition in the 2006 action. First, Ford moved for summary disposition under MCR 2.116(C)(10) with respect to the Department's assessment of use tax for automotive parts that Ford dealers supplied to consumers under ESPs. On March 22, 2010, the Court of Claims granted Ford's motion, concluding that Ford had not used, stored, or consumed the parts, and that Ford's reimbursement to Ford dealers for repairs under ESPs was no different than a consumer purchase, so the dealer was responsible for remitting sales tax. The Court of Claims concluded that the Department had "no basis from which to charge [Ford] use tax on the repair costs paid by [Ford]," and ordered the Department to refund Ford approximately $1.6 million plus interest. The court further ordered the Department to pay Ford's costs and attorney fees "pursuant to MCR 2.114 and MCR 2.625, as [the Department] relied upon a frivolous defense." Ford submitted a request for $152,140.92 in attorney fees and $5,014.95 in costs, to which the Department objected. On January 5, 2011, the court awarded Ford $112,256.73 plus interest.

On November 9, 2011, Ford moved for a show-cause order regarding the Department's failure to pay the January 5, 2011 award and the March 22, 2010 refund. The Department argued that under MCR 7.101(H)(1),[2] an order or judgment cannot be enforced until the time for taking an appeal has expired. Ford replied that the Department's position was meritless because MCR 7.101(H) only governed appeals to circuit courts. The Court of Claims ordered the Department to issue the

[2] MCR 7.101(H)(1) has since been replaced by MCR 7.108(B)(1).

required payments by November 23, 2011, and awarded Ford attorney fees and costs associated with the motion to show cause. The Department stipulated the reasonableness of Ford's bill of costs while preserving its challenge to the appropriateness of the award.

B. SUMMARY DISPOSITION REGARDING FORD'S TEST VEHICLES AND ASSOCIATED SANCTIONS

Ford also moved for summary disposition under MCR 2.116(C)(10) with respect to the Department's assessment of use tax on its test vehicles under former MCL 205.94(g)(*i*). The Department argued that Ford was required to title the vehicles that it manufactured for its own testing, and that the vehicles were licensed because they were driven under manufacturer's license plates. At oral argument, the Department conceded that Ford's untitled test vehicles were not subject to use tax. The Court of Claims granted Ford's motion for summary disposition, concluding that a manufacturer's license plate was not a "license" under former MCL 205.94(g)(*i*) because it could be used interchangeably among test vehicles and was issued to the manufacturer, rather than a specific vehicle. The court ordered the Department to refund Ford the use tax and deficiency interest paid under protest with regard to Ford's test vehicles.

On February 8, 2012, Ford filed an emergency ex parte motion to prevent the Department from sending its multimillion-dollar refund checks by mail. Ford asserted that its counsel was "reluctant to trust $24 million in refunds to the mail and delivery to a general mailbox at Ford," and requested that she be allowed to personally retrieve the checks on Ford's behalf. The Department responded that it would follow its "normal procedure," which was to mail the checks to the tax-

payer's legal address. The Court of Claims granted Ford's motion and awarded Ford associated attorney fees and costs. The Department stipulated the reasonableness of Ford's costs and attorney fees, but preserved its right to challenge the appropriateness of the award.

C. SUMMARY DISPOSITION REGARDING THE 2009 ACTION AND ASSOCIATED SANCTIONS

In December 2011, the Court of Claims held a hearing on Ford's and the Department's motions for summary disposition in the 2009 action. At the hearing, the Department explained that it had reduced the second tax assessment from $44 million to $13 million "based upon information that [the Department] obtained in the other matter that was being litigated." The Court of Claims inquired whether the tax issues in the case were identical to those litigated in the 2006 action, and the Department's counsel admitted the court was "[b]asically . . . correct" and that the issues had already been decided in Ford's favor in the 2006 action. The court then granted Ford's motion to consolidate the 2009 case with the 2006 case, and denied the Department's motion for summary disposition.

Thereafter, Ford filed a motion under MCR 2.114(E) and (F), MCR 2.625(A), and MCL 600.2591 for costs and attorney fees incurred in the 2009 action. Although the Department stipulated to an order cancelling and rescinding the second tax assessment, it argued that its actions were not frivolous because it did not intend to harass, embarrass, or injure Ford. The Court of Claims found that the Department's actions were "frivolous and vexatious" and ordered that "for these reasons and those stated on the record," the Department was liable for actual and exemplary damages,

including Ford's costs and attorney fees. The Department stipulated the reasonableness of the award, but reserved the right to challenge the appropriateness of the award.

D. INTEREST ACCRUAL ON THE TEST VEHICLE REFUND CLAIM

In January 2014, Ford moved for partial summary disposition regarding the date on which interest on its test vehicle refund claim began to accrue. Ford contended that it filed its refund claim on January 28, 1999, when it sent two letters asking the Department to credit the refunds against any deficiencies in the then ongoing tax audit. The Department argued that the letters were inadequate notice of a claim for a refund to start the 45-day period after which interest would accrue. The Court of Claims concluded that under the "adequate notice" standard from *Lindsay Anderson Sagar Trust v Dep't of Treasury*, 204 Mich App 128; 514 NW2d 514 (1994), the January 1999 letters constituted adequate notice of a claim. The Department filed a motion for reconsideration, which the court denied.

II. THE INDUSTRIAL-PROCESSING EXEMPTION

The Department first argues that the Court of Claims erred by concluding that Ford's test vehicles that were titled and driven under manufacturer's license plates were not "licensed . . . for use on public highways," and therefore were exempt from use tax under former MCL 205.94(g)(*i*). We agree.

We review a trial court's decision on a motion for summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). We review questions of statutory interpretation

de novo. *Green Oak Twp v Munzel*, 255 Mich App 235, 238; 661 NW2d 243 (2003). "Where a statute does not define a term, [courts] will construe it in accordance with its ordinary and generally accepted meaning." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). If the plain and ordinary meaning of statutory language is clear, judicial construction is not permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

Before the 1999 amendment of the UTA took effect, former MCL 205.94(g)(*i*) provided that "[p]roperty used or consumed in industrial processing does not include . . . vehicles licensed and titled for use on public highways." The UTA does not define the word "licensed." Courts may rely on dictionary definitions to ascertain the plain and ordinary meaning of undefined statutory terms. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the transitive verb "license" as "to permit or authorize esp. by formal license." Ford's test vehicles were "licensed" because they were driven under manufacturer's license plates that authorized their use on public highways.[3]

Ford contends that manufacturer's license plates did not license its test vehicles for use on public highways,

[3] On appeal, both parties discuss whether the term "licensed" should be interpreted in light of the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., which does not define the word "licensed" but instead defines the word "license" to mean "any driving privileges, license, temporary instruction permit, commercial learner's permit, or temporary license issued under the laws of this state pertaining to *the licensing of persons* to operate motor vehicles." MCL 257.25 (emphasis added). Both Ford and the Department agree that the MVC defines the word "license" only in reference to persons, rather than vehicles, so any reference to the MVC is not helpful in discerning the meaning of the word "licensed" as used in the UTA.

but rather licensed Ford to test the vehicles. The Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., provides the following regarding manufacturer's license plates:

> A manufacturer owning a vehicle of a type otherwise required to be registered under this act may operate or move the vehicle upon a street or highway primarily for the purposes of transporting or testing . . . if the vehicle displays, in the manner prescribed in [MCL 257.225], 1 special plate approved by the secretary of state. [MCL 257.244(1).]

A manufacturer's license plate is a physical representation that a vehicle is authorized to operate on public highways. Therefore, when a manufacturer's license plate is affixed to a test vehicle, the vehicle becomes "licensed . . . for use on public highways." Former MCL 205.94(g)(*i*).

Ford argues that its test vehicles were not licensed because a manufacturer's license plate is not assigned to a specific vehicle and may be legally interchanged among test vehicles. The fact that a manufacturer's license plate is interchangeable has no effect on the fact that a vehicle displaying a plate becomes "licensed . . . for use on public highways." Ford contends that it cannot "license" its own test vehicles by affixing a manufacturer's license plate because only the Secretary of State can license vehicles. However, the Secretary of State, not Ford, issued the manufacturer's license plates authorizing Ford to operate the test vehicles on public highways.

Ford contends that a vehicle is only licensed if it meets the registration and certificate-of-title provisions of MCL 257.216.[4] However, MCL 257.216(a)

[4] MCL 257.216 does not specifically refer to "licensing" a motor vehicle but instead provides: "Every motor vehicle, . . . when driven or moved on a street or highway, is subject to the registration and certificate of title provisions of this act . . . ."

exempts from registration requirements "[a] vehicle driven or moved on a street or highway in conformance with the provisions of this act relating to manufacturers . . . ." Therefore, Ford's test vehicles driven under manufacturer's license plates need not comply with the MVC's registration provisions. Ford's argument also tacitly assumes that there is only one way to license a vehicle for use on public highways, which is clearly not the case because MCL 257.244(1) allows a manufacturer that owns a vehicle "otherwise required to be registered" to "operate . . . the vehicle upon a street or highway . . . if the vehicle displays . . . 1 special plate approved by the secretary of state."

Ford argues that its test vehicles were not licensed *for use* on public highways because Ford could not lawfully sell, lease, or lend a test vehicle to a third party or use a test vehicle for any purpose other than testing. The UTA defines "use" as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." MCL 205.92(b). Manufacturer's license plates specifically authorize Ford to "operate or move the vehicle upon a street or highway[.]" MCL 257.244(1). The mere fact that Ford could not sell or lease the vehicles, or use them for purposes other than testing, does not mean that the vehicles were not licensed for use.

Alternatively, Ford argues that we should retroactively apply the Legislature's 1999 amendment of the UTA. Generally, statutory amendments are applied prospectively unless the Legislature expressly or impliedly identified its intention to give the amendment retrospective effect. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 377; 781 NW2d 310 (2009). "An

amendment may apply retroactively where the Legislature enacts an amendment to clarify an existing statute . . . ." *Mtg Electronic Registration Sys, Inc v Pickrell*, 271 Mich App 119, 126; 721 NW2d 276 (2006).

Ford argues that legislative analysis for the 1999 amendment mentioned extending exemptions to certain "third parties," but otherwise spoke of clarifying the Act. House Legislative Analysis, HB 4744, HB 4745, and SB 544, July 16, 1999, p 11. However, staff-prepared legislative analysis does not "summarize the intentions of those who have been designated by the Constitution to be participants in this legislative process" and therefore "should be accorded very little significance by courts when construing a statute." *In re Certified Question*, 468 Mich 109, 115 n 5, 659 NW2d 597 (2003).

Additionally, Ford argues that the 1999 amendment merely clarified existing law because it gave the phrase "vehicles licensed . . . for use on public highways" the same meaning that it has in other parts of Michigan tax law.[5] Ford contends that every other time the phrase "vehicles licensed . . . for use on public highways" is used, it refers to licensing vehicles under MCL 257.216, and the manufacturer's license plate provisions of the MVC do not apply. As discussed earlier, MCL 257.216 relates to registrations and certificates of title, not specifically to a "license" as defined by the MVC. Further, the specific tax exemption relating to industrial processing is the only place that manufac-

[5] See, e.g., MCL 205.54a(1)(b)(*ii*) (stating that sales of tangible property to a religious organization are exempt from sales tax except for the sale of "vehicles licensed for use on public highways other than a passenger van or bus with a manufacturer's rated seating capacity of 10 or more that is used primarily for the transportation of persons for religious purposes").

turer's license plates would be relevant because only a manufacturer, as opposed to a consumer, would engage in industrial processing.

The first enacting section of 1999 PA 117 lists several clarifications of the UTA, without mentioning the tax exemption for vehicles displaying manufacturer's license plates. Thus, it is not clear that the Legislature intended to clarify the industrial-processing exemption with regard to vehicles using a manufacturer's license plate. Moreover, Section 4o of the amendment, which contains the manufacturer's license plate provision, provides that tax levied under the UTA did not apply to property sold "after March 30, 1999," indicating that the Legislature intended the relevant portion of the 1999 amendment to apply prospectively. Accordingly, we decline to retroactively apply the 1999 amendment of the UTA.

III. ATTORNEY FEES AND COSTS

The Department next challenges four separate awards of attorney fees and costs. We review a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. We review a trial court's determination that a claim or defense was frivolous for clear error. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). A decision is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Id*.

A. ATTORNEY FEES AND COSTS ASSOCIATED WITH THE ESP ISSUE

The Department first challenges the Court of Claims' conclusion that the Department's defense of its

assessment of use tax for automotive parts provided under ESPs was frivolous. A court may find that a party's action is frivolous if (1) the party initiated the suit for purposes of harassment, (2) "[t]he party's legal position was devoid of arguable legal merit," or (3) "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." MCL 600.2591(3)(a). "A claim is not frivolous merely because the party advancing the claim does not prevail on it." *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 368; 844 NW2d 143 (2013). "A claim is devoid of arguable legal merit if it is not sufficiently grounded in law or fact[.]" *Id*. at 369.

The Department argues that the Court of Claims did not make sufficient factual findings to justify its determination that the Department's defense was frivolous. Court rules require trial courts to place findings of fact and conclusions of law on the record. MCR 2.517(A)(1); *Morris v Clawson Tank Co*, 459 Mich 256, 274; 587 NW2d 253 (1998). Findings of fact are sufficient if they are "[b]rief, definite, and pertinent," MCR 2.517(A)(2), and "it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation," *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

The court's order stated that the Department was required to pay Ford's costs and attorney fees "pursuant to MCR 2.114 and MCR 2.625, as [the Department] relied upon a frivolous defense." Although the court did not mention its specific findings regarding the frivolousness of the defense in its order, during a subsequent hearing on the Department's motion to stay the order, the court stated the following:

> It is sad to hear that [the Department] thinks that because of this ruling they would be afraid to file other cases because of fear of retribution or fear of the courts awarding costs and sanctions, attorney fees, what have you. I think the opposite is sad, that [the Department] should have free license to simply file a suit without proper cause or good showing of a meritorious case, without appropriate factual and legal support. That puts the burden on the taxpayer. Not all taxpayers have deep pockets like Ford and I don't think anybody, even Ford, these days have deep pockets.

Therefore, the court awarded Ford costs and attorney fees because it believed the Department's use-tax assessment for automotive parts provided under ESPs lacked factual and legal support. Although the court's explanation occurred in relation to a separate motion, a finding that is "[b]rief, definite, and pertinent," MCR 2.517(A)(2), is sufficient, and the court's statement in this matter was adequate to facilitate appellate review.

Further, the Department's defense was frivolous. Under MCL 205.93, the state imposes use tax on a person who uses, stores, or consumes tangible personal property. The Department's auditor, George Tetteh, admitted that there was no evidence that Ford used, stored, or consumed the repair parts. Tetteh explained that Ford dealers purchased the parts and customers took the parts after the dealer installed them on the customer's vehicle. Tetteh also admitted that he did not have "any particular or specific document . . . to show that . . . the dealers were an agent of Ford." Accordingly, the Department's defense lacked any factual or legal support.

The Department argues that the court's award of $112,256.73 was unreasonable. To evaluate whether an attorney fee is reasonable, courts begin by determining the fee customarily charged in the locality for

similar legal services. *Khouri*, 481 Mich at 530. To determine this amount, courts should use "reliable surveys or other credible evidence of the legal market." *Id*. at 530-531. Then, the reasonable hourly rate should be multiplied by the number of hours that were reasonably expended to reach a baseline figure for a reasonable attorney fee. *Id*. at 533. Courts should make adjustments to the figure using the factors from MRPC 1.5(a) and *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982). *Khouri*, 481 Mich at 532.

The Department first argues that the Court of Claims erred by "presuming" the reasonableness of the fees assessed for all of Ford's attorneys based on the reasonableness of the fees for Ford's lead counsel. The court stated that it was "overly burdensome" to determine the reasonableness of the fees charged by each attorney that worked on the case from its inception. Instead, the court stated that it considered the fees from Ford's lead attorney, Loren Opper, and then "presumed" that the fees for the other attorneys were reasonable based on Opper's fees. However, the court also stated that it reviewed the fees and hours for the other attorneys in preparation for the evidentiary hearing, so its decision was based on evidence.

The Department contends that the court did not attempt to determine the reasonableness of the hours spent on the ESP issue. To the contrary, the court found that the Department conceded the reasonableness of the time spent on affidavits, the brief, and the motion and argument, and that Ford's request for 25% of the time it spent on various categories such as the amended complaint, research, and discovery was appropriate because the ESP issue increased the amount of time spent in those categories. The court further

found that the time spent on some categories, such as depositions and documents, was not reasonable because Ford would have incurred those expenses regardless of whether the ESP issue was in dispute. Therefore, the Court of Claims did not fail to consider the reasonableness of the hours billed.

The Department contends that the Court of Claims erred by awarding Ford attorney fees for time spent on the amended complaint, because, as the court stated, the fees were awarded for "whatever was expended in relation to the motion for partial summary disposition" and "not on the whole case." On this point, we agree. Time spent on the amended complaint could not have been spent "in relation to the motion for partial summary disposition" that followed the complaint. Therefore, the court abused its discretion by awarding attorney fees for time Ford spent on the amended complaint.

The Department challenges the court's determination that Opper, Ford's lead attorney, charged a reasonable rate. Specifically, the Department argues that Opper's hourly rate was contradicted by the State Bar of Michigan Economics of Law Practice Survey and that the court improperly considered Detroit rather than Lansing as the locality on which to base the rate. At the evidentiary hearing, Ford's counsel noted that the 2007 Economics of Law Practice Survey had no participants in the category of "tax problem resolution," which was the relevant area of practice. In lieu of the State Bar's survey, Ford submitted surveys from PricewaterhouseCoopers and the National Law Journal to demonstrate that Ford's hourly rates were reasonable.

In finding that Opper's hourly rates were reasonable, the court stated that the case involved "complex

litigation in state and local taxation," which was a "specialized area of law" that a limited number of Michigan firms practice, and that the hourly rates were reasonable because they were "in line with rates charged in the Detroit region for experienced attorneys performing specialized complex litigation." The Department has not shown an abuse of discretion because the Court of Claims could determine the reasonableness of Opper's rates based on the surveys Ford submitted at the evidentiary hearing. Additionally, Opper testified that he worked with Ford through his firm's Detroit office, so the court did not abuse its discretion by determining that Detroit was the appropriate locality on which to base the rates.

The Department asserts that the court ignored MCL 600.2421c(4), which caps attorney fees against the state at $75 an hour. However, the Department abandoned this issue by providing only one sentence of analysis in its appellate brief. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Moreover, the argument is meritless. The Court of Claims awarded Ford attorney fees under MCL 600.2591, not MCL 600.2421c(4). Additionally, Ford is not a "party" as defined in MCL 600.2421b(2) because it is a corporation with more than 250 employees, so it was not subject to the award restrictions in MCL 600.2421c(4).

B. ATTORNEY FEES AND COSTS ASSOCIATED WITH THE 2009 ACTION

Next, the Department argues that the Court of Claims clearly erred by finding that its defense of the $44 million second tax assessment was frivolous. The court's order specifically stated that the award of attorney fees was appropriate under MCR 2.114(E)-(F), MCR 2.625(A)(2), and MCL 600.2591 because the Department's actions were "frivolous and vexatious."

There is no dispute that the Department's $44 million second tax assessment was improper because the Department stipulated to an order cancelling and rescinding the assessment and acknowledging that it should not have been assessed. At the motion hearing for summary disposition in the 2009 action, the Department's counsel admitted that the court was "[b]asically . . . correct" in its contention that the 2009 action involved the same matters litigated in the 2006 action, which had already been decided in Ford's favor. When asked whether the Department was responsible for verifying the facts underlying the second tax assessment, the Department's audit specialist, Carla Ward, stated, "If the department does not feel they're getting the information that they need, then they have the authority to issue an assessment." These statements all support Ford's contention that the Department issued the second tax assessment to harass Ford. Accordingly, the Court of Claims did not clearly err by finding that the Department's defense was frivolous, and it properly awarded attorney fees.

C. ATTORNEY FEES AND COSTS ASSOCIATED WITH FORD'S EMERGENCY EX PARTE MOTION

The Department contends that the Court of Claims abused its discretion by awarding attorney fees for Ford's ex parte motion to prevent the Department from sending its multimillion-dollar refund checks through the mail. Although the court did not specify the grounds on which it awarded the fees, it is clear from the context of the ex parte motion and Ford's arguments that the court agreed that the Department's refusal to let Ford's counsel personally pick up the multimillion-dollar checks was unreasonable. Given the amount at issue, this is a sound conclusion. Trial courts have inherent authority to impose sanctions on

the basis of a party's misconduct. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639; 607 NW2d 100 (1999). Therefore, the Court of Claims did not abuse its discretion by awarding attorney fees for Ford's emergency ex parte motion.

D. ATTORNEY FEES AND COSTS ASSOCIATED WITH FORD'S MOTION TO SHOW CAUSE

The Department argues that the Court of Claims abused its discretion by awarding attorney fees for Ford's motion to show cause regarding the Department's failure to pay the tax refund on the ESP issue. The Department argued that under former MCR 7.101(H)(1) (now MCR 7.108(B)(1)), an order or judgment cannot be enforced until the time for taking an appeal expired, but Ford replied that MCR 7.101(H)(1) only governed appeals from district or probate courts to circuit courts.

Litigants are required to obey court orders, regardless of their propriety, until the orders are dissolved. *Plumbers & Pipefitters Local Union No 190 v Wolff*, 141 Mich App 815, 818; 369 NW2d 237 (1985). MCL 600.1721 grants courts the power to order a party in contempt of court to indemnify the injured party for any "actual loss or injury" caused by the misconduct. Thus, the Court of Claims could properly assess attorney fees in this instance because the Department violated the court's orders to pay the refund and attorney fees. Therefore, the Court of Claims did not abuse its discretion by awarding the attorney fees.

IV. INTEREST ACCRUAL FOR TEST VEHICLE REFUND CLAIM

Finally, the Department argues that Ford's January 28, 1999 letters were not claims or petitions for a refund that triggered the 45-day period before inter-

est begins to accrue on a tax refund. MCL 205.30 provides that interest begins to accrue on overpaid taxes 45 days after a claim is made or a petition is filed. In *Ford Motor Co v Dep't of Treasury*, 496 Mich 382; 852 NW2d 786 (2014), our Supreme Court held the following regarding MCL 205.30:

> [W]hen the statute is read as a whole it is clear that, in order to trigger the 45-day waiting period before interest begins to accrue on a tax refund, a taxpayer must (1) have actually paid the tax at issue; (2) make a "petition . . . for" a refund or "claim for refund" by demanding, requesting, or asserting a right to a refund of tax payments that the taxpayer made to the Treasury return that the taxpayer asserts are not due; and (3) "file" the claim or petition by submitting it to the Treasury, thereby providing the Treasury with adequate notice of the taxpayer's claim for a refund. [*Ford Motor Co*, 496 Mich at 396.]

The Department first contends that there is no record evidence that Ford paid the taxes at issue as of January 28, 1999. The Department never challenged Ford's payment of the taxes below, so the record is devoid of documentary evidence on this issue. Thus, there are no factual findings on the record for us to review in relation to whether Ford paid the tax by 1999. The Court of Claims implicitly found that Ford paid the tax because it found that the interest began to accrue in 1999. In any event, the Department was able to verify and issue refund checks for the tax overpayment, which negates its contentions that it could not have had the money.

The Department argues that Ford's January 28, 1999 letters were not claims or petitions for a refund because they did not make an explicit demand for money and they contemplated a future follow-up. A taxpayer can make a petition or claim for a refund by asserting a right to a refund for payments that the

taxpayer asserts are not due. *Ford Motor Co*, 496 Mich at 396. Ford's first letter asserted a right to a refund for tax payments made to the Department, stating, "Any tax paid on these vehicles during the audit period was paid in error and *should be credited or refunded to Ford Motor Company*." (Emphasis added.) Ford's second letter also asserted a right to a refund, stating, "Therefore, Ford Motor Co. *should receive a refund* on tax paid on these vehicles for the open statutory period." (Emphasis added.)

The Department argues that Ford's claim was not "filed" because the letters stated that Ford intended to file a claim in the future. However, our Supreme Court has held that a claim is filed when it is submitted to the Department. *Ford Motor Co*, 496 Mich at 395. Filing requires the taxpayer to give the Department "adequate notice of the claim[.]" *Id*. at 396. Both of Ford's letters were addressed and sent to the Department's audit supervisor; thus, the letters were submitted to the Department and gave notice of a claim for a refund. Because evidence shows that Ford paid the taxes at issue, petitioned or claimed a refund, and then filed the claim, the 45-day waiting period before interest began to accrue started after Ford sent its January 28, 1999 letters.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

K. F. KELLY and FORT HOOD, JJ., concurred with GADOLA, P.J.

FALCONER v STAMPS

Docket No. 323392. Submitted December 8, 2015, at Lansing. Decided December 22, 2015, at 9:00 a.m.

Kristen Falconer brought an action in the Calhoun Circuit Court against Chadwick Stamps, seeking custody of their daughter (the child). Defendant's mother, Donna Weddington, intervened in the action, seeking custody of the child under MCL 722.26b(1) (action for custody by a guardian). Plaintiff and defendant had begun dating as teenagers, and plaintiff moved into intervener's home while still attending high school. Plaintiff became pregnant shortly after she graduated from high school. When the child was approximately two years old, defendant moved to Arizona to attend school. Plaintiff went to visit defendant in Arizona and ended up staying there with defendant for approximately 16 months. While plaintiff and defendant were in Arizona, the child lived with intervener, who was appointed the child's guardian in separate proceedings in the Calhoun County Probate Court. In 2011, plaintiff and defendant returned to Michigan. Plaintiff had begun using drugs while in Arizona, and intervener continued to be the child's primary caretaker. Plaintiff left intervener's home in November 2012. In April 2013, plaintiff moved to terminate the guardianship. Department of Health and Human Services employee Candace Stack, the child's counselor, and the child's guardian ad litem, all supported the child's reunification with plaintiff. Stack noted that plaintiff had done an outstanding job overcoming her prior drug use and was ready to be a full-time mother. The probate court ultimately terminated the guardianship on January 16, 2014. Plaintiff filed her complaint for custody in the circuit court shortly before the order terminating the guardianship was entered. The circuit court, Brian Kirkham, J., ordered that the child be left in intervener's care during the custody proceedings, but allowed plaintiff to have regular parenting time. After the lengthy custody hearing, the circuit court awarded sole legal and physical custody to plaintiff, but then went on to address grandparent visitation by intervener. The circuit court awarded intervener standard parenting time for a noncustodial parent. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 722.27b, a child's grandparent may seek a grandparenting-time order when, in the year preceding the commencement of an action for grandparenting time, the grandparent provided an established custodial environment for the child. The grandparenting-time statute sets forth the procedure for bringing the issue of grandparenting time before the court. When the circuit court has continuing jurisdiction over the child because of a custody proceeding, the child's grandparent must seek a grandparenting-time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction. The motion must be accompanied by an affidavit setting forth facts supporting the requested order, which, in turn, allows the party having legal custody to file an opposing affidavit. However, in order to give deference to the decisions of fit parents, it is presumed that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut that presumption, a grandparent must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court must deny the motion. In this case, the circuit court conflated what should have been two different proceedings—the custody determination and the grandparenting-time determination. While the circuit court carefully considered the best-interest factors under the grandparenting-time statute, MCL 722.27b(6), separately from its previous best-interests determination on custody, MCL 722.23, it nevertheless committed error by even considering the issue of grandparent visitation. Importantly, plaintiff received custody of the child just moments before the circuit court's decision on grandparenting time and, therefore, plaintiff had not denied intervener grandparenting time. The trial court, in rendering an opinion on grandparent visitation absent a request to do so, effectively jumped the gun and presumed that plaintiff would unreasonably deny intervener grandparenting time. But plaintiff had testified that she was amenable to visitation as long as intervener did nothing to sabotage plaintiff's relationship with the child. The circuit court, by granting intervener grandparenting time absent a request to do so, deprived plaintiff of the opportunity to argue that intervener had failed to rebut the presumption that plaintiff's ostensible decision to deny grandparenting time did not create a substantial risk of harm to the child. In fact, the circuit court failed to indicate that it was even taking the presumption into

consideration. The Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a better decision could be made. Accordingly, the circuit court's grandparenting-time order had to be vacated.

2. Even if the matter had been properly before it, the circuit court erred by permitting grandparenting time. Given the evidence presented, intervenor failed to overcome the presumption that plaintiff's ostensible decision to deny grandparenting time did not create a substantial risk of harm to the child's physical, mental, or emotional health. The record revealed that while there was support for the child having continued contact with intervener, with whom she had lived her entire life, there was also evidence that intervener's continued involvement in the child's life was potentially detrimental to the child's transition to plaintiff's home and, therefore, the child's overall well-being.

3. MCL 722.27b(6) states that if the court finds by a preponderance of the evidence that it is in the best interests of the child to enter a grandparenting-time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. Where, as here, the grandparent's involvement in a child's life exceeds the typical role of a grandparent, one could envision a visitation schedule that resembles that of a noncustodial parent. However, under MCL 722.27b, the court must balance the parent's fundamental right to manage his or her child against the goal of eliminating the risk of harm to the child that might result from a denial of grandparenting time. Accordingly, if an order for grandparenting time is entered, the amount of grandparenting time should be whatever amount will eliminate the risk of harm to the child. The experts who testified in this case offered no opinion on the amount of grandparenting time necessary to eliminate the risk of harm to the child from a lack of grandparenting time. Given the evidence presented, the amount of grandparenting time ordered was excessive.

4. MCL 722.27b(6) sets forth the best-interest factors a court must consider when deciding whether it is in the best interests of the child to enter an order for grandparenting time. In this case, the circuit court's decision to order grandparenting time was against the great weight of the evidence on the record presented. In fact, the evidence on the best-interest factors strongly predominated against granting visitation.

Circuit court's grandparenting-time order vacated.

PARENT AND CHILD — GRANDPARENTING TIME — PROCEDURE.

Under MCL 722.27b, a child's grandparent may seek a grandparenting-time order; the grandparenting-time statute sets forth the procedure for bringing the issue of grandparenting time before the court; when the circuit court has continuing jurisdiction over the child because of a custody proceeding, the child's grandparent must seek a grandparenting-time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction, but the circuit court must not conflate the custody and grandparenting-time proceedings.

Legal Services of South Central Michigan (by *Megan A. Reynolds*) for plaintiff.

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

K. F. KELLY, J. In a three-way child custody dispute involving plaintiff mother, Kristen Alise Falconer (plaintiff); defendant father, Chadwick Jason Stamps, also known as Chad Meyers (defendant); and paternal grandmother, Donna Bryant Weddington (Intervener), plaintiff appeals as of right because, while plaintiff was awarded sole physical and legal custody of the child,[1] the order included extensive grandparenting time with Intervener. We vacate that portion of the circuit court's order that granted Intervener grandparenting time given that the issue of grandparent visitation was not properly before the circuit court.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. PROBATE COURT PROCEEDINGS

On October 14, 2010, Intervener filed a petition in the Calhoun County Probate Court for appointment of a full

[1] We refer to plaintiff and defendant's daughter as "the child" throughout this opinion to preserve her privacy.

guardianship of the two-year-old child under MCL 700.5204(2). Intervener told the probate investigator that plaintiff and defendant lived with Intervener before the child was born and that all three continued to live with Intervener until defendant moved to Arizona to attend college in February 2010 and plaintiff followed in April 2010. Intervener reported that plaintiff and defendant supported the guardianship and that the child had frequent contact with plaintiff and defendant via telephone calls and video calls using Skype, as well as in-person visits. Intervener was granted full guardianship on November 29, 2010.

Intervener filed an annual report with the court on December 2, 2011, indicating that the parents had now returned to Michigan but that the "[p]arents still lack necessary skills to parent child" and that "neither parent is a suitable guardian for [the child]." The report indicated that the "[c]hild loves parents and vice versa" and that visits took place "as much as possible."

Intervener filed her next annual report on November 30, 2012. She reported that plaintiff had moved out of the home in November 2012 and her whereabouts were "unknown." Intervener requested that plaintiff's future visits be supervised by her.

On April 9, 2013, plaintiff petitioned to terminate the guardianship. The probate court appointed the child a guardian ad litem (GAL), David Marsh. Marsh's September 20, 2013 report provided:

> A. The minor has essentially lived with the guardian, her grandmother, Donna Weddington, all her life.
>
> B. The mother, Kristen Falconer, had a physical abusive and substance abusive relationship with the son of Donna Weddington until sometime in November, 2012 when she moved back to Hastings to be with her family in order to get her life back together.

> Ms. Falconer has apparently made great strides in that direction in that she is employed, substance free and has stable housing.
>
> C. The father, Chadwick Stamps, while living in the same household with his daughter, has had little to do with raising her.
>
> D. The guardian/grandmother has done a good job in raising [the child].
>
> E. Both parties blame the other for the inconsistent contact between [the child] and her mother.
>
> F. The minor child desire[s] to remain living with the guardian/grandmother.
>
> G. Child Protective Services makes no specific recommendation, stating that both parties are appropriate.
>
> This writer believes that Kristen Falconer has done a great job in getting her life together. However, she states that she has only been clean since November, 2012 and did so on her own, without any profession[al] help or support.
>
> In addition, there has not been a lot of contact between Ms. Falconer and her daughter, . . . the blame for which is unclear.
>
> * * *
>
> The undersigned recommends that this Court institute a specific plan in order to better prepare the minor for potential reunification with her mother.

The probate court set forth a court-structured plan on September 23, 2013, requiring plaintiff to, among other things, submit to drug screening and participate in supervised visitation. The plan included a proposed date of March 24, 2014, for terminating the guardianship.

Intervener filed her next annual report on December 6, 2013, shortly after the structured plan was implemented. In the report, Intervener indicated that

defendant lived in the same home as the child and saw her every day: "[The child] loves being with her dad! She grows more fond every day. She is completely not interested/reluctant to see her mother. She cries every time!" Intervener reported that while "[m]other attends 2 hour meeting/visit once a week with [the child], [the child] does NOT enjoy, is very sad + disheartened by each visit. [The child] should not be forced to have a relationship with her mother until ready! [The child] should continue counseling + perhaps Miss Falconer could begin attending. [The child] has been abandoned by her mother 5 times + she is reluctant and afraid." Intervener requested that the guardianship continue because "the father would like to file for full custody but does not yet have funds to hire attorney."

A couple of days later, Intervener filed a motion to have "another, more appropriate supervisor be chosen" for future supervised visits. Department of Health and Human Services (DHHS) worker Candace Stack had allowed plaintiff's grandmother, Connie Falconer, to act as supervisor during plaintiff's visits with the child. Intervener complained that Falconer had once tried to "kidnap" the child in 2009 "after a high speed chase." Included with the motion was a letter Intervener wrote to Judge Michael Jaconette on November 29, 2013, asking how defendant "can apply for custody without an attorney. He has always had physical custody. He has never abandoned her and she adores him." This, in contrast with plaintiff who has abandoned the child "5 times over the last five years" and "[w]hen she did reside with us there was little to no parenting involved." Intervener also included screen shots of email exchanges she had with Stack, even though the exchanges did not cast Intervener in a positive light. The exchanges revealed that Intervener had no intention of presenting the child for supervised visits with plaintiff

if those visits included Connie Falconer. The exchanges also show that Intervener did not agree that plaintiff should see the child twice a week.

In a December 1, 2013 report, the child's counselor, Kathleen Keeder, noted that, although the child had been initially standoffish with plaintiff, "Kristen has followed through with all the recommendations and suggestions made to her to help with the bonding process and help [the child] to feel at ease during the sessions. Kristen has been empathic with [the child], she has validated her feelings even when they are hurtful and has been emotionally supportive. It is evidence to this clinician that [the child's] Guardian is not in support of [the child] being reunited with her mother and this is having an adverse affect [sic] on [the child]." In Keeder's opinion, plaintiff demonstrated an ability to provide a safe and stable home for the child and the two needed to be reunited.

On December 11, 2013, Stack filed a report on the case. Stack, like Keeder, reported that plaintiff was doing a good job at her visits with the child, even though the child would say things like " 'I hate you' " and " 'you are not my mom.' " Stack reported that not only did Intervener make scheduling visits difficult, but Intervener was also a distraction to the child by waiting outside of the visitation room or in the bathroom down the hall. The child, knowing Intervener was outside the door or in the bathroom, would ask to use the bathroom several times. Intervener refused to leave the area until security guards got involved. Once Intervener was out of the area, the child began to warm up to and interact with plaintiff. Stack concluded:

> [The child's] emotional well-being is being jeopardized living with Donna Weddington. Ms. Weddington has

> thwarted any and all efforts of reunification between the child and her mother. It is believed that Ms. Weddington is feeding negative thoughts to [the child] about her mother, Kristen Falconer, instead of being supportive of the relationship. It is a travesty that this reunification period has not been more successful, but it is this worker's opinion this is solely due to Ms. Weddington's attitudes and actions. This worker does not anticipate that Ms. Weddington will ever support the reunification of [the child] and her mother.

In the meantime, Stack noted that plaintiff has "done an outstanding job recovering from her drug use and is ready to be a full time mother. She has awesome family support in the Hasting[s] area. There is no reason to continue this guardianship, the recommendation is to terminate."

The child's GAL made a similar recommendation in his December 18, 2013 report:

> Ms. Weddington has frequently procrastinated and attempted to circumvent the arrangements made by Child Protective Services to move forward with the plan. She claims that these arrangements are detrimental to and against the best interest of [the child]. Ms. Weddington believes that Kristin [sic] Falconer doesn't want [the child]; she is jealous of Chad Stamps and is doing this to hurt him.
>
> It is this writer's opinion that Donna Weddington is so desperately afraid of losing custody of [the child] that she grasps at any straw in the attempt to prevent termination of the guardianship. It is further my belief that Donna Weddington continues to attempt to undermine this process by coaching the minor.
>
> RECOMMENDATION:
>
> The undersigned recommends that this case continue on track to termination of the minor guardianship as the mother has done all that is asked and required of her.

> I further recommend that this Court emphasize the need for Donna Weddington to totally cooperate with the Court structured plan especially with the parenting time arranged by Department of Human Services under the penalty of contempt and/or removal of the minor from Ms. Weddington.

A hearing was held on December 18, 2013. That same day, the probate court ordered that, in light of plaintiff's substantial compliance with the court-structured plan, the termination of the guardianship "should be accelerated from the previously scheduled termination date of 3-24-14 to an earlier date" and that "the best interests of the minor would be served by continuing the guardianship until 1-16-14 pending completion of a modified court-structured plan which will allow for unsupervised parenting time as specified in this plan and will allow for counselor(s)/therapist(s) of the minor to address with her the scheduled 1/16/14 permanent reunification of the minor with her mother." The guardianship was terminated in a January 16, 2014 order.

B. COMPETING COMPLAINTS FOR TEMPORARY CUSTODY

Plaintiff filed her complaint for custody in the Calhoun Circuit Court on December 23, 2013, before the order terminating the guardianship was entered. Plaintiff preemptively sought temporary custody to avoid interference by defendant or Intervener with the guardianship's imminent termination. The complaint sought sole physical and legal custody, suspension of defendant's parenting time, and exclusion of Intervener from any visits the child would have with defendant.

Defendant filed a motion for temporary custody on January 8, 2014. He was concerned that termination of

the guardianship would result in the child being placed with plaintiff, who had abandoned the child and who, defendant contended, was unfit.

At a January 13, 2014 motion hearing, the circuit court indicated that it had discovered outstanding warrants for defendant's arrest for malicious destruction of property and home invasion. Defendant was immediately placed into police custody. Defendant was also ordered to submit to a drug test and tested positive for marijuana. Counsel for defendant nevertheless begged the circuit court not to uproot the child's life by removing her from Intervener's care, especially where "we have a mother who simply left the home where her daughter lived went for many months without having any real meaningful contact with her daughter. . . . She left the home. She made no efforts for a considerable period of time to have regular contact with the daughter." Plaintiff's attorney explained that plaintiff was forced to leave the child in November 2012 because of the abusive situation with defendant. Plaintiff sought substance abuse counseling and had been very diligent in trying to gain custody of the child. In fact, the only reason the probate court did not order same-day termination of the guardianship was to allow intensive services to the child to prepare her for the transition. Counsel believed that Intervener brought defendant to court as a proxy, pointing to the fact that defendant had played no part in the probate court proceedings. Citing its authority to place a child with a third party under the Child Custody Act (CCA), MCL 722.21 *et seq*., the circuit court concluded that it would not uproot the child and left the child in Intervener's care.

Intervener filed her motion for intervention and for custody on January 15, 2014, citing MCL 722.26b(1)

(action for custody by a guardian). The circuit court granted the motion at a February 3, 2014 hearing.

Plaintiff moved to modify the temporary custody order on January 21, 2014, citing defendant's continuous abusive and criminal behavior and Intervener's failure to protect the child by essentially covering up defendant's illegal and violent behavior. The circuit court denied the motion but modified the parenting-time schedule to allow plaintiff mid-week contact and extended weekend visits to Monday mornings. The circuit court also appointed the child a GAL. It refused to appoint Marsh (the child's GAL from the probate proceeding) because of Marsh's ex parte communication with the judge in which Marsh expressed displeasure with how the case was going. Michael Clore was named GAL.

C. THE CUSTODY HEARING

Defendant represented himself at the custody hearing. Importantly, at no time did defendant seek custody of the child; the hearing was essentially between plaintiff and Intervener. At the time of the hearing, there were a number of allegations regarding defendant's assaultive behavior. The focus was on whether the child was exposed to domestic violence in Intervener's home. Intervener and defendant denied that there was any domestic violence. In contrast, plaintiff and her witnesses reported that defendant had a history of abusing, not only his girlfriends, but Intervener.

Children's Protective Services (CPS) investigator Megan Wilder testified that she received an allegation of substance abuse and physical neglect in Intervener's home on January 13, 2014, which coincided with the hearing in which defendant was arrested on outstanding warrants. Wilder tried visiting the home four times

and left a business card. She received a voice mail on January 21 from Intervener, telling Wilder she was not welcome in the home and giving Wilder the name of her attorney. Wilder finally met with Intervener in February, along with Wilder's supervisor, Chadd Hannah, and ongoing CPS caseworker Christian Giggy. Defendant was not present for the meeting. Wilder noted that Intervener's "story changed several times" during the meeting. When confronted with two separate police reports regarding defendant's criminality, Intervener either denied the incidents occurred or downplayed them. One incident involved the malicious destruction of property and the other involved a home invasion. CPS was concerned because the child was present for both incidents.[2]

Wilder reviewed the police reports and had another CPS worker speak with defendant's ex-girlfriend Alaura Haueter about "other things" in the home that concerned Wilder. Wilder ultimately concluded that Intervener failed to protect the child. A case was opened as a "category two." Both Intervener and defendant were placed on the Central Registry and the matter was transferred to an ongoing caseworker for services, including psychological evaluations for Intervener, defendant, and the child. The child was not removed from Intervener's care because Wilder did not "see any significant risk of harm that was an immedi-

[2] The malicious destruction of property incident occurred on February 9, 2013. Defendant was involved in a road-rage incident and ripped the rear windshield wiper off of the back of another vehicle (road-rage incident). The second incident occurred on June 18, 2013, when defendant went to a "friend's" home armed with a knife to confront the friend about taking marijuana plants (home-invasion incident). Intervener admitted that the child was present for the home-invasion incident, but he gave conflicting statements about whether the child was present for the road-rage incident.

ate threat to the child." Wilder met with the child at school and the child "seemed a little coached" and made statements "I don't usually hear a five or six-year-old say to me."

DHHS worker Christian Giggy testified that he received the case after Wilder substantiated the allegations. Defendant was noncompliant and did not complete his psychological evaluation; Intervener and the child completed theirs. The child was already receiving counseling with Sheri Pancost, so additional counseling was not ordered. Giggy was led to believe that defendant was out of Intervener's home. Giggy believed the child's home with Intervener was safe, but Intervener was always rescheduling appointments. So while Intervener was technically compliant, Giggy testified that "[t]he amount of time and energy that I've put into trying to make arrangements to see her, to see the children,[3] verify their well-being, has been extensive, in my opinion." On one unannounced visit, Giggy knocked on the door and was confident that individuals were there but not responding to his knocks. Intervener told Giggy that the child was unavailable for a psychological evaluation during spring break, but Giggy contacted plaintiff who was able to make sure the evaluation was completed. Afterward, Intervener left Giggy a voicemail and "talked about how we failed to forget that she has custody and she didn't authorize the psychological evaluation to occur and that we would be hearing from her attorney."

Giggy observed plaintiff with the child and found her to be "very attentive." He had no concerns about plaintiff's parenting ability. Giggy noted that when the child was with Intervener, she was more guarded in

[3] The plural use of "children" includes Intervener's teenaged daughter, AW.

talking to Giggy, looking to Intervener for reassurance. Giggy opined that "there may be some type of coaching." In contrast, the child opened up more when with plaintiff. Giggy testified that the case would likely close if the child was returned to plaintiff, but would remain open if the child remained with Intervener.

CPS outreach counselor Kathleen Keeder testified that her involvement in the case dated back to the probate matter. She received a referral in the probate case to work with plaintiff, Intervener, and the child to ease the child's transition from living with Intervener to living with plaintiff. Keeder observed numerous visits between plaintiff and the child. At the first visit, the child did not interact with plaintiff, saying things like " 'you're not my mom, I want to go home.' " Plaintiff tried to engage the child, showing an enormous amount of patience and empathy, but the child would not talk to or even look at plaintiff. Keeder categorized plaintiff's level of skill at these visits as "good" from the very start. They met weekly and, as the sessions continued, the child warmed up to plaintiff, becoming affectionate and engaging in activities. "[I]t seemed like a—a normal mother/child relationship the way they were playing together."

Keeder observed that the child would use the bathroom frequently during these visits and believed it was because Intervener was just outside the room where plaintiff was visiting with the child. The workers then asked Intervener to sit downstairs and observed that the child did not leave the room as frequently once she realized Intervener was not there. Intervener also canceled visits the child was to have with plaintiff on at least two occasions. In Keeder's estimation, Intervener was not interested in outreach services and refused visits Keeder planned to make to Intervener's

home; Intervener was "not cooperative at all." Keeder wanted Intervener to help the child prepare to the transition from one home to the other, but Intervener refused. In contrast, plaintiff welcomed Keeder into the home that plaintiff shared with her grandparents. The downstairs was a completely furnished apartment. The child would have her own room and the living arrangement was appropriate.

Keeder previously recommended terminating the guardianship because plaintiff was "at a place where she can take care of [the child], and [the child] does appear to have a bond with her mom and . . . they get along great together, and so I felt that it was time for [the child] to go back home to her mom." Keeder opined that plaintiff and the child "have a very good bond. I think Kristen loves her child very much and I think [the child] loves her very much." Because Intervener would not cooperate, Keeder never had a chance to see Intervener interact with the child.

Ongoing CPS caseworker Candace Stack testified that she became involved in October 2013 after the court-structured plan was put into place in the probate proceeding. Plaintiff had five drug screens between October 2013 and December 2013, all negative. Plaintiff had already started counseling by her own initiative and Stack was able to obtain their reports. Stack supervised visits with the child and plaintiff. At first, visits did not go well. The child was "standoffish" with plaintiff and would sit in the corner, saying, " 'You're not my mom, I hate you[.]' " Several of the visits were like that. Intervener had placed herself right outside the visiting room instead of sitting where other people were waiting. She would even sit on the floor. The child would ask to use the bathroom four or five times and Intervener would be right there. Intervener even once

waited in the bathroom. Stack asked Intervener if she could go run errands or wait downstairs. Intervener said she would go run errands if someone gave her a gas card. Stack asked Intervener two more times to please go down to the first floor. Eventually a security guard asked her to and she complied. But Intervener returned to the floor and had to be escorted by security. Intervener's teenaged daughter, AW, was also present during the visits.

Stack noticed that visits started to go well after Intervener was removed from the situation and plaintiff "was doing a fantastic job" interacting with the child. "I could see that she was a very loving, caring mother." Parenting time was expanded to visits at plaintiff's house on Saturdays. Intervener, who believed that expanded visitation went against the court's visitation order, was not cooperative in bringing the child for the visits. Intervener also objected to plaintiff's grandparents, Connie and Donald Falconer, acting as designees for supervised visits. Intervener told Stack that the child was "scared to death of Connie" because there was a high-speed chase that occurred when the child was an infant. Stack noted that the child was born in March 2008 and the alleged incident occurred in January 2009 when the child was less than a year old. The Falconers had no criminal record and were not on Central Registry.

Plaintiff was fully compliant with her structured plan and Stack had recommended that the guardianship end. Because Intervener would not cooperate, Stack never had the chance to visit Intervener's home or report who lived there. Stack reported Intervener's noncompliance to the probate court. Stack also observed Intervener with a black eye at a custody hearing.

Sheri Pancost testified that she was the child's therapist. Intervener had retained Pancost on July 3, 2013, prior to any court intervention, to help with the child's adjustment to seeing plaintiff. Pancost noted that the child looked to Intervener for reassurance and asked that Intervener be part of the first couple of sessions. The child reported that she wanted to live with Intervener and that she was unsure about visiting plaintiff. She was initially angry at plaintiff. Pancost continued to see the child weekly after the court became involved. On January 9, 2014, Pancost began joint sessions with the child and plaintiff at CPS's suggestion. By that time, the child had become more comfortable talking about plaintiff. Pancost observed that plaintiff interacted with the child "just the way you would expect most parents interact. She engages with her, talks to her." Pancost had no concerns about plaintiff's parenting ability. As the visits progressed, the child was increasingly able to show plaintiff love and affection. The child reported that she had fun with her cousins on plaintiff's side of the family, but was still uncomfortable with her great-grandparents. She thought they were a little "creepy" because they were so much older. The child reported that she missed her half-sister, whom we will refer to as "A."[4] The child also expressed fear of defendant in regard to one particular incident and did not discuss him nearly as much as the other people in her life. Pancost believed that the incident that caused the child to fear defendant was the reason that Intervener, AW, and the child had to stay in a hotel just before they moved into a new house. Pancost had the impression that even when they were living together, defendant's interaction with the child

[4] As will be discussed in further detail below, A was defendant's child with his former girlfriend Alaura Haueter.

was limited. The child reported that defendant would yell and spend a lot of time in his room.

Pancost opined that the child was capable of making a healthy adjustment to living with plaintiff. Pancost believed that the child would have adjustment problems if someone was saying negative things about plaintiff. Pancost believed that the child was not nice to plaintiff initially because the child was afraid she would have to move. The child was afraid that plaintiff would "leave [her] again," meaning leave her with people she was not comfortable with. Pancost indicated that this fear stemmed mostly from lack of interaction with the great-grandparents, but the child also referred to a "car chase." Pancost noted that the child "has a strong bond with [Intervener]. She feels really close to her and comfortable with her" and it would be traumatic for the child to lose all contact with Intervener, who was the stable force in her life. "[I]f she had visitations or something like that still, it might lessen that impact . . . ."

Clinical psychologist Dr. Randall Haugen testified that he evaluated the child on April 10 and 11, 2014. The child expressed ideas of being abandoned or lost and had a "vague sense of mother being unsafe." Haugen testified that the child's "presentation of the information was pretty adult-like." She repeatedly used the word " 'abandonment' " and said it was "bad," but could not tell Haugen what the word meant. Haugen noted that using the word abandonment, as the child did almost 40 times, was inconsistent with a child her age. Haugen believed the child was repeating some adult conversation. In terms of being conditioned, Haugen noted that the child's interpretation of events "seemed to be what she felt that grandma perceived also." Haugen warned that if the negative feelings

continued, it would impact the child's function: "Children in these situations over a long period of time are really prone to develop emotionally behavioral difficulties," and negative statements create "a lot of anxiety and apprehensiveness just about her basic sense of stability, who she is, where she's going to be in the future."

Haugen testified that, without regard to intent, the child had been groomed or conditioned either directly or indirectly by Intervener. The child perceived Intervener as "her psychological parent at this time," who met her needs. She had a more conflicted relationship with her mother because she perceived plaintiff as having abandoned her and as someone who "has a lot of problems and is really bad." The child did not believe that plaintiff's love for her was true love; she believed that the love she received at "home" was "real" love. The child said, " 'mommy is pretending.' " Haugen believed that Intervener's statements to the child that plaintiff was the biological mom but not the real mom were "undermining."

At the time of trial, plaintiff was 24 years old. Plaintiff testified that she was 17 and defendant was 15 when they began dating. Plaintiff was not getting along well with her step-mother and Intervener indicated that she would "love" for plaintiff to move in with them. At the time, plaintiff and defendant had been dating for approximately two months. Plaintiff described herself during that time as a "dumb, lovestruck teenager." She managed to graduate from high school in 2007, but defendant dropped out.

Plaintiff became pregnant with the child in July 2007. Plaintiff, defendant, and Intervener were living in Florida at the time. They returned to Michigan in August 2007. Plaintiff and Intervener lived in Grand

Rapids with one of Intervener's friends because they had no money and needed a place to stay while Intervener found a home. AW lived in Battle Creek with a friend, and defendant lived in Hastings. Eventually, Intervener found housing in Battle Creek and the group came back together. From December 2006 until the time of trial, Intervener had eight different residences. Plaintiff testified that, aside from the move from Florida back to Michigan, each move was the result of the failure to pay rent.

The child was born in March 2008.[5] Plaintiff stayed home with the child for three weeks but then went back to work as a waitress because the family needed money. Plaintiff testified that, at that time, Intervener helped take care of the child, but the primary childcare responsibility went to plaintiff.

Plaintiff testified that defendant moved down to Arizona in March 2010 to attend a mechanic's school. Plaintiff went down a month later to visit. Intervener and defendant decided that plaintiff should stay in Arizona in order to help defendant recuperate from shoulder surgery and to make sure that he did not drop out of school. Although she wanted to be with the child in Michigan, plaintiff wanted to make sure defendant graduated from the program so that he could begin contributing to the family's finances. The couple stayed in Arizona for approximately 16 months. They saw the child on visits and via Skype. During this time, plaintiff believed she had a "good" relationship with Intervener. She did not feel the need to delegate parental authority because she trusted Intervener. Plaintiff acknowledged that in the time she was in Arizona,

[5] Plaintiff explained that the child was given the last name of one of defendant's mentors because defendant did not want the child to have his biological father's last name.

"things had kind of turned a little bit" and Intervener had primary care of the child. Defendant finished his program in July 2011 and the couple returned to Michigan that summer. Plaintiff "had no idea" about the guardianship until she left the home in November 2012.

Plaintiff acknowledged that she began abusing drugs while living in Arizona. She began with the prescription drug oxycodone. When the couple moved back to Michigan, defendant started using heroin in December 2011 and plaintiff started using it in April 2012. Plaintiff began working as a dancer and admitted that she "wasn't parenting the way that I . . . should have . . . I wasn't in a good state to be a parent." She and defendant slept a lot and spent a lot of time in their room. Plaintiff deferred to Intervener when it came to the child's care. Plaintiff and defendant would fight when they ran out of money for drugs, which was nearly weekly. Intervener would take the child into another room and tell her that defendant "didn't mean to act like that." A number of times Intervener had to summon the police, but once they got there, Intervener would tell them that everything was fine, so plaintiff followed suit. In 2009, plaintiff attempted suicide one time by taking a number of aspirin: "Because Chadd had gotten into an argument with me and told me that I made everybody miserable, nobody wanted me around, [the child] didn't need me, [the child] didn't want me, and that I was a horrible person and that everybody hated me and . . . being treated like that on a daily basis gets to you."

Plaintiff testified that there was physical violence in the home, including pushing, kicking and hair-pulling. On one occasion defendant was at the top of the stairs and threw an old television at plaintiff, who was at the

bottom of the stairs. There was physical violence almost daily; Intervener was present for it and was also a victim. Plaintiff explained that the "littlest things" would upset defendant and "you never knew what was going to make him mad." Plaintiff had been pushed down the stairs and had her face stomped on. When plaintiff talked to Intervener about defendant's behavior, Intervener's response most of the time was to tell plaintiff that she needed to learn to "not make him so mad and it wouldn't happen."[6]

Plaintiff explained the "kidnapping" incident. Plaintiff tried to leave defendant in January 2009 and stayed with her grandparents for about a week. Plaintiff obtained an affidavit of parentage, thinking that she could take the child out of the Intervener's home. Plaintiff and her grandmother, Connie Falconer, went to Intervener's home, but the child was not there. Plaintiff and her grandmother waited until Intervener and defendant left the home and followed them. Plaintiff wanted the child to have a family, so she went back to Intervener's home shortly thereafter.

Plaintiff left Intervener's home once and for all in November 2012. Defendant confronted one of plaintiff's male friends by slashing one of his tires and running over his leg with a car. Plaintiff went to a friend's house and went through drug withdrawal. When plaintiff's new boyfriend became abusive in December 2012, plaintiff went to live with her grandparents. It was at that point that plaintiff decided to focus her efforts on finding stability. Plaintiff had recently become a certified nursing assistant at a long-term care facility. Plaintiff would ask Intervener to see the child, but Intervener made it difficult.

[6] Plaintiff's sisters also testified as to the abuse and plaintiff's alienation from her family.

Intervener did not allow plaintiff to see the child again until February 2013. Plaintiff applied for termination of the guardianship in April 2013. Intervener contacted plaintiff and told her that if she dropped the petition to terminate the guardianship, then plaintiff would be able to see the child at certain times, including unsupervised visits. Plaintiff was tempted to drop the petition, but did not.

Plaintiff acknowledged that the child had some negative emotions at first and initially refused to refer to plaintiff as "mom." Plaintiff also acknowledged that the child shared a very close bond with both Intervener and AW, whom the child referred to as her sister. Plaintiff was not opposed to the child seeing Intervener: "I don't think that she shouldn't be allowed any contact, but as long as Donna can show that she is not going to be harmful to [the child's] emotional wellbeing . . . and if she will be in support—actual support of [the child] and my relationship." Plaintiff further stated that she would be comfortable with Intervener having grandparenting time when she could "see from Donna that she's trying and that she's not—not trying to turn [the child] against me in any way, shape, or form."

Plaintiff testified that the child had a medical appointment that she wanted to attend. In the waiting room, Intervener turned to plaintiff and said that she did not need to come back to the room and was not wanted there. Intervener told plaintiff to wait in the waiting room. Plaintiff also testified to an incident in which Intervener gave her misinformation about a party that the child wanted to attend. Intervener also interfered with plaintiff's attempts to meet with the child's teacher, again telling plaintiff that she was not allowed in the school and was not wanted there.

Although plaintiff initially vehemently denied having recent contact with defendant, she later admitted to seeing him on a number of occasions since February 2013. Plaintiff allowed the child to talk to defendant on the phone and allowed her to see defendant after he hurt his head. Plaintiff admitted to staying overnight at defendant's on occasion. They were having sexual relations throughout the course of the case. But plaintiff still denied being in a relationship with defendant: "I was stupid and I am very ashamed for letting him get into my head. He absolutely made me believe that I needed him on my side and I was—I needed to do anything and everything possible to get [the child] out of a bad situation."

Plaintiff called Alaura Haueter as a witness. Haueter testified that defendant was her ex-boyfriend and father of her child, A, born in December 2013. Haueter began her relationship with defendant in October 2012 and moved in with defendant, Intervener, and AW in November or December 2012, just one month after plaintiff left the home. Haueter testified that there was domestic violence perpetrated by defendant against Haueter and Intervener. The abuse would take place as regularly as every other week and included "[p]unching, kicking, biting, pulling hair, anything he possibly could." Within two weeks of A coming home from the hospital, defendant gave Intervener a black eye. Intervener minimized defendant's behavior and would ask Haueter, " 'What did you do this time?' " The child was also present for some of the outbursts. Intervener would tell the child that defendant "was sick and that it was going to be okay and that he was going to fix himself . . . ." The child would cry and run and hide. Haueter testified that defendant kept Haueter from her family: "I never had a phone, I never had a way out. He had sold my car. He had never let me

talk to my family." Haueter tried leaving defendant on two separate occasions by having her sister come get her. Defendant convinced her to come back by promising to get counseling.

Haueter took advantage of the fact that the rest of the household was at court on January 13, 2014, to make her escape. Haueter called her sister and father to come and get her. Intervener came home while she was packing and told Haueter, " 'You're not going anywhere' " and asked, " 'Why are you doing this to our family?' " Intervener would not move out of Haueter's way, so Haueter ripped the shades off of the window and banged on the window to get her sister's and father's attention. Police officers arrived on the scene. Intervener proclaimed that she had done nothing wrong and that Haueter had not been held against her will.

Haueter was present during the home-invasion incident when defendant went to confront the man whom he believed stole marijuana and lamps from him. AW believed she knew who had taken the marijuana and lamps. Intervener, defendant, Haueter, and the child drove to where AW was. It was Intervener's idea that the child accompany the family to confront this individual. AW was trying to convince the individual to return her brother's items when defendant became upset and chased the individual into the house. Defendant knocked on the door and knocked on a window so hard that his hand went through it. The child was sitting on Haueter's lap inside the family's van. The child was upset because she thought defendant was going to die since he cut his arm. An ambulance was called and police questioned defendant at the hospital.

Haueter testified that the child was present when Intervener and defendant discussed plaintiff. They

described plaintiff to the child as "[s]omeone that she never really knew." They said that plaintiff "was a druggie and that she would never change because she has mental issues and that she doesn't know [the child] and she doesn't have the right to know [the child]."

Fifteen-year-old AW described the child as her little sister and favorite person in the world. AW did not observe any domestic violence in Intervener's home. If there was yelling, she, Intervener, and the child would leave. AW observed verbal fights between defendant and Haueter, but not as frequently as when defendant and plaintiff used to fight. AW saw defendant push past Haueter once when Haueter refused to leave him alone. AW never saw Intervener or defendant try and keep plaintiff from leaving the home.

The day Haueter left, AW was home sick from school with the flu. AW called her mom, who arrived as Haueter was packing her things. AW denied that Intervener did anything to keep Haueter from leaving, though she acknowledged that Haueter pulled the shade off of the window. AW denied that the police were involved. AW and Intervener now lived in a different house from defendant. AW denied that the move was prompted by anything other than wanting more space and because defendant was older. She denied that the child was afraid of defendant. AW never heard any negative comments about plaintiff.

In the middle of the proceedings, plaintiff filed a motion to modify temporary custody after it was revealed that the child placed calls to plaintiff and others in an attempt to recant what she previously told her therapist—that she had witnessed defendant's domestic abuse. AW was there when the child called plaintiff after being confronted about statements she made to Pancost. Intervener explained that defendant had

been at the house and returned a few minutes later after speaking with plaintiff on the phone. Apparently plaintiff let defendant know that the child had revealed that there was domestic abuse in the home to her therapist. Defendant returned to the home to see if it was true. Defendant was upset when he questioned the child about it. Intervener asked AW to take the child to her room. Intervener told defendant that the child did not reveal any abuse. Instead, plaintiff "was continuing to push his buttons, and that he needed to calm down and to think about the situation, and that was about it, and then he left." Intervener did not realize that the child had called plaintiff. The circuit court later ordered that defendant have no contact with the child pending resolution of the case. It declined plaintiff's motion to change temporary custody, even as the GAL noted: "This child is being told things, and this—this case is being discussed with her. She is being put in the middle of this. She is being pitted against her mother by calling her. This is harming this child."

On June 6, 2014, the matter was adjourned because the child's half-sister, A, had become ill and was in the hospital. The circuit court ordered that plaintiff's summer parenting time be accelerated and ordered that plaintiff could pick up the child from school at the end of the day to begin parenting time or, alternatively, if the child was with her sibling at the hospital, plaintiff was to begin summer parenting time at noon the next day. Intervener picked up the child from school that day. Staff informed her that plaintiff had called and said she was bringing paperwork that would allow her to take the child home. Intervener left before plaintiff arrived, explaining that "I didn't have time to worry about it" in light of the fact that she was on her way to the hospital in Grand Rapids to see A. Because the child was not allowed to have contact with defendant, Inter-

vener dropped the child off at her friend's home. Plaintiff went to the hospital, looking for the child but Intervener told plaintiff that the child was not with her and that she had no way of contacting the child. Intervener did not know the address for her friend, whom she had known for 15 years. Intervener did not provide the phone number because "I wasn't asked for it." Intervener denied knowing about the court order, but admitted, "She [plaintiff] tried to hand me a piece of paper when she first got there, but I was already walking out." Intervener admitted she had spoken with her own attorney an hour before seeing plaintiff at the hospital.

Intervener testified that the child calls her "Mimi" and never referred to her as "grandma." Intervener denied doing anything to negatively impact the relationship between plaintiff and the child, stating, "The mother has done that all by herself."

Intervener testified to the number of times plaintiff was absent from the child's life, including when she was in the hospital for a week when the child was six months old after attempting suicide. Plaintiff left for Arizona on two separate occasions. Intervener had flown plaintiff and defendant home for Christmas and Intervener expected plaintiff would stay, but she decided to go back with defendant. While Intervener believed plaintiff abandoned the child, she did not believe defendant had abandoned the child.

Intervener denied ever trying to keep plaintiff or Haueter from leaving her home. In fact, she "wanted them out, both of the girls" after she "saw what they had become and what they were doing." Intervener claimed that she was actually helping Haueter carry her things out to the car, but also acknowledged that the police were there. Intervener denied that there was

any domestic violence between defendant and plaintiff. "There was yelling, absolutely, throughout the course of their relationship. But I'm not sure of a relationship that doesn't have yelling. But I never saw any physical violence." Intervener denied there was ever any domestic violence against her. "In the past, when my son was 14 or 15, he got out of hand with me and I called the police and had him arrested. Has he raised his voice at me? Yes, he has. Do I put up with it? No." Intervener always makes sure AW and the child are away from the house when defendant is upset. Intervener attributed her black eye in January 2013 to a fall on the ice. She denied that they had to move because of an incident at AW's school with defendant. She explained that defendant arrived at the school upset, though she could not remember why—"[t]hat's how trivial it was." Intervener did not see any reason why the child would be afraid of defendant.

Regarding the home-invasion incident, Intervener testified that defendant "went to keep someone for the police, keep someone from leaving the state until the police got there when someone broke into the shed." Intervener was the one that called the police on their way there. "It was not supposed to be any physical altercation, whatsoever." The child was in the car playing for the hour it took police to arrive on the scene. She did not witness defendant getting hurt. "There were no safety issues at all." "I didn't put [the child] in that situation. [The child] was just in the vehicle."

Intervener denied knowing anything about the road-rage incident or speaking to officers. Defendant told her that someone had cut him off and that his shirt got caught on the windshield wiper.[7]

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[7] This was in stark contrast to the testimony of Battle Creek Police Officer Tonya Wilt. Wilt testified that she responded to an incident on

Regarding the high-speed chase, Intervener testified that plaintiff "ran off" with someone and came back a week later to take the child. The child was not home. Plaintiff and Connie Falconer waited until Intervener and defendant left the house and then "began to chase us." The police ordered plaintiff to stop and leave them alone. Plaintiff moved back in with Intervener a week later.

Intervener admitted to sitting in the hallway and the bathroom, but believed prior testimony was "embellished" and that "Ms. Stack was very combative with me the entire time . . . ." Intervener only lived a few minutes from where the two-hour visits were taking place, but decided to stay in order to read the Bible. She did not think she should have to spend money on gas to go back and forth.

Intervener testified that she was cooperative with CPS and it was the CPS workers who refused to return her phone calls. She denied changing any appointments. Intervener still remained uncertain as to what CPS's concerns were. Intervener did not believe the child needed protection from defendant. "I don't agree that [defendant] would ever do anything to hurt his

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February 9, 2013, involving the malicious destruction of property to a vehicle. The victim provided a license plate number that led Wilt to Intervener's home. Intervener described the incident to Wilt and indicated that the other driver stopped abruptly and almost killed them. She told Wilt that the other driver spat on defendant and threatened him with a gun. The windshield wiper was torn off when defendant's jacket got caught on it. Intervener led Wilt to believe that she had no way of contacting defendant. She offered to pay the damages. Wilt testified that contact with Intervener was "odd": "just, you know, her changing of statements and stuff like that. Changing from Mr. Meyers being her son . . . to not knowing him, to him being a juvenile, when originally she had advised that he was in his twenties, I believe. I don't—didn't remember all of that, you know, offhand, but I—like I said, I just remember them being odd." Wilt had considered referring Intervener to the prosecutor for giving false information.

daughter, absolutely not." Intervener stated, "I never failed to protect [the child] from anybody." She added, "That's what I'm trying to do now."

Intervener had followed the order that prohibited defendant from having contact with the child though she did not see the child at risk with defendant. Prior to that, the child saw defendant at least three or four times a week. Intervener believed defendant was fit to raise the child, but then clarified that there was a difference between "fit" and "ready" and defendant was not ready. This was in contrast to a letter she filed in the probate court, begging the court for help in finding out how defendant could apply for custody of the child without an attorney.

Intervener testified that plaintiff was not ready to take care of the child but did not deny there was the potential for plaintiff to provide care and custody in the future. She believed plaintiff still needed to learn "how to tell the truth, learning right from wrong, learning not how to be manipulated by other people." Intervener added that plaintiff continued to use drugs. Although Intervener was confronted that there was no proof of plaintiff's alleged continued drug use, Intervener testified, "No, but I—somebody will—it will get testified to. Some person who has proof will testify to it before the day is over, sir."

Intervener denied influencing the child. "[The child] knows these proceedings are going on. As everybody has told you, she is an extremely intelligent child. Have I dwelled on or told her her mother was a bad mother, absolutely not." All that Intervener told the child was that plaintiff believed she was capable of taking care of the child and "wanted [the child] to come live with her . . . ." Intervener denied interfering with plaintiff's attempt to have a relationship with the

child. Intervener talked to the child about the importance of having her parents in her life. The child reported that plaintiff would yell at her. "And you know, we talk about different kinds of parenting skills and—and, you know, that possibly—hopefully Kristen will be getting more help with her parenting skills, you know. And that as long as she felt safe, that you know, people have different types of parentings skills." Intervener testified that claims that she was attempting to sabotage the relationship was "just not the truth." "I have been there since day one for all of them—all of them; these two included, and would love nothing better than to have a peaceful relationship with all of them."

The child's GAL questioned Intervener about any efforts she might have made to facilitate the child's relationship with plaintiff:

> *Q*. How have you fostered a relationship between Ms. Falconer and [the child]?
>
> *A*. [The child] and I have had talks about both of her parents getting sober and that they are continuing to get the help they need.
>
> *Q*. That's how you foster that relationship?
>
> *A*. By talking to her? Yes, we talked about it all—yes.
>
> *Q*. I—I . . .
>
> *A*. And that she's making an effort . . .
>
> *Q*. You . . .
>
> *A*. . . . to try to be a better parent.
>
> *Q*. Okay.
>
> *A*. *And maybe one day she will be*.

When confronted by the GAL's questioning regarding why Intervener would have left the child in plaintiff's care when Intervener knew she was using drugs,

Intervener lashed out: "I shouldn't have left her with her mother? Yes, *that was a bad decision to let her mother try to be a mother. And I'm trying not to make that decision again and I'm hoping the Court won't.*" And during another exchange with the GAL about her willingness to cooperate with plaintiff, Intervener stated as follows:

> *Q*. You're not going to cooperate with Ms. Falconer about anything are you?
>
> *A*. What are you talking about?
>
> *Q*. Her simply trying to hand you a piece of paper, you're not going to cooperate with that, are you?
>
> *A*. How about me getting my Father's Day visit, is she going to cooperate with me?
>
> *Q*. And—and . . .
>
> *A*. Yes, absolutely, I would love to cooperate with Ms. Falconer if she could quit telling lies long enough to cooperate.

Intervener denied ever being evicted since caring for the child, even in the face of documents to the contrary. She testified that she never saw the documents or that the claims had been "taken care of." Intervener also downplayed an arrest for retail fraud at Meijer regarding a prescription. She denied stating on Facebook that plaintiff " 'has some serious mental issues' " and was " 'trying to legally remove [the child] from my home . . . .' "

Although Intervener testified that she had no objection to having her psychological evaluation released, it never was.

Defendant testified that he and plaintiff were "off and on" during the proceedings and had spent nights together. They stopped speaking in June 2014. Defendant last used heroin in April with plaintiff; they had

used heroin together at least six times in 2014. Defendant admitted that his relationship with plaintiff was a "cat and mouse game." He knew she had used heroin and could use that against her, while she was in a position to cause trouble with Haueter, with whom he was seeking to reconcile. Defendant's last contact with plaintiff was "when she decided that when my five-month-old was just waking up out of surgery that she needed to come up to her room to cause a commotion over a court paper."

Defendant denied any domestic violence with plaintiff: "[W]e've had our horrible fights, just like I would assume any other couple has had. But I've never sat there and just, I mean, Mohammad Ali went crazy on her or anything like that." Defendant denied seeing Intervener coach the child.

Defendant was combative and hostile during cross. Defendant denied receiving any of the pleadings in the guardianship proceeding. He supported his mother in her resistance to terminating the guardianship and did not see a reason to be involved. Even now, he did not fight for custody because he was "not fit at this time" and wanted to allow "someone that I have seen raise [the child] her entire life continue to raise her until I am ready or Kristen is ready." He admitted to a 2009 conviction for interfering with a communication with Intervener; he claimed that the phone just died. Defendant was charged with assault and malicious destruction of property for a November 18, 2012 incident with plaintiff's friend, but that was "dropped" when no one appeared at court. Defendant constantly indicated that he did not remember things, adding "I'm sorry, I have a lot going on right now if you haven't noticed." Defendant claimed he did not remember the road-rage incident. He had also "blocked out" the home-invasion incident.

During closing arguments, plaintiff's attorney noted that Intervener was attempting to sabotage plaintiff's relationship with the child. Counsel added that Intervener "does not have an independent right to grandparenting time. . . . [T]here's a . . . claim in which she could file to seek that, but it's not this. This is a custody case." The GAL likewise noted, "I would recommend that any parenting time with the grandmother be at the mother's discretion[.]" The GAL further noted that the circuit court should not even bother with an in camera interview of the child, in light of the grooming. The circuit court nevertheless interviewed the child.

D. THE CIRCUIT COURT'S DECISION

The circuit court first commented on the witnesses' testimony. It found that plaintiff was not entirely forthcoming in that plaintiff initially denied seeing defendant during the proceedings. The circuit court found that Intervener lied about some things, but nevertheless accepted some of Intervener's testimony as credible. Regarding defendant, the circuit court noted: "listening to his testimony, or lack thereof, as well as considering his demeanor . . . , the Court totally discounts and rejects his entire testimony . . . . [B]ased upon the testimony and his actions, the Court believes that in fact there just was no truthfulness in this testimony and I completely reject it." The circuit court admonished plaintiff that further contact with defendant "could prove to be disastrous to you."

The circuit court cited MCL 722.25(1), *Heltzel v Heltzel*, 248 Mich App 1; 638 NW2d 123 (2001), and *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009), for the notion that there is a presumption that placement with the natural parent is in the child's best interests absent clear and convincing evidence other-

wise. It also cited *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000), for the notion that a natural parent has a fundamental liberty interest in caring for his or her child. The circuit court concluded, therefore, that Intervener had the burden of showing by clear and convincing evidence that the child should be placed with Intervener. It then proceeded to analyze the best-interest factors in MCL 722.23 of the CCA.

The circuit court found the parties on equal footing as it related to Factor (a)—the love, affection, and emotional ties the child had with the parties.

As for Factor (b)—the capacity and disposition of the parties to give the child love, affection, and guidance, the circuit court noted that the factor favored plaintiff:

> As it relates to guidance, the—Ms. Weddington had allowed her son and the Plaintiff in her home to engage in sexual relations during the time that they were minors resulting in the birth of this child. She's allowed them in both—in her house as well when they were both engaging in drug use, when she knew that, when she had in essence two minor children in the household.
>
> Additionally, Ms. Weddington took [the child] [during the home-invasion incident]. And basically, when she was questioned extensively . . . she showed a total lack of judgment as to how this could have been a dangerous situation for [the child].
>
> As a result—and for other reasons as well—the Court will find that this factor . . . does favor the Plaintiff Mother.

As to Factor (c)—the capacity and disposition of the parties to provide the child with food, clothing, medical and other remedial care—the circuit court concluded that Intervener's insistence on continuing to help defendant with his rent affected her ability to provide for the child and, as such, there was a "slight" advantage to plaintiff.

As for Factor (d)—the length of time the child has lived in a stable satisfactory environment and the desirability of maintaining that environment—the circuit court concluded that Intervener's many moves and the lack of safety caused it to "slightly" favor plaintiff.

As for Factor (e)—the permanency as a family unit of the existing and proposed homes—the circuit court found the factor equal.

As for Factor (f)—the moral fitness of the parties—the circuit court noted that "neither party has an exemplary history as it relates to this factor." It noted, however, that Intervener's behavior of pandering to or condoning defendant's behavior caused it to "slightly" favor plaintiff.

As for Factor (g)—the mental and physical health of the parties—the circuit court found that the factor "slightly" favored plaintiff.

As for Factor (h)—the home, school, and community record of the child—the circuit court found that the factor favored plaintiff.

As for Factor (i)—reasonable preference of the child—the circuit court noted that it spoke to the child, who was clearly impacted by the proceedings. "And sometimes kids of that age come in and are just simply maybe somewhat apprehensive of the—of the Judge, or not knowing what's going to happen, but you could see that [the child] was impacted by these proceedings. But she was very pleasant, very thoughtful, and she did express a preference, and the Court is considering that preference in this particular matter."

As for Factor (j)—willingness and ability to facilitate and encourage a close and continuing relationship—the circuit court had a lot to say:

In this particular matter, the testimony was that Ms. Weddington, when the Plaintiff went to the doctor's office, that Ms. Weddington told her to wait in the lobby. Ms. Weddington told the Plaintiff that—when she was at school that she was not welcome at school. She told her she wouldn't be able to—she wouldn't be able to get a report card without a court order, and she—Ms. Weddington objected to having the maternal grandparents supervise any parenting time.

And the Court, likewise, believes as it relates to this issue of the car chase, there was this car chase in which she basically characterizes it [as] a car chase, the Court doesn't—believes that they were followed, but the Court doesn't believe that it was a car chase in this particular matter. And *I think that the way that Ms. Weddington has approached a number of things in this matter have in fact impacted the way that* [*the child*] *views her mother in this particular case.*

Ms. Haueter testified that Ms. Weddington and the Defendant discussed the Plaintiff in front of [the child] and the—basically *the only reason for such conduct would be to alienate the child from the parent*.

Ms. Weddington is likewise—has a—a Facebook post that she admitted to, stating that [the child] was living with a stranger and at a stranger's home and feeling so sad. In this particular case, at some point, the child would be able to view that and see that, and that *is not conducive to establishing a parent/child relationship.*

Additionally, when Ms. Weddington was questioned by [the GAL] back on June 18th as to whether she credited Plaintiff with any improvement, Ms. Weddington would not acknowledge that she had improved her life in any way. She wouldn't even acknowledge the improved housing, the stable job, and she wouldn't acknowledge that the Plaintiff had in fact gained control of her drug issues; notwithstanding the fact that she had had a number [of] negative drug tests.

These statements and conduct *belie any ability on behalf of Ms. Weddington to establish and continue a parent/child relationship between* [*the child*] *and the Plaintiff mother.*

> So as a result, the Court will find that that factor does favor the Plaintiff mother.

As for Factor (h)—domestic violence—the circuit court noted that there was no evidence that plaintiff had been involved in any domestic violence whereas "there was voluminous testimony" that defendant had. The circuit court concluded that the factor favored plaintiff:

> I would state that Ms. Weddington did not commit any domestic violence, but she had allowed that to continue in the home, and notwithstanding the fact that she would take the child and have the child removed by her own statements and by the statements of [AW], the testimony of Ms. Haueter was that [the child] would cry and hide during these bouts when they occurred in the home.

And finally, as for Factor (i)—any other factors the court deems relevant—the circuit court noted:

> In this case, when grandmother was asked about Mr. Stamps, she acknowledged that he gets angry, he has a temper, that there's a history of bad decisions concern—and I state based on what I've seen, there's a history of bad decisions concerning her son—that she's simply blinded to his faults, his bad behavior, and his conduct.
>
> And the Court is also concerned about Ms. Weddington's total and complete lack of objectivity when it comes to her son in this matter . . . .

Intervener having failed to meet her burden by clear and convincing evidence, the circuit court ruled that plaintiff would have custody of the child.

The circuit court did not end its inquiry, however. It indicated that "there are other issues the Court has to decide. Those other issues concern grandparent visitation." It addressed the factors in MCL 722.27b(6)(a) through (j).

The circuit court concluded that Factor (a)—the love, affection, and other emotional ties existing between the grandparent and the child—favored grandparent visitation.

The circuit court also concluded that Factor (b)—the prior relationship between the grandparent and the child—also favored visitation.

The circuit court found that Factors (c) and (d)—the grandparent's moral, physical, and mental fitness—weighed against visitation.

The circuit court considered the child's reasonable preferences under Factor (e).

As for Factor (f)—the effect on the child of hostility between the grandparent and the parent—the circuit court noted:

> It does appear that the parties have been able to in fact get along somewhat as it relates to the exchanges, et cetera, and as a result the Court will find that in fact, hopefully, the parties can get past any animosity they have when this case is concluded, but the Court will find that that factor does favor grandparenting time.

As for Factor (g)—willingness of grandparent to encourage a relationship with the parent—the circuit court concluded that, for the same reasons set forth under the similar custody factor, Factor (g) did not favor visitation.

As for Factor (h)—allegations of abuse—the circuit court did not give the factor weight even though Intervener had been substantiated for neglect.

As for whether plaintiff's decision to deny grandparenting time was motivated by something other than the child's best interests under Factor (i), the circuit court concluded that it did not feel that plaintiff acted

out of ill will "but the Court does find that in fact it would adversely affect the minor child if this contact was cut off."

Finally, the circuit court gave "substantial[]" consideration to Factor (j), which was "any other factor relevant to the physical and psychological well-being of the child." The circuit court noted that the child had come to depend upon Intervener. The circuit court concluded that "the grandmother has met the burden by a preponderance of the evidence that in fact it would be a—the child would be placed at substantial risk of harm to the child's mental, physical, and emotional health if in fact that contact is cut off."

On August 11, 2014, the circuit court entered the final order for child custody. The order granted plaintiff sole physical and legal custody of the child. Defendant's parenting time remained suspended and Intervener was granted standard parenting time for a noncustodial parent. The circuit court denied plaintiff's motion for reconsideration. Plaintiff now appeals as of right.

II. ANALYSIS

A. STANDARD OF REVIEW

As recently set forth by this Court:

> Orders concerning grandparenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. Issues of statutory interpretation are questions of law. Questions of law are reviewed for clear legal error. Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law. [*Varran v Granneman (On*

Remand), 312 Mich App 591, 617; 880 NW2d 242 (quotation marks, citations, and brackets omitted).]

B. PROCEDURAL ERROR

This case is a custody dispute between plaintiff, who is the child's biological mother, and Intervener, who is the child's paternal grandmother. Intervener had provided the child with an established custodial environment for a number of years before the custody hearing. Generally, a "court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). However, a natural parent has a fundamental liberty interest in the care and custody of her child. *Hunter*, 484 Mich at 257. To that end, MCL 722.25(1) provides:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or 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.

Our Supreme Court has held that the parental presumption in MCL 722.25(1) controls over the conflicting presumption favoring an established custodial environment in MCL 722.27(1)(c). *Hunter*, 484 Mich 263-264; see also *Heltzel*, 248 Mich App at 26-28. This is because "the parental presumption has some constitutional provenance, whereas the custodial environment presumption has none." *Hunter*, 484 Mich 272. The Court explained:

> The importance of the family and the essential, basic, and precious right of parents to raise their children are well established in United States Supreme Court jurisprudence. This right is not easily relinquished. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Therefore, to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures. [*Id*. at 257 (quotation marks and citations omitted).]

The Court further explained:

> *Troxel* explicitly requires courts to give some deference to a parent's decision to pursue custody because it is inherently central to the parent's control over his or her child.
>
> By contrast, unlike the parental presumption in MCL 722.25(1), no constitutional protections for third persons underlie the established custodial environment presumption in MCL 722.27(1)(c). This Court has held that no constitutional or statutory basis exists for third parties to have standing to seek child custody solely because they have an established custodial relationship with the child. [*Id*. at 263.]

Absent a statutory requirement to the contrary, the parental presumption does not even require a threshold determination of parental fitness. *Id*. at 268. That is because "a natural parent's fitness is an intrinsic component of a trial court's evaluation of the best interest factors in MCL 722.23." *Id*. at 270. The best-interest factors that require a trial court to consider a parent's "moral fitness" and "mental and physical health" "reflect the legislative determination that concerns about parental fitness are of paramount importance in custody determinations." *Id*. at 270-271. Therefore, in a custody dispute between a natural parent and a third party, it is presumed that the child's

best interests are served by being placed with the natural parent unless the third party can demonstrate otherwise by clear and convincing evidence. A custody proceeding necessarily involves an inquiry as to the fitness of the competing parties, utilizing the best-interest standards set forth in MCL 722.23.

An action for grandparenting time, unlike custody, is simply a different cause of action altogether. Here, in granting plaintiff full physical and legal custody, the circuit court methodically considered the child's best interests under MCL 722.23 and concluded that Intervener failed to meet her burden of showing by clear and convincing evidence that the child's best interests would have been served by placing the child in Intervener's care. Necessarily included in that decision was the circuit court's tacit finding that plaintiff was a fit parent. Whereas a custody case involves an inquiry as to parental fitness, a proceeding under the grandparent visitation statute *presumes* parental fitness. Absent a challenge to the circuit court's custody decision, it is presumed that plaintiff is a fit parent and "there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 US at 68 (opinion by O'Connor, J.).

The United States Supreme Court has declared that "the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Id*. at 70. *Troxel* struck as unconstitutional a Washington statute that permitted *any* person to at *any* time to seek visits with a child if such visits were in the child's best interests because a fit parent's

decision was accorded no deference under the statute. *Id*. at 67; *id*. at 75-77 (Souter, J., concurring in judgment). Similarly, in *DeRose v DeRose*, 469 Mich 320, 333-334; 666 NW2d 636 (2003), our Michigan Supreme Court struck as infirm the prior version of MCL 722.27b because "[t]here is no indication that the statute requires deference of any sort be paid by a trial court to the decisions fit parents make for their children" and "fails to require that a trial court accord deference to the decisions of fit parents regarding grandparent visitation . . . ."

Our current grandparenting-time statute now affords such deference. A child's grandparent may seek a grandparenting-time order where, as here, "[i]n the year preceding the commencement of an action under [MCL 722.27b(3)] for grandparenting time, the grandparent provided an established custodial environment for the child as described in [MCL 722.27], whether or not the grandparent had custody under a court order." MCL 722.27b(1)(f). The grandparenting-time statute also sets forth the procedure for bringing the issue of grandparenting time before the court. Where, as here, the "circuit court has continuing jurisdiction over the child" because of the custody proceeding, "the child's grandparent *shall* seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction." MCL 722.27b(3)(a) (emphasis added). Additionally, the motion "shall be accompanied by an affidavit setting forth facts supporting the requested order." In turn, the party having legal custody may file an opposing affidavit. MCL 722.27b(4)(a). "A hearing shall be held by the court on its own motion or if a party requests a hearing. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard." *Id*.

However, because "[a] parent has a fundamental right, one that is protected by the Due Process Clause of the Fourteenth Amendment, to make decisions concerning the care, custody, and control of his or her child. It cannot be disputed that a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of a child." *Varran*, 312 Mich App at 605 (citations omitted). Therefore, our Legislature has provided:

> In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion. [MCL 722.27b(4)(b).]

Our Court has recently upheld a constitutional challenge to this statute, holding that the statute "does not allow a trial court to grant grandparenting time simply because it disagrees with the parent's decision" and "thus abides by the *Troxel* deference requirement." *Varran*, 312 Mich App at 612. The Court further held that, because due process concerns are not at their highest in cases involving requests for grandparenting time, "the requirement that grandparents, in order to rebut the presumption given to a fit parent's decision, prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child is sufficient to protect the fundamental rights of parents." *Id*. at 615.

Here, the circuit court conflated what should have been two separate and distinct actions—the custody determination and the grandparenting-time determination. It first concluded that plaintiff was entitled to custody of the child based on Intervener's failure to show by clear and convincing evidence that the child's best interests were not served by placing the child with plaintiff. However, the circuit court sua sponte continued that "there are other issues the Court has to decide. Those other issues concern grandparent visitation." It then plowed ahead and addressed the factors in MCL 722.27b(6), which provides:

> *If the court finds that a grandparent has met the standard for rebutting the presumption described in* [*MCL 722.27b(4)*], the court shall consider whether it is in the best interests of the child to enter an order for grandparenting time. If the court finds by a preponderance of the evidence that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. In determining the best interests of the child under this subsection, the court shall consider all of the following:
>
> (a) The love, affection, and other emotional ties existing between the grandparent and the child.
>
> (b) The length and quality of the prior relationship between the child and the grandparent, the role performed by the grandparent, and the existing emotional ties of the child to the grandparent.
>
> (c) The grandparent's moral fitness.
>
> (d) The grandparent's mental and physical health.
>
> (e) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.
>
> (f) The effect on the child of hostility between the grandparent and the parent of the child.

> (g) The willingness of the grandparent, except in the case of abuse or neglect, to encourage a close relationship between the child and the parent or parents of the child.
>
> (h) Any history of physical, emotional, or sexual abuse or neglect of any child by the grandparent.
>
> (i) Whether the parent's decision to deny, or lack of an offer of, grandparenting time is related to the child's well-being or is for some other unrelated reason.
>
> (j) Any other factor relevant to the physical and psychological well-being of the child. [Emphasis added.]

While the circuit court carefully considered the best-interest factors under the grandparenting-visitation statute, MCL 722.27b(6), separately from its previous best-interests determination on custody, MCL 722.23, it nevertheless committed error by even considering the issue of grandparent visitation. Importantly, plaintiff received custody of the child just moments before the circuit court's decision on grandparenting time and, therefore, plaintiff had not denied Intervener grandparenting time. See MCL 722.27b(4). The circuit court, in rendering an opinion on grandparent visitation absent a request to do so, effectively jumped the gun and presumed that plaintiff would unreasonably deny Intervener grandparenting time. But plaintiff testified that she was amenable to visitation as long as Intervener did nothing to sabotage plaintiff's relationship with the child.

Additionally, "[b]ecause a grandparenting-time order overrides a parent's legal decision to deny grandparenting time, a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child." *Varran*, 312 Mich App at 605-606. As previously stated, the primary issue in a custody proceeding is markedly different from the primary

issue in a grandparent visitation proceeding. In the former, the trial court must determine the relative fitness of the parties and the child's best interests. In the latter, the parent's fitness is presumed and it is incumbent on the grandparent to show by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. The circuit court, by granting Intervener grandparenting time absent a request to do so, deprived plaintiff of the opportunity to argue that Intervener had failed to rebut the presumption that plaintiff's decision did not create a substantial risk of harm. In fact, the circuit court failed to indicate that it was even taking the presumption into consideration. Plaintiff was also denied the opportunity to address the best-interest factors set forth in the statute. "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 US at 72-73 (opinion by O'Connor, J.).

Also of critical importance was the fact that the custody proceeding was not conducted in such a way as to elicit whether the child would suffer mental, physical, or emotional harm if grandparent visitation was denied. Instead, the focus was on the child's physical placement. True, there was testimony that the child, who had lived with Intervener her entire life, was strongly bonded to Intervener and that a total denial of contact with Intervener would be potentially harmful. But the evidence also clearly demonstrated that the child's transition from Intervener's home to plaintiff's home was made unnecessarily difficult as a result of Intervener's behavior. Thus, even assuming that Intervener could successfully rebut the presumption, the

record would need to be developed to determine just exactly how grandparent visitation (or lack thereof) would impact the child. By the same token, assuming that continued visits would be permissible after such an inquiry, the parties should at least have some input into exactly what "reasonable grandparenting time" should be. MCL 722.27b(6).

Contrary to the circuit court's approach, a request for grandparenting time is not automatically included in a third-party request for custody. We, therefore, vacate that portion of the circuit court's order that granted Intervener grandparenting time where the issue of grandparent visitation was not properly before the circuit court.

While this would generally end our inquiry, considering the numerous errors below, we make additional observations in the event Intervener brings a proper motion before the circuit court.

C. INTERVENER'S FAILURE TO OVERCOME THE PRESUMPTION

Assuming that the matter was properly before it, the circuit court nevertheless erred by permitting grandparenting time where Intervener failed to overcome the presumption that plaintiff's "decision" to deny grandparenting time did not create a substantial risk of harm to the child's physical, mental, or emotional well-being.

Because grandparenting time was not an issue at the custody hearing, the presumption was never discussed. While it may be possible that Intervener could prove that failure to allow visits would create a risk of harm to the child at some future proceeding, the record, in its present form, does not support the circuit court's actions. The record reveals that although there is support for the child having continued contact with

Intervener, with whom she had lived her entire life, there is also evidence that Intervener's continued involvement in the child's life was potentially detrimental to the child's transition to plaintiff's home and, therefore, the child's overall well-being.

Intervener's disapproval of plaintiff exercising her parental rights was obvious, even as far back as the probate proceeding. Intervener's first two annual court reports revealed that the child and plaintiff loved one another and saw each other frequently. It was only after plaintiff moved to terminate the guardianship and a court-structured plan was in place that Intervener suddenly changed the tone of her annual report: "[The child] loves being with her dad! She grows more fond every day. She is completely not interested/reluctant to see her mother. She cries every time!" Intervener reported that while "[m]other attends 2 hour meeting/visit once a week with [the child], [the child] does NOT enjoy, is very sad + disheartened by each visit. [The child] should not be forced to have a relationship with her mother until ready! [The child] should continue counseling + perhaps Miss Falconer could begin attending. [The child] has been abandoned by her mother 5 times + she is reluctant and afraid." Intervener requested that the guardianship continue because "the father would like to file for full custody but does not yet have funds to hire attorney." By all accounts except for her own, Intervener made visits as difficult as possible, objecting to DHHS's designee for supervised visits and canceling or rescheduling appointments. She would sit outside the visitation room or camp out in the bathroom down the hall. Even when advised that her actions were interfering with the child's visits, Intervener refused to comply with requests that she leave the area and only left after security guards got involved.

Intervener's behavior was such that Candace Stack noted:

> [The child's] emotional well-being is being jeopardized living with Donna Weddington. Ms. Weddington has thwarted any and all efforts of reunification between the child and her mother. It is believed that Ms. Weddington is feeding negative thoughts to [the child] about her mother, Kristen Falconer, instead of being supportive of the relationship. It is a travesty that this reunification period has not been more successful, but it is this worker's opinion this is solely due to Ms. Weddington's attitudes and actions. This worker does not anticipate that Ms. Weddington will ever support the reunification of [the child] and her mother.

Similarly, the child's GAL in the probate proceeding noted in a report:

> It is this writer's opinion that Donna Weddington is so desperately afraid of losing custody of [the child] that she grasps at any straw in the attempt to prevent termination of the guardianship. It is further my belief that Donna Weddington continues to attempt to undermine this process by coaching the minor.

The lack of cooperation continued (and actually got worse) once CPS opened a case against Intervener and defendant in January 2013. The case was originally opened due to defendant's criminality and domestic violence, as well as Intervener's failure to protect the child. Workers were concerned that Intervener took the child with her when she and defendant went to confront one of defendant's "friends" over some stolen items. Defendant was badly injured during the incident when he broke through a glass window. The child was present and was upset. Intervener failed to see that such behavior placed the child at risk. There was also evidence that Intervener allowed the child to be exposed to defendant's domestic violence. Intervener

excused defendant's behavior. Intervener's "enabling" behavior caused the GAL in the circuit court proceeding to note:

> Unfortunately, Ms. Weddington—she loves her son, obviously, and she's going to protect him, and she's been there for him. But she's been there for him too much. She needs to stop protecting him and lying for him. And hopefully, she will find a way to do that, but she is enabling him, and it's a concern of mine.
>
> If this child were to continue to be placed in the custody of Ms. Weddington, I, as the Guardian Ad Litem would find it necessary to file a neglect petition myself. I—I feel that strongly about it.

At the time of the custody trial, Intervener expressed confusion as to why the workers were concerned for the child. Intervener did not believe the child needed protection from defendant. "I don't agree that [defendant] would ever do anything to hurt his daughter, absolutely not." She added, "I never failed to protect [the child] from anybody," and "[t]hat's what I'm trying to do now," implying that the child needed protection from plaintiff in spite of the probate court's order that the guardianship be terminated and the child be returned to plaintiff's care.

The child's therapist, Sheri Pancost, opined that the child was capable of making a healthy adjustment to living with plaintiff. The child revealed that she was afraid that plaintiff would "leave [her] again." Pancost indicated that this fear stemmed mostly from lack of interaction with the great-grandparents up to that point, but also from the "car chase." The child, who was an infant at the time of the alleged chase, could not have possibly remembered the incident. Pancost definitely believed that if someone was saying negative things about plaintiff, that would be a problem for the

child's adjustment. Pancost noted that the child "has a strong bond with [Intervener]. She feels really close to her and comfortable with her." Pancost believed it would be traumatic for the child to lose all contact with Intervener, who was the stable force in her life, but "if she had visitations or something like that still, it might lessen that impact . . . ." Pancost's testimony falls far short of opining that plaintiff's "decision" to deny grandparenting time[8] created a substantial risk of harm to the child's physical, mental, or emotional well-being.

Dr. Randall Haugen testified that the child had clearly been groomed, either intentionally or unintentionally. Haugen noted that the child's interpretation of events "seemed to be what she felt that grandma perceived also." Haugen warned that if the negative feelings continued, it would impact the child's function. He testified that "[c]hildren in these situations over a long period of time are really prone to develop emotionally behavioral difficulties," and negative statements create "a lot of anxiety and apprehensiveness just about her basic sense of stability, who she is, where she's going to be in the future." Haugen noted that the child perceived Intervener as "her psychological parent at this time," who met her needs but that the child had a more conflicted relationship with plaintiff because she perceived plaintiff as having abandoned her and as someone who "has a lot of problems and is really bad." The child told Haugen that she did not believe that plaintiff's love for her was true love; she believed that the love she received at "home" was "real" love. The child said, " '[M]ommy is pretending.' " Haugen opined that Intervener's statements to the child that plaintiff

[8] Again, because grandparent visitation was not an issue at the custody trial, there was no decision to deny parenting time.

was the child's biological mom but not her real mom were "undermining." Again, Haugen fell far short of opining that plaintiff's "decision" to deny grandparenting time created a substantial risk of harm to the child's physical, mental, or emotional well-being.

It is clear beyond the shadow of a doubt that the child is well bonded to Intervener and has looked to her for care for many years. However, it is just as clear that the lower courts have ordered that plaintiff receive custody of the child, having now adequately reformed her life so that she is a fit parent. Given the presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health, it was incumbent upon Intervener to show by a preponderance of the evidence that plaintiff made a decision that created a substantial risk of harm to the child's mental, physical, or emotional health. Instead of receiving evidence on this issue, the circuit court appears to have trumped plaintiff's discretion as a fit parent. Again, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 US at 72-73 (opinion by O'Connor, J.).

Plaintiff points to this Court's decision in *Hollis v Miller*, unpublished opinion per curiam of the Court of Appeals, entered December 6, 2012 (Docket No. 306090). While not precedentially binding, MCR 7.215(C)(1), we agree with the Court's observation:

> Plaintiff's entire argument was that a child needs a loving grandparent and some access to the maternal side of the family. However, if that were sufficient to overcome the presumption in favor of the [parent's] decision, it is hard to imagine a case when the presumption would not be overcome. This would not be consistent with the Leg-

> islature's decision to set up a presumption that denial of grandparenting time by a fit parent does *not* create a substantial risk of harm. A trial court may not merely conclude that "grandparenting is good, therefore it should occur." [*Hollis*, unpub op at 4, quoting *Keenan v Dawson*, 275 Mich App 671, 682; 739 NW2d 681 (2007).]

D. THE AMOUNT OF GRANDPARENTING TIME ORDERED WAS EXCESSIVE

MCL 722.27b(6) provides, "If the court finds by a preponderance of the evidence that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for *reasonable grandparenting time* of the child by the grandparent by general or specific terms and conditions." (Emphasis added.) Once again, because grandparenting time was not an issue at the custody hearing, the issue of what was "reasonable" under MCL 722.27b(6) was never discussed at the custody hearing. The record reveals that although there is support for the child having continued contact with Intervener, with whom she had lived her entire life, there is also evidence that Intervener's continued involvement in the child's life was potentially detrimental to the child's transition to plaintiff's home and, therefore, the child's overall well-being.

We decline plaintiff's invitation to declare that only "occasional, temporary" visitation is contemplated under the grandparenting-time statute. Where, as here, the grandparent's involvement in a child's life exceeds the "traditional" role of a grandparent, one could envision a visitation schedule that resembles that of a noncustodial parent. *In re Visitation of L-ADW*, 38 NE3d 993, 1000 (Ind, 2015), is an example of such a situation. In that case, the maternal grandparents played a significant role in the child's upbringing. They

lived with the parents and the child on two separate occasions to allow the parents an opportunity to pursue their highly demanding careers and then later to help with the child as the mother was dying of cancer. Feeling that they were being cut out of the child's life after the mother's death, the maternal grandparents sought visitation under Indiana's Grandparent Visitation Act. *Id*. at 995. The trial court ordered structured and unsupervised grandparenting time, which included weekly overnight visits. *Id*. at 996 n 4. Indiana's intermediate court determined that, while grandparenting time was certainly in the child's best interests (even in light of the presumption that the father was a fit parent), the trial court abused its discretion in the amount of grandparenting time it ordered. *Id*. at 997. Indiana's highest court affirmed the decision to grant grandparenting time, but disagreed that the amount awarded was excessive. *Id*. at 999. The high court noted:

> In the present case, the trial court considered the extensive role that Grandparents played in L–A's life from the time she was born, which far exceeded the "traditional" role of a grandparent. While living in Mother and Father's home, Grandparents largely carried out parental duties, such as cooking meals, doing L–A's laundry, taking L–A to and from school, helping with homework, reading to L–A before she went to sleep, and attending L–A's extracurricular activities. All on a daily basis. After Mother's death, Grandparents still never missed L–A's extracurricular activities. Now, Grandparents also serve as one of L–A's only connections to her deceased Mother. Even though it is not disputed that since Mother's death, Father has spent more time with L–A and developed a closer relationship with her, Grandparents were heavily involved in raising L–A up until that point. Thus, it is reasonable that the trial court would view a more involved visitation schedule as appropriate for this family. [*Id*. at 1000.]

However, of great significance (and totally absent in the case at bar), is the fact that there was extensive record evidence in the form of expert testimony supporting the trial court's decision:

> Right before Mother's passing, Laura Ellsworth, MA, a licensed mental health counselor, had been contacted by Father to assist the family in developing a parenting time schedule that would be in the best interest of L–A. After Mother's death, Ellsworth continued consulting with the family to help L–A transition from staying with Grandparents on a regular basis to being cared for primarily by Father. Ellsworth conducted multiple interviews with Father, Grandparents, and L–A to determine what was in L–A's best interest. Some interviews were conducted individually and some were conducted as group sessions. Ellsworth concluded that due to L–A's close relationship with Grandparents throughout her life, it would be in her best interest to have regularly scheduled time with Grandparents. She also found it "disturbing" that Grandparents had only three overnights and one at-home visitation with L–A in the five months following Mother's death. Despite an apparent agreement that Father would comply with the recommended schedule, the schedule was not followed.
>
> Grandparents also hired a mental health expert, Dr. Rebecca Luzio, in order to provide a recommendation regarding what type of visitation was in the best interest of L–A. Ellsworth and Dr. Luzio frequently consulted with one another regarding their observations. Ultimately, both testified at the visitation hearing that Father was a fit parent and that grandparent visitation was in L–A's best interest. The experts disagreed only on whether it was necessary for there to be court-ordered visitation. Ellsworth believed that Father should be allowed to determine a visitation schedule, while Dr. Luzio was of the opinion that court-ordered visitation was necessary to ensure that L–A maintained a meaningful and regular relationship with Grandparents. [*Id*. at 995-996.]

While Ellsworth believed that the father should be allowed to determine a visitation schedule, her recommended schedule nearly mirrored the trial court's ultimate schedule. *Id*. at 995 n 3. This Indiana case is in no way controlling, but does support the idea that, in some very unusual circumstances, extensive grandparenting time may be appropriate. Where, as here, the child has looked to Intervener for her care her entire life, we do not believe that grandparenting visitation should necessarily be limited to only occasional visits. Rather, what is reasonable grandparenting time must be determined on a case-by-case basis, keeping the child's best interests in mind.

However, we agree with plaintiff's statement that the "design of MCL 722.27b(4)(b) and MCL 722.27b(6) is to balance the parent's fundamental Constitutional right to manage his or her child against the goal of eliminating the risk of harm to the child." The circuit court made no attempt to balance these competing interests. Unlike the Indiana case, there was absolutely no testimony in this case regarding what amount of contact with Intervener, if any, was in the child's best interests. As plaintiff aptly notes, the amount of grandparenting time should have been whatever amount would have eliminated the risk of harm to the child. So, while the experts may have subtly opined that grandparent visitation was in the child's best interests given the particular history of this case, the experts offered no opinion as to the amount of grandparenting time necessary to eliminate the risk of harm to the child.

Additionally, as plaintiff appropriately notes, there is evidence that Intervener failed to follow court-ordered visitation, which would likely have an effect on the type of visitation ordered. There were a number of

relevant posttrial events that took place that warrant discussion. On July 14, 2014, plaintiff filed a motion to show cause, alleging that Intervener failed to return the child after her week-long visit with Intervener. Attached to plaintiff's motion were copies of texts that went back and forth between plaintiff and Intervener. In those messages, Intervener steadfastly refused to reveal where the child was and also insisted that because the upcoming weekend was Intervener's scheduled visitation time, the vacation was really "seven days plus two," meaning that Intervener did not have to return the child on Sunday, but would return her on Tuesday. Intervener also refused to have the child call plaintiff unless she wanted and would not answer the phone when plaintiff tried calling the child. Plaintiff further argued that, based on Intervener's use of the plural "kids" in a Facebook post, that Intervener was allowing the child to have contact with defendant. Intervener had also posted the following message on Facebook: "Thinking about Megan Reynolds, Michael Khlor [sic], Candace Stack, Christian Giggy, Kathleen Keeter [sic], Megan Wilder and a few others. I hope you are having a wonderful summer so far!!"[9]

A hearing was held on July 28, 2014. The circuit court found that plaintiff's inquiries about the child's whereabouts were neither harassing nor unreasonable and that plaintiff should not have had to guess where the child was. It concluded that Intervener's keeping the child beyond the one-week period was contempt of court and remedied that by reducing Intervener's August visit by two days. The circuit court found that Intervener's Facebook posting naming individuals in-

[9] During the proceedings, these individuals were critical of different aspects of Intervener's behavior.

volved in this case was passive-aggressive behavior, but was not a technical violation of its previous order. The circuit court noted, "I think it's clear that—and the Court would simply reiterate that Mr. Stamps is not to be around the child. And hopefully, in view of the contempt as it relates to the week, that Ms. Weddington will not push . . . the limits of that particular order . . . because the Court will in fact deal with that much more seriously if the issue of contempt comes back before the Court."

On September 26, 2014, plaintiff filed another motion to show cause. Plaintiff claimed that Alaura Haueter's mother, Randie Haueter (Randie) revealed that Intervener and defendant were in flagrant violation of the court's order that defendant not have contact with the child. In an affidavit, Randie averred that she had a falling out with her daughter after her daughter obtained an order preventing defendant from being at the hospital with A. Randie believed that defendant should have been allowed to see A. Because Randie was separated from her husband, Intervener offered to let Randie stay with her. It was obvious to Randie that defendant continued to live with Intervener and that he had contact with the child during Intervener's visits. Randie also noted that defendant continued to do drugs. The circuit court granted plaintiff's request that Intervener's grandparenting time be suspended until further order of the court.

Intervener filed a pro se response on October 14, 2014, dismissing Randie's affidavit as an attempt to get back into Haueter's good graces so that Randie could visit her sick grandchild. Intervener denied that she allowed defendant to have contact with the child and further denied that defendant lived with her or was still using drugs.

The parties appeared before the circuit court to argue the motion on October 13, 2014, but the court concluded that an evidentiary hearing was necessary. It continued the order suspending grandparent visitation until the conclusion of the evidentiary hearing. It declined Intervener's request to have at least supervised visits.

The hearing was held on November 7, 2014. Randie testified about what she had observed while living with Intervener. Intervener offered witnesses who testified that Randie was not worthy of belief. Intervener testified as well. She denied ever leaving plaintiff a voicemail recording wherein the caller indicates that "as much as you don't want him involved in your life, he's going to be involved. It's [the child's] daddy and she loves him dearly, as she does her grandmother and her aunt and her cousins." Intervener denied trying to have contact with the child in spite of the court order suspending visits. Intervener admitted that she wrote to the child and that AW delivered the letter and a Halloween basket to the child on the street outside of the child's school. Defendant stayed with Intervener during the week, but she explained that was so that she could make sure he was complying with services.

The circuit court noted that Intervener lacked credibility and that she was evasive. It specifically noted that it recognized Intervener's voice on the voicemail in spite of her denials. The circuit court was "miffed" about the denial because it called into question Intervener's overall credibility. The circuit court concluded:

> And the Court does believe that the testimony does show in that particular matter that you did allow [the child] to be around her father, Mr. Stamps. And based

> upon the testimony as a whole, the Court is going to find that you did in fact violate the court order. You are in contempt of court as a result.
>
> * * *
>
> . . . I do believe that she has a substantial relationship with grandmother and with her Aunt [AW] in this particular case, and as a result, in deciding the remedy, the Court doesn't believe that it is in her best interest that all contact be suspended or eliminated in this matter.
>
> But what the Court will do, in view of the violation of this order—and the order is put in place to protect [the child]—and what happens, if you're not going to protect her, this Court will protect her.
>
> What I'm going to do is I am going to order supervised grandparent time that will occur on alternating weekends starting November 15, 2014, or alternating Saturdays from twelve o'clock noon until four o'clock p.m., and alternating holidays, with Ms. Weddington to receive Thanksgiving, again, from twelve o'clock noon to four o'clock p.m.

The circuit court was amenable to adjusting the grandparenting-time schedule based on Intervener's behavior but, in so doing, the circuit court showed the folly of its original order granting Intervener such liberal grandparenting time without first considering expert testimony as to what would be appropriate under the circumstances. The developments that occurred after the initial order give credence to plaintiff's fears.

E. BEST-INTEREST FACTORS

Finally, the circuit court's decision to award Intervener grandparent visitation was against the great weight of the evidence, at least as far as the record existed at the time of the custody trial.

The circuit court considered the best-interest factors in MCL 722.27b(6).

1. FACTOR (a) THE LOVE, AFFECTION, AND OTHER EMOTIONAL TIES EXISTING BETWEEN THE GRANDPARENT AND THE CHILD

The circuit court noted, "I've already addressed that as it relates to the custody issue of the Child Custody Act, and as the Court found that that factor was equal as to the parties in this particular case, the Court does find that in fact that factor would favor grandparent visitation at this time." Plaintiff does not challenge this finding.

2. FACTOR (b) THE LENGTH AND QUALITY OF THE PRIOR RELATIONSHIP BETWEEN THE CHILD AND THE GRANDPARENT, THE ROLE PERFORMED BY THE GRANDPARENT, AND THE EXISTING EMOTIONAL TIES OF THE CHILD TO THE GRANDPARENT

The circuit court noted that this factor favored visitation without discussion. Plaintiff complains that the circuit court failed to consider the fact that the relationship was not healthy for the child. Absent an explanation from the circuit court, we agree. When it analyzed Factor (b) under the CCA—the capacity and disposition of the parties to give the child love, affection, and guidance—the circuit court noted:

> As it relates to guidance, the—Ms. Weddington had allowed her son and the Plaintiff in her home to engage in sexual relations during the time that they were minors resulting in the birth of this child. She's allowed them in both—in her house as well when they were both engaging in drug use, when she knew that, when she had in essence two minor children in the household.
>
> Additionally, Ms. Weddington took [the child] [during the home-invasion incident]. And basically, when she was questioned extensively . . . she showed a total lack of

> judgment as to how this could have been a dangerous situation for [the child].

There was significant domestic violence in Intervener's home perpetrated by defendant, whom Intervener constantly enabled. The child was placed in danger when Intervener decided to take her along on a confrontation defendant had with a friend, which is part of the reason she was substantiated for neglect. There was evidence that, even when forbidden to do so, Intervener allowed defendant to have contact with the child. Moreover, the child had clearly been coached. Haugen testified that such coaching damaged the child's emotional well-being.

Additionally, when looking at Factor (d) under the CCA best interest factors—the length of time the child has lived in a stable satisfactory environment and the desirability of maintaining that environment—the circuit court concluded that Intervener's many moves and the lack of safety caused it to "slightly" favor plaintiff.

3. FACTOR (c) THE GRANDPARENT'S MORAL FITNESS AND FACTOR (d) THE GRANDPARENT'S MENTAL AND PHYSICAL HEALTH

The circuit court found that Factors (c) and (d) weighed against visitation for the same reason it found against Intervener in the custody analysis. In its custody analysis, the circuit court had noted that "neither party has an exemplary history as it relates to [moral fitness]." It also noted, however, that Intervener's behavior of pandering to or condoning defendant's behavior caused it to "slightly" favor plaintiff. On appeal, plaintiff complains that the circuit court did not give sufficient weight to this factor, pointing out that the circuit court had found that Intervener had intentionally lied while testifying, lied to police to prevent defendant from being arrested, excused her

son's bad behavior, and intentionally alienated the child from plaintiff. Again, absent a more detailed finding, we are inclined to believe that the circuit court failed to give this particular factor proper weight.

4. FACTOR (e) THE CHILD'S REASONABLE PREFERENCE, IF THE COURT CONSIDERS THE CHILD TO BE OF SUFFICIENT AGE TO EXPRESS A PREFERENCE

The circuit court considered the child's reasonable preferences. As the plaintiff correctly notes, there was little value in interviewing the child where the evidence at trial clearly revealed that she had been coached.

5. FACTOR (f) THE EFFECT ON THE CHILD OF HOSTILITY BETWEEN THE GRANDPARENT AND THE PARENT OF THE CHILD

The circuit court noted:

> It does appear that the parties have been able to in fact get along somewhat as it relates to the exchanges, et cetera, and as a result the Court will find that in fact, hopefully, the parties can get past any animosity they have when this case is concluded, but the Court will find that that factor does favor grandparenting time.

In fact, hostility permeated these proceedings. Intervener tried to prevent plaintiff from attending a doctor's appointment for the child or visiting the child's school. Intervener was twice held in contempt of court for failing to follow court orders regarding grandparenting time. Intervener made Facebook postings in which plaintiff was described as mentally ill and a stranger to the child. Both Pancost and Haugen testified that the child's emotional well-being was in peril when Intervener made negative comments about plaintiff. The circuit court erred by finding that the factor favored grandparenting time.

6. FACTOR (g) THE WILLINGNESS OF THE GRANDPARENT, EXCEPT IN THE CASE OF ABUSE OR NEGLECT, TO ENCOURAGE A CLOSE RELATIONSHIP BETWEEN THE CHILD AND THE PARENT OR PARENTS OF THE CHILD

The circuit court concluded that, for the same reasons set forth under the custody Factor (j)—willingness and ability to facilitate and encourage a close and continued relationship—the factor did not favor visitation. In analyzing Factor (j), the circuit court had concluded:

> In this particular matter, the testimony was that Ms. Weddington, when the Plaintiff went to the doctor's office, that Ms. Weddington told her to wait in the lobby. Ms. Weddington told the Plaintiff that—when she was at school that she was not welcome at school. She told her she wouldn't be able to—she wouldn't be able to get a report card without a court order, and she—Ms. Weddington objected to having the maternal grandparents supervise any parenting time.
>
> And the Court, likewise, believes as it relates to this issue of the car chase, there was this car chase in which she basically characterizes it [as] a car chase, the Court doesn't—believes that they were followed, but the Court doesn't believe that it was a car chase in this particular matter. And *I think that the way that Ms. Weddington has approached a number of things in this matter have in fact impacted the way that* [*the child*] *views her mother in this particular case*.
>
> Ms. Haueter testified that Ms. Weddington and the Defendant discussed the Plaintiff in front of [the child] and the—basically *the only reason for such conduct would be to alienate the child from the parent*.
>
> Ms. Weddington is likewise—has a—a Facebook post that she admitted to, stating that [the child] was living with a stranger and at a stranger's home and feeling so sad. In this particular case, at some point, the child would be able to view that and see that, and that *is not conducive to establishing a parent/child relationship.*

> Additionally, when Ms. Weddington was questioned by [the GAL] back on June 18th as to whether she credited Plaintiff with any improvement, Ms. Weddington would not acknowledge that she had improved her life in any way. She wouldn't even acknowledge the improved housing, the stable job, and she wouldn't acknowledge that the Plaintiff had in fact gained control of her drug issues; notwithstanding the fact that she had had a number [of] negative drug tests.
>
> These statements and conduct *belie any ability on behalf of Ms. Weddington to establish and continue a parent/child relationship between* [*the child*] *and the Plaintiff mother*.
>
> So as a result, the Court will find that that factor does favor the Plaintiff mother. [Emphasis added.]

On appeal, plaintiff complains that the circuit court did not give sufficient weight to this factor. We are inclined to agree.

7. FACTOR (h) ANY HISTORY OF PHYSICAL, EMOTIONAL, OR SEXUAL ABUSE OR NEGLECT OF ANY CHILD BY THE GRANDPARENT

The circuit court did not give the factor weight even though Intervener had been substantiated for neglect. Incredibly, the circuit court noted that it was "mindful of the CPS investigation in this particular case, and the Court will consider that, but the Court feels that to be minimal in this particular matter on that particular action, so I'm not giving a lot of—of weight in this particular case." CPS substantiated Intervener for her failure to protect the child from defendant's criminal and violent behavior. That was perhaps *the* theme of the entire custody debate—whether and if Intervener was capable of protecting the child. It was error for the court to minimize this factor, especially when it should have considered that, not only was Intervener substantiated, but she was completely uncooperative.

8. FACTOR (i) WHETHER THE PARENT'S DECISION TO DENY, OR LACK OF AN OFFER OF, GRANDPARENTING TIME IS RELATED TO THE CHILD'S WELL-BEING OR IS FOR SOME OTHER UNRELATED REASON

The circuit court concluded that it did not feel that plaintiff acted out of ill will "but the Court does find that in fact it would adversely affect the minor child if this contact was cut off." Again, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 US at 72-73 (opinion by O'Connor, J.). Plaintiff was determined to be a fit parent and the circuit court found that plaintiff's "decision" to disallow grandparenting time was not motivated by ill will. The circuit court simply substituted its judgment for plaintiff's.

9. FACTOR (j) ANY OTHER FACTOR RELEVANT TO THE PHYSICAL AND PSYCHOLOGICAL WELL-BEING OF THE CHILD

Finally, the circuit court noted that the child had come to depend upon Intervener and, therefore, the factor favored grandparenting time. Once again, absent any expert testimony on this direct issue, the circuit court appears to have given this factor undue weight.

After weighing all of these factors, the circuit court concluded that "the grandmother has met the burden by a preponderance of the evidence that in fact it would be a—the child would be placed at substantial risk of harm to the child's mental, physical, and emotional health if in fact that contact is cut off."

We once again note that the issue of grandparenting visitation was not properly before the court. We also agree with plaintiff that when taken as a whole, and on

this record, the factors "strongly predominate against any grant of visitation . . . ."

That portion of the circuit court's order granting grandparenting visitation is vacated. The custody order is otherwise affirmed. The circuit court is further directed not to revisit the issue of grandparenting time unless Intervener brings a proper motion under MCL 722.27b(3). As the prevailing party, plaintiff may tax costs. MCR 7.219.

GADOLA, P.J., and FORT HOOD, J., concurred with K. F. KELLY, J.

ENBRIDGE ENERGY LTD PARTNERSHIP v UPPER PENINSULA POWER COMPANY

Docket No. 321946. Submitted October 6, 2015, at Lansing. Decided December 22, 2015, at 9:05 a.m. Leave to appeal sought.

Enbridge Energy Limited Partnership (Enbridge) filed a complaint with the Public Service Commission (PSC) challenging a settlement agreement involving the PSC staff, respondent Upper Peninsula Power Company (UPPC), and other parties not relevant to the disposition of this case. Enbridge was not a party to the settlement agreement, nor did it intervene. In the settlement agreement, the PSC approved UPPC's 2009 request to increase its electric rates and to implement a revenue-decoupling mechanism (RDM) for the test year 2010. In May 2011, UPPC filed an application to reconcile the 2010 costs associated with the RDM and to recover a shortfall. The Court of Appeals decided *In re Applications of Detroit Edison Co*, 296 Mich App 101 (2012), while UPPC's application for reconciliation was pending. In *Detroit Edison*, the Court of Appeals recognized that the PSC was without statutory authority to approve an electric utility's use of an RDM. In deciding on UPPC's application for reconciliation, the PSC considered *Detroit Edison* and acknowledged that it could not approve an RDM for an electric utility, but the PSC noted that UPPC's RDM was adopted as a result of a settlement agreement binding the signatories of the agreement—which included all parties to the reconciliation. Enbridge was not a party to the reconciliation. The PSC concluded that *Detroit Edison* had no effect on the PSC's reconciliation decision because the reconciliation decision reflected only the language of an agreement to which all parties subscribed; it did not represent the PSC's improper exercise of authority. The PSC granted UPPC's motion to dismiss Enbridge's complaint and the PSC staff's motion for summary disposition. The PSC denied Enbridge's motion for summary disposition on the grounds that Enbridge failed to state a claim on which relief could be granted. Enbridge appealed.

The Court of Appeals *held*:

The PSC exceeded its statutory authority when it approved a settlement agreement that permitted UPPC to implement an

RDM. *Detroit Edison* made it clear that the PSC was without authority to approve an electric utility's use of an RDM. That the approval of UPPC's RDM was effected by a settlement agreement did not make valid an otherwise invalid exercise of authority. *Detroit Edison* clearly states that the PSC, whose authority is defined by statute, has no statutory authority to approve an electric utility's use of an RDM. This limitation of the PSC's authority applies even when the method by which the RDM is approved is a settlement agreement.

Reversed and remanded.

Clark Hill PLC (by *Robert A. W. Strong* and *Sean P. Gallagher*) for Enbridge Energy Limited Partnership.

Miller, Canfield, Paddock and Stone, PLC (*Sherri A. Wellman* and *Paul M. Collins*), for Upper Peninsula Power Company.

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

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

SAAD, J. Enbridge Energy Limited Partnership (Enbridge) appeals the order of the Michigan Public Service Commission (PSC) that dismissed Enbridge's complaint, which challenged the PSC's authority to approve a settlement agreement that provided for the use of a revenue decoupling mechanism (RDM). For the reasons below, we reverse and remand.

I. BACKGROUND

This case raises the issue of whether the PSC possessed the authority to approve a settlement agreement between the PSC staff and the Upper Peninsula

Power Company (UPPC) that established an RDM for UPPC for the test year 2010.

In June 2009, UPPC filed an application seeking an increase in electric rates in excess of $12 million.[1] UPPC, the PSC staff, and other intervening parties entered into a settlement agreement that increased UPPC's electric rates and implemented an RDM for UPPC for the test year 2010. The PSC subsequently approved the rate increase and the settlement agreement. Enbridge did not seek to intervene in the case.

In May 2011, UPPC filed an application to reconcile the costs associated with the RDM for 2010 and to recover a shortfall.[2] While the application was pending, this Court decided *In re Applications of Detroit Edison Co*, 296 Mich App 101; 817 NW2d 630 (2012). In that case, the appellants, including the Attorney General, challenged the PSC's order that authorized Detroit Edison, an electric utility, to adopt an RDM. This Court observed that while MCL 460.1089(6) authorized the PSC to approve the use of an RDM by a natural gas utility, the statute contained no similar provision for an electric utility. *Id*. at 108-109.[3] The *Detroit Edison* Court concluded that "a plain reading of MCL 460.1097(4) does not empower the PSC to approve or direct the use of an RDM for electric providers" and reversed the PSC's decision to allow Detroit Edison to adopt an RDM. *Id*. at 110.

Thereafter, the PSC issued an order in Case No. U-16568 in which it considered *Detroit Edison* and stated:

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[1] The PSC docketed this application as Case No. U-15988.

[2] The PSC docketed this application as Case No. U-16568.

[3] This Court noted that although MCL 460.1097(4) mandated research and reporting on the *potential* use of RDMs by electric utilities, the statute did not authorize their implementation. *Detroit Edison*, 296 Mich App at 109.

> In light of the Court of Appeals' opinion, the Commission appreciates that it cannot approve UPPCo's RDM. However, this RDM was adopted pursuant to a settlement agreement, which constitutes a binding contract between the signatories to that agreement. Those signatories include all parties to this reconciliation. As such, the RDM reconciliation must simply comport with the language of the settlement agreement.

Enbridge filed a petition for rehearing, or in the alternative, a formal complaint, regarding the PSC's order. The PSC denied the petition for rehearing because Enbridge was not a party to the proceeding, and therefore, it lacked standing. The PSC did not address the filing as a formal complaint.

Enbridge refiled its formal complaint[4] and again argued that the PSC lacked the authority to approve the use of an RDM by an electric utility, thereby lacking subject-matter jurisdiction to approve the surcharges in Case No. U-16568. Enbridge and the PSC staff moved for summary disposition, and UPPC moved to dismiss the complaint.

The PSC granted UPPC's motion to dismiss and the PSC staff's motion for summary disposition and denied Enbridge's motion for summary disposition. The PSC found that pursuant to Rule 323 of the rules governing practice and procedure before the PSC, Enbridge failed to state a claim on which relief could be granted. The PSC rejected Enbridge's assertion that it lacked subject-matter jurisdiction, noting that it had the general authority to set rates. In addition, the PSC relied on *Dodge v Detroit Trust Co*, 300 Mich 575; 2 NW2d 509 (1942), for the proposition that it had the authority to approve a settlement agreement that

[4] The instant case began when that complaint was filed, Case No. U-17077.

resolved a disputed legal issue. The PSC noted that at the time the parties negotiated the settlement agreement, the question of whether statutory law permitted electric utilities to implement RDMs was unclear. The PSC distinguished *Detroit Edison* from the instant case on the ground that *Detroit Edison* did not involve the implementation of an RDM by a settlement agreement, but rather, the creation of an RDM for Detroit Edison by the PSC itself. The PSC held that under MCL 460.6 and *Dodge*, it had the authority to approve the settlement agreement.

II. STANDARDS OF REVIEW

"The standard of review for PSC orders is narrow and well-defined." *Attorney Gen v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed to be lawful and reasonable. A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, a party must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is "arbitrary, capricious, or totally unsupported by admissible and admitted evidence." *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966). Thus, 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;

see also *Attorney Gen v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

A reviewing court "gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC." *Pub Serv Comm No 2*, 237 Mich App at 88. We give "respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and [we] will not overrule that construction absent cogent reasons." *In re Application of Consumers Energy Co for Reconciliation of 2009 Costs (On Reconsideration)*, 307 Mich App 32, 42; 859 NW2d 216 (2014). "If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining the legislative intent, and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature." *Id*. But the PSC's interpretation of a statute is not binding on us. *Id*. "Whether the PSC exceeded the scope of its authority is a question of law that we review de novo." *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. ANALYSIS

On appeal, Enbridge argues that because the PSC is a creation of statute and has only those powers conferred on it by the Legislature, the PSC exceeded its authority and its subject-matter jurisdiction when it approved the settlement agreement allowing for the UPPC's use of an RDM in Case No. U-16568.

Initially, we note that Enbridge's argument that the PSC exceeded its subject-matter jurisdiction when it approved the settlement agreement containing an RDM is misplaced. "[This] argument conflates subject-matter jurisdiction with a court's *exercise* of its jurisdiction." *Usitalo v Landon*, 299 Mich App 222, 230; 829

NW2d 359 (2013). "Subject-matter jurisdiction concerns a body's abstract power to hear a case of the kind or character of the one pending, and is not dependent on the particular facts of the case." *Pelland*, 254 Mich App at 682. The PSC has specific statutory authority to establish the rates charged by all regulated utilities, MCL 460.6(1), and therefore, the PSC had jurisdiction to hear the cases before it.

Instead, the question before us is whether, by approving the underlying settlement agreement, the PSC exceeded its statutory authority. "The PSC possesses only that authority granted it by the Legislature. Authority must be granted by clear and unmistakable language. A doubtful power does not exist." *Mich Electric Coop Ass'n v Pub Serv Comm*, 267 Mich App 608, 616; 705 NW2d 709 (2005).

We hold that the PSC erred when it upheld the settlement agreement in the previous case and dismissed Enbridge's complaint in the instant case. There is no dispute that the PSC's authority is limited to whatever the Legislature dictates. See *id*. The statute in question governing RDMs for electric utilities is MCL 460.1097(4), which provides as follows:

> Not later than 1 year after the effective date of this act, the commission shall submit a report on the potential rate impacts on all classes of customers if the electric providers whose rates are regulated by the commission decouple rates. The report shall be submitted to the standing committees of the senate and house of representatives with primary responsibility for energy and environmental issues. The commission's report shall review whether decoupling would be cost-effective and would reduce the overall consumption of fossil fuels in this state.

As we have explained in *Detroit Edison*, this "provision mandates research and reporting on how RDMs would

operate in connection with providers of electricity, *but does not call for or authorize actual implementation of an RDM by those utilities*." *Detroit Edison*, 296 Mich App at 109 (emphasis altered). As the *Detroit Edison* Court noted, this provision for electric utilities is in stark contrast to MCL 460.1089(6), which expressly allows the PSC to approve RDMs for *gas* utilities. *Id*. at 110; see also *French v Mitchell*, 377 Mich 364, 384; 140 NW2d 426 (1966) (opinion by BLACK, J.) ("[W]hen the legislature has used certain language in one instance and different language in another, the indication is that different results were intended . . . ."). Thus, there is no question that the PSC did not have the authority to implement the RDM for UPPC, an electric utility, in the instant case.

In spite of the clear statutory language, the PSC approved the settlement agreement and relied on *Dodge*, 300 Mich 575, as it does on appeal, for the proposition that it had the authority to approve a settlement agreement that resolved a disputed legal issue. In *Dodge*, the parties to the litigation involving a contested will entered into a settlement agreement that resolved a disputed legal issue. *Id*. at 592-593. Some 17 years later, a party to the settlement agreement filed suit seeking to have the agreement set aside as void because of an intervening change in the law. *Id*. at 592-593, 597-598. Our Supreme Court noted that there was no lawful basis to allow a party to invalidate a settlement when there was "an honest dispute between competent legal minds" regarding the status of the law at the time of the settlement. *Id*. at 614. Instead, it ruled that

> where *a doubt as to what the law is* has been settled by a compromise, a subsequent judicial decision by the highest court of the jurisdiction upholding the view adhered to by

> one of the parties affords no basis for a suit by him to upset the compromise. [*Id*. (emphasis added).]

The PSC's reliance on *Dodge* is inapposite for two primary reasons. First, in the instant case, unlike in *Dodge*, there was no intervening change in the law. MCL 460.1097(4) became effective in 2008 and has not been altered since. 2008 PA 295. Although *Detroit Edison* was issued after the PSC approved the settlement in this case, that fact is not dispositive. Even without the benefit of our decision in *Detroit Edison*, contrary to the PSC's claim that "it was unclear whether Act 295 [of 2008] permitted electric RDMs," the act's language is unmistakably clear, and it was not reasonable to believe that the law was in dispute or otherwise unclear. While the PSC could approve RDMs for gas utilities, it was not authorized to do so for electric utilities. Second, the settlement in *Dodge* involved private parties, who only themselves were bound by the agreement. Here, as acknowledged by all the parties, settlements in the regulatory context carry the force of law and necessarily bind *all* consumers in the affected area, even those who were not parties to the agreement.[5] See *Indiana Bell Tel Co, Inc v Office of Utility Consumer Counselor (On Rehearing)*, 725 NE2d 432, 435 (Ind App, 2000) ("[A] settlement agreement that must be filed with and approved by a regulatory agency 'loses its status as a strictly private contract and takes on a public interest gloss.' ") (citation omitted). As a result, the strong public policy behind the long-standing doctrine that requires parties to be bound by their settlement agreements, see *Plamondon*

[5] Indeed, at oral argument, the PSC admitted that the settlement did not merely bind the signatories to the agreement, as it claimed in its order in Case No. U-16568, but rather, the settlement bound thousands of users in the affected area.

v Plamondon, 230 Mich App 54, 56; 583 NW2d 245 (1998), simply is not advanced when such a "settlement" affects countless others who were not parties to the agreement.

In sum, the PSC exceeded its clear statutory authority when it approved the RDM in Case No. U-16568. The fact that the approval was accomplished in the context of a settlement agreement does not transform the PSC's ultra vires act into a legal one. See, e.g., *Timney v Lin*, 106 Cal App 4th 1121, 1127-1129; 131 Cal Rptr 2d 387 (2003) ("[E]ven though there is a strong public policy favoring the settlement of litigation, this policy does not excuse a contractual clause that is otherwise illegal or unjust."). We stress that our holding is based on the fact that reasonable minds could not have disputed the extent of the PSC's authority at the time it approved the settlement agreement.

We reverse the PSC's dismissal of Enbridge's complaint in Case No. U-17077 and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

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

PEOPLE v SARDY

Docket No. 319227. Submitted May 12, 2015, at Detroit. Decided December 29, 2015, at 9:00 a.m. Part II vacated and case remanded 500 Mich 887.

Ghassan Salim Sardy was convicted in the Oakland Circuit Court of child sexually abusive activity (CSAA), MCL 750.145c; using a computer to commit a crime, MCL 752.796; and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c, following a jury trial. The victim was defendant's daughter. In searching defendant's home, police officers had found a CD with nude images of the victim and two videos that had been filmed using defendant's phone. Although the victim was clothed in both videos, the prosecution characterized the victim's actions as constituting masturbation for purposes of the CSAA and computer-crime charges. The victim also reported instances in which, while both were clothed, defendant pressed his penis against her genital area, which formed the basis of the CSC-II counts. The victim was seven years old when she testified at the preliminary examination in the 52-4 District Court. She testified without an oath or affirmation. When the victim first took the stand, the prosecutor asked her a few preliminary questions for the purpose of establishing that she could distinguish truth from lies. The victim answered appropriately, and the court, William E. Bolle, J., responded in the affirmative when the prosecutor asked the court for permission to proceed with questioning her. Defendant did not object to the unsworn testimony that followed, allowing the victim's testimony to be fully developed. Defense counsel extensively cross-examined the victim, asking numerous questions regarding her ability to tell the truth and distinguish between fact and fabrication. Midway through cross-examination, defense counsel asked the victim whether she had been telling the truth so far, and the victim replied yes. She also stated that she was telling the truth and would continue to do so, adding that several people had told her to simply tell the truth when she testified. Ultimately, the court bound defendant over for trial. At trial, the victim took the stand, but when the questioning turned to defendant's conduct, the victim indicated that she could not remember what had occurred. The prosecutor's efforts to refresh the victim's memory by referring to the preliminary

examination transcript were unsuccessful. The victim was adamant that she could not remember the events giving rise to the charges, and the trial court, Daniel Patrick O'Brien, J., concluded that because of her lack of memory, she was unavailable as a witness. The court instead admitted the victim's preliminary examination testimony over defendant's objection. After defendant was convicted, the trial court sentenced him to concurrent prison terms of 71 months to 20 years for the CSAA and computer-crime convictions and 71 months to 15 years for the CSC-II convictions. Defendant appealed.

The Court of Appeals *held*:

1. Defendant argued that the court violated his constitutional right to confront the witnesses against him when it permitted the victim's preliminary examination testimony to be admitted as substantive evidence at trial. Under the Confrontation Clauses, US Const, Am VI and Const 1963, art 1, § 20, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant had a previous opportunity to cross-examine the declarant. Because testimony given at a preliminary examination qualifies as testimonial in nature, it was necessary to establish that the victim was unavailable at trial and that defendant had an opportunity to cross-examine her at the preliminary examination.

2. MRE 804(a) addresses hearsay exceptions regarding unavailable witnesses and sets forth situations in which a witness is properly deemed unavailable. Under MRE 804(a)(3), a witness or declarant is unavailable when the declarant has a lack of memory of the subject matter of his or her statement. The trial court and the parties thoroughly quizzed the victim regarding whether she truly could not testify on the relevant matters due to lack of memory, and she steadfastly asserted that lack of memory was the reason for her inability to testify. The trial court did not clearly err by finding the victim unavailable on that ground. Under MRE 804(a)(2), a declarant is also unavailable as a witness when the declarant persists in refusing to testify concerning the subject matter of his or her statement. Had the trial court determined that the victim was fabricating her claimed lack of memory and was instead refusing to testify, it was clear from the record that she would still not have testified about the relevant matters even if ordered to do so. Finally, when a child attempts to testify but because of the child's youth is unable to do so since he or she lacks the mental ability to overcome the distress, the child has a then existing mental infirmity within the meaning of MRE 804(a)(4) and is therefore unavailable as a witness.

3. Defendant argued that his confrontation rights were infringed because the preliminary examination did not provide him a full and fair opportunity at cross-examination. Specifically, he complained that his counsel did not have the opportunity to examine certain discovery materials before the preliminary examination, including a thumb drive containing a computer forensic analysis. He also contended that the purpose of cross-examination at a preliminary examination differs substantially from the purpose of cross-examination at trial and that the district court had improperly curtailed cross-examination with respect to relevant issues of motive and bias. The right of confrontation only guarantees an opportunity for effective cross-examination, not cross-examination that is effective to whatever extent and in whatever way a defendant wishes. While a preliminary examination is ordinarily a less searching exploration into the merits of a case than a trial, the Confrontation Clause can be satisfied if a defendant's cross-examination of the witness at the preliminary examination was not significantly limited in scope or nature and the witness was actually unavailable at trial. Although the district court found irrelevant a line of questioning pertaining to the victim's belief that her mother did not like defendant (which might have suggested the victim's bias against defendant and a motive to lie about the sexual assaults), defendant had ample opportunity during cross-examination in the preliminary examination to explore this avenue, and at trial the jurors were read preliminary examination testimony that constituted more than adequate evidence from which defense counsel could have formulated and presented an argument predicated on bias and an ill motive. There was no significant limitation with respect to the scope and nature of defendant's cross-examination of the victim. In the context of this case, the purpose of cross-examination at the preliminary examination was essentially identical to that at the trial, which was attempting to show that the sexual-assault and impropriety claims were untrue. Defense counsel thoroughly cross-examined the victim at the preliminary examination to explore these areas. The discovery materials were made available for defendant's review, but he chose not to take advantage of that opportunity and did not identify the specific discovery materials that would have assisted in cross-examining the victim or explain how familiarity with the particular discovery materials would have been beneficial. Finally, the thumb drive pertained mainly to the CSAA and computer-crime charges, not the CSC-II counts. Because the victim's testimony was focused only on the CSC-II charges, the relevance of the thumb drive to the cross-examination of the victim was minimal.

4. Witnesses in judicial proceedings must swear or affirm that their testimony will be true. MRE 603, MCL 600.1432(1), and MCL 600.1434 address the requirement that before testifying, every witness must declare that he or she will testify truthfully by swearing an oath or giving an affirmation administered in a form calculated to awaken the witness's conscience and impress on the witness's mind the duty to do so. However, neither MCL 600.1434 nor MRE 603 mandates special words or actions before a witness may testify; each requires only a simple affirmation or promise to tell the truth. Therefore, as long as a witness's promise to testify truthfully is minimally sufficient, the trial court must allow the witness's testimony. A simple promise by a young child to tell the truth comports with the statute and evidentiary rule. Nevertheless, to the extent that the victim's statement that she would tell the truth constituted a promise to tell the truth at the preliminary examination, that statement was not made until cross-examination was partially concluded and well after the prosecutor had elicited the inculpatory testimony. While the victim demonstrated her ability to distinguish truth from lies when the prosecutor questioned her, the district court and the prosecutor failed to take the extra step of obtaining a promise or affirmation to tell the truth. Nonetheless, reversal of defendant's convictions was not necessary on the basis of this unobjected-to error. Defendant made no attempt to address on appeal whether the error was structural; whether the error was waived and thus not appealable; whether the error was forfeited; whether, if forfeited, the plain-error test precluded or required reversal; whether the error was preserved; and, if preserved, whether the harmless-error test precluded or required reversal. The panel concluded that a structural-error approach relative to the unsworn testimony was not consistent with caselaw. It also noted that some Michigan precedent had effectively applied a waiver analysis when a party failed to object to unsworn testimony and allowed it to be fully developed. In this case, defendant objected at trial that the victim's preliminary examination testimony had not been given under oath or by affirmation but had not objected when the testimony was actually procured at the preliminary examination. Only an objection at the preliminary examination would have been meaningful, allowing the district court to take corrective action. Under Michigan's waiver caselaw, defendant waived the issue concerning the victim's unsworn testimony, and reversal was not warranted. Finally, more recent precedent regarding the concepts of forfeiture and waiver suggested that simply not objecting to the unsworn testimony at the preliminary examination, particularly given the lack of any indication that defendant

was aware of the oversight and knowingly remained quiet, constituted more of a case of forfeiture than waiver, implicating a review for plain error affecting defendant's substantial rights.

5. Defendant argued that the offense of CSAA was unconstitutionally vague as applied to him, undermining both the CSAA conviction and the related computer-crime conviction that were based on the videos. Under MCL 750.145c(2), a person who knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material is guilty of a felony. MCL 750.145c(1)(n) defines "child sexually abusive activity" as a child's engaging in a listed sexual act, which under MCL 750.145c(1)(i) includes masturbation. MCL 750.145c(1)(k) defines in extensive detail what acts constitute masturbation. MCL 750.145c(1)(o) defines "child sexually abusive material" as any depiction, including a video, of a child engaging in a listed sexual act. Finally, MCL 752.796(1) prohibits the use of a computer program, computer, computer system, or computer network to commit a crime. For purposes of the computer-crime charge against defendant, the predicate crime was the CSAA offense. A statute may be challenged as unconstitutionally vague when (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words. The statutory definition of "masturbation" plainly provides specific criteria for its application, was not arbitrarily applied to create criminal conduct, and gives fair notice of the illegal nature of the proscribed conduct in the context of a CSAA prosecution. Moreover, a person of ordinary intelligence would reasonably know that filming the actions depicted in the videos would be prohibited without the need to speculate regarding the meaning of "masturbation" as defined in the statute. Reversal was not warranted on vagueness grounds.

6. Defendant also argued that there was insufficient evidence to support his CSAA and computer-crime convictions. Viewing the direct and circumstantial evidence in a light most favorable to the prosecution, taking into consideration all reasonable inferences arising from the evidence, resolving all conflicts in the evidence in favor of the prosecution, and deferring to the jury's assessment of

the weight of the evidence and the credibility of the witnesses, however, a rational juror could have found that the prosecution proved beyond a reasonable doubt that defendant knowingly videotaped the victim while she was engaged in a listed sexual act. That evidence included the videos themselves and the acts depicted in them, the detective's characterization of the victim's behavior in the videos, defendant's suggestive questions to the victim during the videotaping, the victim's responses to defendant while being filmed, the inappropriate photographs of the victim taken by defendant, the testimony of the victim's mother about a similar masturbatory act, and expert testimony about normal sexual behavior by children. That evidence sufficiently supported both the CSAA and computer-crime convictions.

7. Defendant argued that the trial court erred by permitting the prosecution's rebuttal expert witness to testify about hearsay when she alluded to statements made by the victim during her forensic interview and mentioned acts of fellatio and sexual contact unrelated to the charged CSC-II counts for which defendant was convicted. The statements, however, were not offered to prove that defendant engaged in those acts with the victim. Rather, the first statement was offered as part of an explanation and discussion of source-monitoring questions posed to the victim. The second statement was offered to clarify what incident the expert was referring to in regard to statements the victim made to the forensic interviewer, all in the context of broader questioning concerning forensic interviewing procedures.

8. Defendant also argued that the trial court erred by permitting the prosecution's rebuttal witness to testify beyond the scope of defendant's case on matters concerning typical patterns of behavior relative to sexually abused children. Admission of rebuttal evidence is within the trial court's sound discretion. The trial court must evaluate the overall impression that might have been created by the defense proofs. Rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence produced by the other party. The test for whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecution's case in chief, but whether the evidence was properly responsive to evidence introduced or a theory developed by the defendant. In this case, the prosecutor asked the rebuttal witness only one question about delayed disclosure of sexual abuse by children and made no attempt through further questioning to connect the issue to defendant's case. Any error was accordingly harmless. With regard to the dynamics and characteristics of child sexual abuse, the witness's testimony was

responsive and was properly admitted. She testified that it was consistent and not unusual for child victims of sexual abuse to appear unafraid of the abuser, to have an apparently close and loving relationship with the perpetrator, to forget at some point what had occurred to them, and to believe that they had already told someone about the abuse. This testimony was properly offered to rebut any inferences arising from the testimony by defendant's niece and his friend that defendant and the victim had an appropriate, normal, and loving relationship.

9. Defendant argued that the trial court erred by allowing the officer in charge of the investigation to give her opinion that the victim had not been coached, thereby violating the rule that one witness may not comment on the credibility of another witness. In cross-examination, defense counsel had pursued a line of questioning suggesting that the victim had been coached in light of the number of persons who had spoken to her before the forensic interview. On redirect examination, the officer explained the methods used and questions asked by forensic interviewers to determine whether an alleged child victim of criminal sexual conduct had been coached. The prosecutor then asked whether there was any indication that the victim here had been coached. The officer testified that there was no indication. Defendant opened the door to the question. Moreover, under MRE 702 and MRE 703, giving an opinion that there was no indication of coaching based on forensic-interview training, experience, education, and the totality of the circumstances is not the equivalent of opining that the victim was credible or telling the truth.

10. Defendant argued that the prosecutor's cross-examination of defendant's expert witness regarding the forensic interview exceeded the scope of direct examination and effectively permitted the prosecutor to introduce hearsay and present to the jurors a second time parts of the victim's preliminary examination testimony and the officer's opinion on coaching. The trial court, however, did not rule that questions concerning the forensic interview could not be asked on direct examination. MRE 611(c) provides that a witness may be cross-examined on any matter relevant to any issue in the case, including credibility, and the trial court has the discretion to limit cross-examination with respect to matters not testified to on direct examination. The prosecutor's cross-examination gave defendant's expert a forum to voice her criticisms of the forensic interview, which defense counsel further explored on redirect examination. Defendant was not prejudiced, and any error was harmless.

11. The trial court did not err by admitting other-acts evidence, consisting of nude and semi-nude photographs of the victim and evidence of allegations of abuse by defendant that she made during the forensic interview. MRE 404(b)(1) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with that character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when those matters are material, regardless of whether the other crimes, wrongs, or acts are contemporaneous with or before or after the conduct at issue in the case. If a defendant is charged with unlawful sexual acts, MCL 768.27 (which is essentially the statutory version of MRE 404(b)) allows the admission of evidence of uncharged activities between the defendant and the victim when that evidence enhances credibility, shows familiarity, explains and gives context to the relationship, forms a link in the chain of events, allows the jury to appreciate the full range and nature of the interactions between the defendant and the victim, and otherwise provides the jurors with the full or entire story, instead of leaving the jurors to view events in a vacuum. All these reasons were relevant in this case. The photographs gave context to the videos and enhanced the victim's credibility with respect to her CSC-II accusations, thereby assisting in providing the jury the full story. With respect to the forensic interview references, defendant himself elicited the evidence and relied on it in arguing that the victim's claims were nonsensical and that she could not be believed. The evidence was actually beneficial to defendant's claim of innocence.

12. In *People v Lockridge*, 498 Mich 358 (2015), the Supreme Court held that Michigan's sentencing guidelines scheme was unconstitutional to the extent that it allows courts to find by a preponderance of the evidence facts that are then used to increase the mandatory minimum punishment a defendant receives. To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her offense variable (OV) level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range. If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand for the trial court to determine whether plain error occurred, i.e., whether the court would have imposed

the same sentence absent the unconstitutional constraint on its discretion, using the procedures outlined in *United States v Crosby*, 397 F3d 103 (CA 2, 2005). If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant. In this case, defendant's minimum sentence range under the guidelines was 51 to 85 months. The trial court, however, engaged in judicial fact-finding to score two OVs. Deducting the improperly assessed points from defendant's total OV assessment changed the applicable guidelines minimum sentence range to 45 to 75 months under MCL 777.63. Accordingly, defendant was entitled to a *Crosby* remand.

Convictions affirmed; case remanded for compliance with *Lockridge* in regard to sentences.

STEPHENS, J., concurring, wrote separately to address two points of the majority's analysis. The first point regarded the majority's equivocation about whether the failure to object to the victim's testimony at the preliminary examination resulted in a waiver or forfeiture. Judge STEPHENS concluded that it was the latter. Waiver requires positive action or words, while forfeiture results from incomplete or ineffective action or from complete inaction. In this case, defense counsel, whether for reasons of inadvertence, strategy, or courtesy, failed to object to the admission of the unsworn testimony at the preliminary examination. The second point concerned the ramifications of the forfeited error. Judge STEPHENS disagreed with the majority and concluded instead that the forfeited error in this case was structural. The concept that defendants should only be found guilty of crimes on the basis of the testimony of persons to whom some oath has been given is fundamental to our system of jurisprudence. The oath not only impresses the witness with the obligation to be truthful, but imposes grave penalties for a willful untruth. The oath serves to undergird public confidence in the integrity of our judicial system in much the same way that the promise of an unbiased judiciary and a jury of peers does. Not all structural errors require reversal, however, and Judge STEPHENS agreed with the majority that reversal was not warranted in this case.

1. EVIDENCE — WITNESSES — OATHS OR AFFIRMATIONS — CHILDREN — PROMISES TO TELL THE TRUTH.

Before testifying in a judicial proceeding, witnesses must swear or affirm that their testimony will be true, and the oath or affirmation must be administered in a form calculated to awaken the witness's conscience and impress on the witness's mind the duty

to do so; the statutes and court rules, however, do not mandate special words or actions before a witness may testify, requiring only a simple affirmation or promise to tell the truth; as long as a witness's promise to testify truthfully is minimally sufficient, the trial court must allow the witness's testimony, and a simple promise by a young child to tell the truth comports with the statutes and evidentiary rules (MRE 603; MCL 600.1432(1), MCL 600.1434).

2. CRIMINAL LAW — EVIDENCE — REBUTTAL — ADMISSIBILITY.

Admission of rebuttal evidence in a criminal case is within the trial court's sound discretion; the court must evaluate the overall impression that might have been created by the defense proofs; rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence produced by the defense; the test for whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecution's case in chief, but whether the evidence was properly responsive to evidence introduced or a theory developed by the defendant.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Kathryn G. Barnes*, Assistant Prosecuting Attorney, for the people.

Robyn B. Frankel for defendant.

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

MURPHY, P.J. Defendant was convicted by a jury of child sexually abusive activity (CSAA), MCL 750.145c, using a computer to commit a crime, MCL 752.796, and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. The victim of these crimes was defendant's young daughter. Defendant was sentenced to concurrent prison terms of 71 months to 20 years for the CSAA and computer-crime convictions and 71 months to 15 years for the CSC-II convictions. Defendant appeals as of right. We affirm defendant's

convictions, but remand to address a sentencing matter pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

I. BASIC FACTS

Defendant is the biological father of the victim. Defendant and the victim's mother were not married, and they were residing in different homes when the child made claims to her mother regarding inappropriate sexual behavior by defendant. The child's mother contacted law enforcement, which led to a forensic interview of the child and the execution of a search warrant at defendant's home. In executing the warrant, the police seized computers, including an Apple iMac, external hard drives, numerous CDs, a diskette, multiple SD (storage data) cards, two cellular phones, including an iPhone 4, and a flash drive. A detective, who was qualified as an expert in computer forensic examinations, testified that, for the most part, examination of these items did not reveal any suspicious activities. He did, however, discover a CD with nude images of the child in the bathtub and bathroom.[1] Additionally, the detective retrieved two suspicious videos, created seven minutes apart, that had been filmed using defendant's iPhone 4. These videos were additionally stored on the iMac and an external hard drive, and they formed the basis of the CSAA and computer-crime charges. The victim was clothed in both videos, and in one video, the child is observed, as described by the detective, "grinding . . . on the couch," with defendant "focusing [the camera] on her rear

[1] While some of these images are disturbing, including a photo that is focused entirely on the child's buttocks while in the bathtub and a photo showing the child touching her genitals, they did not directly form the basis of any of the charges.

end."[2] The detective opined that the child's act entailed manual manipulation of the genitals, and the prosecution characterized the victim's actions as constituting masturbation for purposes of the charges. In the video, defendant is heard asking the child why she was engaging in the act, and she responded, "because it's comfortable." When defendant then asked her why it was comfortable, the child expressed that it felt good. With respect to the second video, the child is seen grinding against the couch with one hand under her body on her genitals. The child's mother testified to having once observed the child with "her hands between her legs and . . . gyrating on the bed," and when she told the child to stop, the child responded that "she was allowed to" engage in the behavior.

In preliminary examination testimony that was eventually submitted to the jury during the trial after the trial court found that the victim had become unavailable due to lack of memory, the child, seven at the time of the preliminary examination, testified that defendant would watch her as she bathed in the shower and when she used the toilet. The victim also testified regarding a couple of instances in which, while both were clothed, defendant pressed his penis against the child's genital area, which conduct formed the basis of the two counts of CSC-II. One of the assaults occurred on a couch in defendant's home as defendant lay on top of the child, who believed that she was in first grade at the time. The other sexual assault occurred when defendant entered the child's bedroom where she lay, lay down on her bed under the covers, and then maneuvered his body so that the two were on their sides facing each other and making direct contact.

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[2] The video was played as the detective testified to his interpretation of the events filmed by defendant.

II. CONSTITUTIONAL RIGHT OF CONFRONTATION

A. GENERAL GOVERNING LEGAL PRINCIPLES AND BACKGROUND INFORMATION

On appeal, defendant first argues that the trial court violated his constitutional right to confront the witnesses against him when it permitted the victim's preliminary examination testimony to be admitted as substantive evidence at trial. Defendant contends that the victim was not "unavailable" as required to admit the evidence, that the victim's testimony at the preliminary examination was unsworn and thus unusable, given that she had not been placed under oath before testifying, and that the preliminary examination did not provide defendant a full and fair opportunity for cross-examination. We reject each of these arguments as a basis for reversal.

We review de novo the question whether a defendant was denied the constitutional right to confront complaining witnesses. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). Under the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI. Similarly, under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her[.]" Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004) ("Where testimonial

evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").[3] We are unaware of any precedent suggesting that the right of confrontation under the Michigan Constitution is to be analyzed any differently than the Sixth Amendment's Confrontation Clause. In *People v Nunley*, 491 Mich 686, 697-698; 821 NW2d 642 (2012), our Supreme Court observed:

> The Confrontation Clause is "primarily a functional right" in which the right to confront and cross-examine witnesses is aimed at truth-seeking and promoting reliability in criminal trials. Functioning in this manner, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."
>
> The specific protections the Confrontation Clause provides apply "only to statements used as substantive evidence." In particular, one of the core protections of the Confrontation Clause concerns hearsay evidence that is "testimonial" in nature. The United States Supreme Court has held that the introduction of out-of-court testimonial statements violates the Confrontation Clause; thus, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant. [Citations omitted.]

Of course, testimony given at a preliminary examination qualifies as being testimonial in nature, see *id*. at 698-699; *Crawford*, 541 US at 68; therefore, it was necessary to establish that the victim here was un-

[3] The Confrontation Clause of the Sixth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Tennessee v Lane*, 541 US 509, 523; 124 S Ct 1978; 158 L Ed 2d 820 (2004).

available at trial and that defendant had an opportunity to cross-examine her at the preliminary examination.

At the preliminary examination, the victim testified absent oath or affirmation. When the victim first took the stand, the prosecutor asked her a few preliminary questions for the purpose of establishing that the child could distinguish truth from lies. The victim answered appropriately, and the district court responded in the affirmative when the prosecutor asked the court for permission to proceed with the questioning of the child. Defendant failed to voice any objection to the unsworn testimony that followed, allowing the child's testimony to be fully developed. The victim was subject to extensive cross-examination by defense counsel, encompassing nearly 70 pages of transcript. Defendant's attorney grilled the child with questions regarding her ability to tell the truth and distinguish between fact and fabrication. Midway through cross-examination, defense counsel asked the victim whether she had "been telling the truth so far," and the victim replied, "Yes." The child also stated: "I'm telling the truth"; "I'll tell the truth"; and "I'll still tell the truth." The victim further testified how several people had told her to simply tell the truth when she testified.

At the trial, the victim took the stand and testified to foundational and peripheral matters; however, when the questioning turned to defendant's conduct that formed the heart of the prosecution's case, the victim indicated that she could not remember what had occurred. Efforts by the prosecutor to refresh the child's memory through reference to the preliminary examination transcript were unsuccessful. Outside the presence of the jury, the trial court and the attorneys engaged in an extensive colloquy regarding how to

proceed, with the court entertaining arguments concerning the propriety of having the victim's preliminary examination testimony read to the jurors. The trial court and the parties also made direct inquiries to the child herself, seeking to understand whether she could not remember what had transpired or whether she simply refused or did not want to testify about defendant's conduct. The child was adamant that she could not remember the events giving rise to the charges, and the trial court concluded that, due to lack of memory, the child was "unavailable." The trial court ruled in favor of admitting the victim's preliminary examination testimony, rejecting defendant's arguments that his counsel had not had a full and fair opportunity to cross-examine the victim at the preliminary examination and that the failure to place the victim under oath at the examination barred admission.

B. UNAVAILABILITY

We initially address defendant's argument that the trial court erred by finding that the child was unavailable for purposes of confrontation analysis. The gist of defendant's argument is that, given all the surrounding circumstances, the child was feigning a lack of memory and therefore she was not unavailable, contrary to the trial court's ruling. We fail to see the relevance of defendant's argument, considering that had the trial court instead found that the child was intentionally refusing to testify or was too scared or distressed to testify, she still would have qualified as unavailable, as explained below. In examining a Confrontation Clause argument and determining whether a person is unavailable as part of that analysis, it is proper to consider MRE 804(a), which addresses hear-

say exceptions relative to unavailable witnesses and sets forth situations in which a witness is properly deemed unavailable. See *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). A trial court's factual finding on the issue of unavailability is reviewed for clear error. *Id*.

A witness or declarant is unavailable when "the declarant . . . has a lack of memory of the subject matter of the declarant's statement[.]" MRE 804(a)(3). The trial court and the parties thoroughly quizzed the victim regarding whether she truly could not testify on the relevant matters due to lack of memory, and the child was steadfast in asserting that lack of memory was the reason for her inability to so testify. Indeed, even defense counsel conceded below, "I believe the record speaks for itself that she has no recollection." On the existing record, we conclude that the trial court did not clearly err by finding that the victim was unavailable because of lack of memory, especially given the trial court's special opportunity to judge the victim's credibility. MCR 6.001(D); MCR 2.613(C).

Moreover, a witness or declarant is also unavailable when "the declarant . . . persists in refusing to testify concerning the subject matter of the declarant's statement . . . ." MRE 804(a)(2). If the trial court had determined that the child was fabricating in claiming failed memory and that she was instead refusing to testify, it is abundantly clear from the record that the child would still not have testified on the relevant matters even if ordered. Additionally, in *People v Duncan*, 494 Mich 713, 717; 835 NW2d 399 (2013), our Supreme Court held "that when a child attempts to testify but, because of her youth, is unable to do so because she lacks the mental ability to overcome her distress, the child has a 'then existing . . . mental . . . infirmity'

within the meaning of MRE 804(a)(4) and is therefore unavailable as a witness." (Ellipses in original.)[4] To the extent that the victim in the present case was unable to testify because of her youth and the absence of the mental ability to overcome distress, she would also qualify as being unavailable under MRE 804(a)(4).[5] It is also plain that additional attempts to accommodate the victim, e.g., allowing her to testify via closed-circuit television, would have been futile, considering that despite the enormous efforts by the trial court and the attorneys to procure the child's testimony, she was not prepared to testify because of her lack of memory. See *Duncan*, 494 Mich at 729 (urging courts, "when appropriate," to use "the tools in our court rules and statutes to accommodate young witnesses"). We note our reference in the preceding sentence to "additional" attempts to accommodate the child, as the trial court in this case did close the courtroom during her testimony and permitted a victim support advocate to be present for the child's mental well-being. Reversal is unwarranted.

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[4] Pursuant to MRE 804(a)(4), a declarant is unavailable if he or she "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity[.]"

[5] We note that in *Duncan* a child criminal sexual conduct (CSC) complainant had competently testified at the preliminary examination, but she faltered at the defendants' trial. Our Supreme Court solely addressed the issue regarding whether the CSC complainant was unavailable under MRE 804(a)(4) after this Court had affirmed the circuit court's decision that the complainant was not unavailable. *Duncan*, 494 Mich at 717-722. Ruling that she was unavailable under MRE 804(a)(4), the Supreme Court remanded the case for a determination "whether the complainant's preliminary examination testimony satisfie[d] the requirements of MRE 804(b)(1) and, if so, whether admission of that testimony would violate defendants' rights under the Confrontation Clause." *Id*. at 717. The Court found that the child complainant's "emotional distress made it impossible for her to testify," as "highlighted by the fact that she had previously been able to give testimony about the alleged sexual contacts at issue . . . ." *Id*. at 728-729.

C. FULL AND FAIR OPPORTUNITY FOR CROSS-EXAMINATION

We next address defendant's argument that his confrontation rights were infringed because the preliminary examination did not provide defendant a full and fair opportunity for cross-examination. More specifically, defendant complains that his counsel lacked the ability or opportunity to examine certain discovery materials before the preliminary examination, encompassing those materials subject to a protective order and "a thumb drive containing all of [the] . . . computer forensic analysis" compiled by the detective who testified as an expert witness in computer forensic examinations. Defendant further contends that the purpose of cross-examination at a preliminary examination differs substantially from the purpose of cross-examination at trial and that the district court had improperly curtailed cross-examination with respect to relevant issues of motive and bias. We hold that these arguments are unavailing.

The constitutional right of confrontation solely guarantees an opportunity for effective cross-examination, not cross-examination that is effective to whatever extent and in whatever way a defendant wishes. *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988). The United States Supreme Court has recognized that while a preliminary examination "is ordinarily a less searching exploration into the merits of a case than a trial," the Confrontation Clause can be satisfied if a defendant's cross-examination of the witness at the preliminary examination was not significantly limited in scope or nature and the witness was actually unavailable at trial. *California v Green*, 399 US 149, 166; 90 S Ct 1930; 26 L Ed 2d 489 (1970).

In regard to defendant's assertion that the district court had improperly curtailed cross-examination with respect to issues of motive and bias, the line of questioning cited by defendant, which the district court had found irrelevant, pertained to why the child had come to believe that her mother did not like defendant. In his appellate brief, defendant provides no elaboration whatsoever explaining his theory that the questioning went to the issues of motive and bias. But we assume that defendant is suggesting that the child was biased against defendant and might have had a motive to lie about the sexual assaults based on the nature of her parents' relationship, i.e., she falsely accused defendant of sexual misconduct in order to gain favor with or please her mother. We first note that the victim's mother testified at trial, and defendant had ample opportunity during cross-examination to explore this avenue from that perspective. Moreover, defendant ignores the fact that the jurors were read preliminary examination testimony in which the child testified that she "always wanted to stay with my mom," that she never wanted to go with defendant, and that her mother did not like defendant. This was more than adequate evidence from which to formulate and present an argument predicated on bias and an ill motive, and we fail to see how questioning regarding *why* the child's mother disliked defendant was of any real relevance, assuming that the child even had sufficient personal knowledge to answer that question. The exclusion of the testimony, even if constituting evidentiary error, did not reflect a significant limitation with respect to the scope and nature of defendant's cross-examination of the child. Accordingly, defendant's argument does not suffice to establish a violation of his confrontation rights.

With respect to defendant's argument that the purpose of cross-examination at a preliminary examination differs substantially from the purpose of cross-examination at trial, he again provides no elaboration in support of the argument. In the context of this case, we conclude that the purpose of cross-examination at the preliminary examination and at the trial was essentially identical, which was to attempt to show that the sexual-assault and impropriety claims were untrue, resulting from improper coaching, a problematic forensic examination, the confused mind of a child spinning outlandish tales, or a purposeful attempt by the child to imperil her father. As mentioned earlier, defense counsel took full advantage of cross-examination of the victim at the preliminary examination in exploring these areas and was extremely thorough.

We next reject defendant's argument that he lacked the ability to review discovery materials before the preliminary examination, encompassing those materials subject to a protective order and a thumb drive containing information regarding the computer forensic examination. The record reflects that discovery materials were the subject of a motion the week before the preliminary examination and were made available for defendant's review at the Troy Police Department. Apparently, defendant chose not to take advantage of reviewing the materials despite the ability to do so, and he fails to explain on appeal why review of the discovery materials was not pursued. Indeed, except for the thumb drive, defendant fails to even identify in his appellate brief the specific discovery materials that would have assisted in the cross-examination of the victim, let alone explain how familiarity with the particular discovery materials would have been beneficial in cross-examining the victim. With respect to the

thumb drive, the prosecution noted at the preliminary examination that it had previously identified the thumb drive in an answer to defendant's motion for discovery. And the thumb drive was admitted into evidence on the first day of a two-day preliminary examination—the second day of which took place *three weeks after* day one—yet defendant did not seek to reopen cross-examination of the victim. Additionally, the prosecutor indicated, with no assertion by defendant to the contrary, that the thumb drive, like the other discovery materials, had been made available for defendant's review at the Troy Police Department before the preliminary examination was conducted. Finally, the importance of the thumb drive has to be assessed in the context of the cross-examination of the victim, not the case in general. The thumb drive pertained mainly to the prosecution's case regarding the CSAA and computer-crime charges, not the two CSC-II counts. And the victim's testimony was focused on the CSC-II charges, not the CSAA and computer-crime charges. Therefore, the relevance of the thumb drive to the cross-examination of the victim was minimal. Accordingly, the claimed inability to review the thumb drive before the preliminary examination did not constitute a significant limitation with respect to the scope and nature of defendant's cross-examination of the child.

D. OATH OR AFFIRMATION—VICTIM'S UNSWORN TESTIMONY

We next address the argument that defendant's confrontation rights were violated because the victim never declared at the preliminary examination, by oath or affirmation, that she would testify truthfully. See MRE 603 ("Before testifying, every witness shall be required to declare that the witness will testify

truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."); MCL 600.1432(1) (addressing administration of an oath to a witness); MCL 600.1434 (addressing affirmation as an alternative to an oath). "[W]itnesses in judicial proceedings must swear or affirm that their testimony will be true." *People v Putman*, 309 Mich App 240, 243; 870 NW2d 593 (2015).

Michigan Model Criminal Jury Instruction 5.9 currently provides that "[f]or a witness who is a [young] child, a promise to tell the truth takes the place of an oath to tell the truth." (Second set of brackets in original.) The "Use Note" for the instruction states that "[t]his instruction is based on former MCL 600.2163, repealed by 1998 PA 323, [effective] Aug. 3, 1998." MCR 2.512(D)(2) provides that

> instructions approved by . . . the Committee on Model Criminal Jury Instructions . . . must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and
>
> (c) they are requested by a party.

Of course, M Crim JI 5.9 would generally have no direct application in regard to a preliminary examination, as there is no jury to instruct. The trial court did instruct the jury on M Crim JI 5.9 *at the trial* in light of the child's limited live testimony, during which the child promised the trial court to tell the truth without an oath being administered. Defendant voiced no objection to the child's simple promise to tell the truth or to the associated instruction. MRE 603, MCL 600.1432, and MCL 600.1434 do not contain language

comparable to that found in M Crim JI 5.9. However, this Court, in examining the concept of affirmation, has held:

> Neither MCL 600.1434 nor MRE 603 mandates special words or actions before a witness may testify; each requires only a simple affirmation *or promise to tell the truth*. Thus, as long as [the witness's] promise to testify truthfully was minimally sufficient, the trial court was required to allow her testimony. [*Donkers v Kovach*, 277 Mich App 366, 374; 745 NW2d 154 (2007) (emphasis added).]

In *Donkers*, the witness was not required to raise her right hand in affirming or promising to tell the truth. *Id*. See also *Putman*, 309 Mich App at 244-245.

Therefore, M Crim JI 5.9 is not inconsistent with MCL 600.1434 or MRE 603, and a simple promise by a young child to tell the truth would appear to comport with the statute and rule of evidence. Nevertheless, to the extent that the victim's statement that she would "tell the truth" constituted a "promise" to tell the truth at the preliminary examination, the statement was not made until cross-examination was partially concluded and well after the prosecutor had elicited the inculpatory testimony. While at the commencement of the child's testimony she showed her ability to distinguish truth from lies on questioning by the prosecutor, the district court and the prosecutor failed, clearly inadvertently, to take the one extra step to obtain a promise or affirmation to tell the truth. For the reasons explained below, however, reversal of defendant's convictions is not necessary because of this unobjected-to error.[6]

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[6] Defendant couches his argument concerning the unsworn testimony solely within the context of an alleged Confrontation Clause violation. We question whether the issue regarding the unsworn testimony is even

Although defendant argues that his right of confrontation was violated by the admission of the victim's preliminary examination testimony, defendant makes

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relevant *for purposes of confrontation analysis under Crawford*. It is true that, generally speaking, " '[t]he right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness.' " *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001) (citation omitted). However, within the framework of a *Crawford* analysis for purposes of confrontation, in which the focus is on a statement made by a witness *who does not appear at trial*, the relevant inquiry entails whether the statement was testimonial in nature, whether the witness was unavailable for trial, and whether there was a previous opportunity to cross-examine the witness. *Crawford*, 541 US at 59, 68. Resolution of a confrontation dispute under *Crawford* is not governed or controlled by whether the witness made the statement under oath or whether the witness's demeanor while making the statement was observable by the jury. For example, unless an out-of-court statement made by a witness was videotaped, with the jury being shown the video, a jury typically is unable to observe the demeanor of a witness when he or she made an out-of-court statement, yet *Crawford* allows the admission of the statement if the witness was unavailable at trial and subject to prior cross-examination. This is true despite the fact that ordinarily the right of confrontation allows jurors to observe the demeanor of a witness. *Watson*, 245 Mich App at 584. Similarly, in a *Crawford* setting, whether a statement was sworn or unsworn has little to do with determining if a Confrontation Clause violation occurred. The United States Supreme Court has held that the absence of an oath is not dispositive in deciding whether a statement is testimonial in nature. *Bullcoming v New Mexico*, 564 US 647, 664; 131 S Ct 2705; 180 L Ed 2d 610 (2011); *Crawford*, 541 US at 52. Thus, an unsworn statement may be admitted against a defendant if the statement is not actually testimonial in nature *or* when the unsworn statement is testimonial, but the statement was made by a now-unavailable witness whom the defendant had a prior opportunity to cross-examine. Under a *Crawford* analysis, the fact that the prosecution elicited unsworn testimony from the victim in the instant case does not appear to equate with an infringement of defendant's right of confrontation. While outside the context of confrontation and *Crawford* there may have been a problem with admitting the preliminary examination testimony under MRE 804(b)(1) (hearsay exception—"former testimony" by unavailable declarant) or under a straight application of MRE 603, defendant does not frame the argument in that manner. Despite our reservations outlined in this footnote, we shall proceed on the basis that an error occurred.

no attempt whatsoever to address questions concerning whether the error was structural, whether the error was waived and therefore not appealable, whether the error was forfeited, whether, if forfeited, the plain-error test precludes or requires reversal, whether the error was preserved, and whether, if preserved, the harmless-error test precludes or requires reversal. Clearly, at least one of these principles must apply, yet defendant engages in no legal analysis regarding any of the principles.

With respect to structural-error analysis, it perhaps can be implied that defendant's position is that structural error occurred, considering that he argues error and then simply demands reversal.[7] But even giving defendant the benefit of this implication, our Supreme Court has stated as follows:

> "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. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [*Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (citation omitted).]

Furthermore, a structural-error approach relative to the unsworn testimony is not consistent with caselaw.

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[7] As explained by the Supreme Court in *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000):

> Structural errors . . . are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. Such an error necessarily renders unfair or unreliable the determining of guilt or innocence. . . . [S]tructural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. [Citation omitted.]

In *People v Kemmis*, 153 Mich 117, 117-118; 116 NW 554 (1908), our Supreme Court addressed a case in which a 10-year-old witness "was permitted to give his testimony without being sworn" and "[n]o exception was taken." On appeal, the defendant, in seeking reversal of his conviction, argued that "the testimony was improperly received . . . ." *Id*. at 118. The Supreme Court held, "We dispose of this contention by saying that it was not made in the trial court and cannot be made for the first time in this court." *Id*. In *Mettetal v Hall*, 288 Mich 200, 207-208; 284 NW 698 (1939), the Michigan Supreme Court similarly held that "[w]here a witness gives his testimony without being sworn, the adverse party by not objecting thereto *waives* any objection to it." (Emphasis added.) In *People v Knox*, 115 Mich App 508, 511; 321 NW2d 713 (1982), this Court, after acknowledging MRE 603, MCL 600.1432, and MCL 600.1434, ruled that, under *Kemmis* and *Mettetal*, the issue of unsworn testimony was not reviewable because "defense counsel did not object to the failure of the trial court to insist upon an oath or affirmation."

This precedent effectively applies a waiver analysis when a party fails to object to the unsworn testimony and allows the testimony to be fully developed. Federal courts have taken a similar stance. In *United States v Odom*, 736 F2d 104, 114-115 (CA 4, 1984), the United States Court of Appeals for the Fourth Circuit observed:

> It is well settled that the swearing of a witness is waived by failure to raise the point during the witness' testimony, thus denying the trial court an opportunity to correct what has been characterized as an "irregularity." The rationale of this principle was declared a century and a half ago in the oft-cited case of *Cady v. Norton*, [31 Mass 236, 237] 14 Pick. 236, 237 (Mass.1833). The Court in that

> case stated two justifications for the rule: First, the defect or failure could have been corrected if a timely objection had been made; second, in the absence of a waiver rule counsel might deliberately avoid objecting to a witness being unsworn in order to have a ground of appeal.

The Fifth Circuit in *United States v Perez*, 651 F2d 268, 273 (CA 5, 1981), stated that "[i]t has long been the general rule that even a failure to swear a witness may be waived," and "[t]his may occur either by knowing silence . . . or by the mere failure of counsel to notice the omission . . . ." And in *Wilcoxon v United States*, 231 F2d 384, 387 (CA 10, 1956), the Tenth Circuit indicated that "the administering of the oath to a witness may be waived" and that "[b]y failing to bring the matter to the attention of the trial court in some manner . . . , [the defendant] effectively waived the right to seek a new trial . . . ."

State courts outside of Michigan have also applied a waiver analysis when there was no objection to unsworn testimony. *State v Paolella*, 211 Conn 672, 687-688; 561 A2d 111 (1989); *Heier v State*, 727 P2d 707, 708 (Wy, 1986) (" 'It is generally held that the failure to require an oath or affirmation before testifying must be raised by objection or it is considered waived.' ") (citation omitted); *State v Navarro*, 132 Ariz 340, 342; 645 P2d 1254 (Ariz App, 1982) ("[I]rregularity in failing to swear a witness is waived where he is permitted to testify without objection."); *Brown v Ristich*, 36 NY2d 183, 189; 366 NYS2d 116; 325 NE2d 533 (1975) ("[T]he failure to object to unsworn testimony serves to waive any argument that the testimony was not properly admitted.").

In this case, although defendant objected at the trial that the victim's preliminary examination testimony had not been given under oath or by affirmation, there

was no objection at the time that the testimony was actually procured at the preliminary examination. Only an objection at the preliminary examination would have been meaningful, allowing the district court to take corrective action and prevent the error. While *Kemmis*, *Mettetal*, and *Knox* dealt with a failure to object at trial and the complaining parties' raising the issue of unsworn testimony for the first time on appeal, which varies from the procedural circumstances here, the waiver analysis is nonetheless applicable. This is so because the overriding principle arising from the caselaw is that one must object at the time the unsworn witness is giving the testimony, not at a later date. Given that preliminary examination testimony always presents the potential of being admitted at a future trial due to witness unavailability caused by injury, illness, death, flight, lack of recall, or other events or circumstances, it is incumbent on counsel to protect the record. Under *Kemmis*, *Mettetal*, and *Knox*, defendant waived the issue concerning the victim's unsworn testimony, and thus reversal is unwarranted.

We acknowledge that the waiver analysis is somewhat inconsistent with more recent Supreme Court precedent regarding, in general, the concepts of forfeiture and waiver. In *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), our Supreme Court explained the difference between waiver and forfeiture, stating:

> Waiver has been defined as the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which has been explained as the failure to make the timely assertion of a right. One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. Mere forfeiture, on the other hand, does not extinguish an error. [Citations and quotation marks omitted.]

Simply not objecting to the unsworn testimony at the preliminary examination, especially given that there is no indication that defendant was cognizant of the oversight and knowingly remained quiet, appears to be more of a case of forfeiture than waiver, which would implicate plain-error analysis. Claims of constitutional or nonconstitutional forfeited error are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In *Carines*, the Court set forth the plain-error test:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal 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." [*Id*. at 763 (citations omitted; alteration in original).]

Indeed, in *Putman*, 309 Mich App at 243, this Court addressed an unpreserved claim that the trial court had erred by not properly administering the oath to witnesses, and the panel did not apply a waiver analysis but instead stated:

> Defendant did not object to the form of the oath given to the witnesses at trial. Therefore, the issue is unpreserved. This Court reviews unpreserved issues for plain error

> affecting a defendant's substantial rights. [Citation omitted.]

This approach in *Putman* does appear to be inconsistent with *Kemmis*, *Mettetal*, and *Knox*. Regardless, even if we apply the plain-error test, reversal is unwarranted. Assuming the existence of a plain error, defendant has not shown that he was prejudiced as a result of the district court's allowing the victim to testify absent an oath, an affirmation, or a promise (or timely promise) to tell the truth. At the preliminary examination, before any substantive testimony was elicited from the victim, the prosecution carefully questioned the child regarding the difference between truth and lies. And the child responded in a manner showing that she fully understood the distinction. Certainly, even the child, despite her youth, appreciated that the prosecutor's questions were meant to instill an understanding of the necessity to tell the truth. Additionally, defense counsel peppered the child with questions regarding her ability to tell the truth and to distinguish between fact and fabrication. Counsel asked the child whether she had "been telling the truth so far," and she replied, "Yes." The child further implored: "I'm telling the truth"; "I'll tell the truth"; and "I'll still tell the truth." The victim recalled how several people had emphasized to her to simply tell the truth when she testified. Accordingly, although the child did not expressly promise to tell the truth at the preliminary examination and did not do so before testifying on behalf of the prosecution, the record reflects that the child understood the difference between truth and lies, understood the need to tell the truth, and adamantly asserted that she had told the truth, was telling the truth, and would continue to tell the truth. The purpose of an oath or affirmation is "to awaken the witness' conscience and impress the witness' mind

with the duty to" testify truthfully, MRE 603, and the child was clearly conscious of and had impressed on her the need to testify truthfully. Defendant's argument does not withstand scrutiny under the plain-error test, as we confidently conclude that prejudice has not been shown.

Additionally, even if we treat the claim of error as having been *fully preserved*, defendant's argument, as noted earlier, is entirely couched within the framework of an alleged violation of his right of confrontation. And our Supreme Court has unequivocally held that "[h]armless error analysis applies to claims concerning Confrontation Clause errors." *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (applying the harmless-beyond-a-reasonable-doubt standard) (citation omitted). At the risk of being redundant, we again conclude that, although the child did not expressly promise to tell the truth at the preliminary examination and did not do so before testifying on behalf of the prosecution, the record reflects that the child understood the difference between truth and lies, understood the need to tell the truth, and adamantly asserted that she had told the truth, was telling the truth, and would continue to tell the truth. Any error was harmless beyond a reasonable doubt.

In regard to structural error, we note that the Kentucky Supreme Court has held that the failure to administer an oath to a witness is not a structural error. *Peak v Commonwealth*, 197 SW3d 536, 547 (Ky, 2006). Moreover, our Supreme Court in *People v Cain*, 498 Mich 108, 118 n 4; 869 NW2d 829 (2015), recently explained that structural error has only been found in a very limited class of cases—"complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and

defective reasonable-doubt instructions." We are unaware of any cases holding that the admission of unsworn testimony constitutes structural error.

Finally, even assuming that *unpreserved structural error* actually occurred, our Supreme Court in *Cain*, 498 Mich at 118 n 4, quoting *People v Vaughn*, 491 Mich 642, 654, 667; 821 NW2d 288 (2012), observed that even if an unpreserved error is structural, a new trial is only warranted if the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings (the fourth prong of the plain-error test). Given the evidence, the nature of the assumed error, and the victim's testimony regarding telling the truth, we cannot conclude that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. Reversal is unwarranted.

III. VAGUENESS AND THE SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the offense of CSAA is unconstitutionally vague as applied to him under the circumstances in this case, undermining both the CSAA conviction and the related computer-crime conviction, and that there was insufficient evidence supporting the CSAA conviction. Defendant also argues that his trial counsel was ineffective for failing to raise a vagueness argument below and for withdrawing a motion for a directed verdict challenging the sufficiency of the evidence. We reject each of these arguments.

A. VAGUENESS AND THE CSAA STATUTE

As indicated earlier in this opinion, the CSAA and computer-crime offenses were prosecuted on the basis of the two videos filmed using defendant's iPhone 4,

which were also stored on the iMac and an external hard drive. With respect to the offense of CSAA, MCL 750.145c(2) provides, as pertinent to the prosecution's theory of the case, that "[a] person who . . . knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . is guilty of a felony . . . ." " 'Child sexually abusive activity' means a child engaging in a listed sexual act." MCL 750.145c(1)(n). A "listed sexual act" expressly includes, as relevant here, "masturbation." MCL 750.145c(1)(i). "Masturbation" is statutorily defined as follows:

> [T]he real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, either by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person. [MCL 750.145c(1)(k).]

" 'Child sexually abusive material' means any depiction, whether made or produced by electronic, mechanical, or other means, including a . . . video . . . which is of a child . . . engaging in a listed sexual act[.]" MCL 750.145c(1)(o). Finally, MCL 752.796(1) provides that "[a] person shall not use a computer program, computer, computer system, or computer network to commit . . . a crime." For purposes of the computer-crime charge under MCL 752.796(1), the predicate or underlying crime relied on by the prosecution was the CSAA offense.

As outlined in his appellate brief, the crux of defendant's vagueness argument is as follows:

> The language used to define masturbation does not provide any specific criteria for its application. Rather, in this

> case the statute was arbitrarily applied to create criminal conduct. That there was no fair notice as to the illegal nature of the charged conduct is highlighted in several regards. Even . . . [the] [d]etective [computer forensic examiner] was clueless as to what, if any behavior exhibited in the digital media was illegal.

"The constitutionality of a statute is a question of law that this Court reviews de novo." *People v Douglas*, 295 Mich App 129, 134; 813 NW2d 337 (2011) (addressing a vagueness challenge). We assume that a statute is constitutional and interpret the statute as constitutional "unless it is clearly unconstitutional." *Id*. at 135. The party claiming that a statute is unconstitutional bears the burden of proving its invalidity. *Id*.

In *People v Gratsch*, 299 Mich App 604, 609-610; 831 NW2d 462 (2013), vacated in part on other grounds 495 Mich 876 (2013), this Court discussed the nature of a vagueness challenge:

> The void-for-vagueness doctrine flows from the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17, which guarantee that the state may not deprive a person of life, liberty, or property, without due process of law. A statute may be challenged as unconstitutionally vague when (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. "A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." But "[a] term that requires persons of ordinary intelligence to speculate about its

> meaning and differ on its application may not be used." [Citations and quotation marks omitted; alteration in original.]

The statutory definition of "masturbation," MCL 750.145c(1)(k), plainly provides specific criteria for its application, was not arbitrarily applied to create criminal conduct, and gives fair notice of the illegal nature of the proscribed conduct in the context of a CSAA prosecution. Defendant's vagueness argument, at its core, is that a person of ordinary intelligence is forced to speculate in ascertaining whether the particular actions and movements of the child as seen in the videos fall within the statutory definition of "masturbation," thereby rendering MCL 750.145c unconstitutionally vague as applied to defendant and the specific facts in this case. We disagree.

As relevant to the CSAA charge brought against defendant, and under the definitions recited above, including the definition of "masturbation," a person is subject to a criminal penalty for knowingly allowing a child to engage in an act, while videotaping the act, wherein the child rubs or otherwise stimulates the child's own clothed genitals by manual manipulation or with an artificial instrument for the purpose of real or simulated overt sexual gratification or arousal. MCL 750.145c(1)(i), (k), (n), and (o) and (2). On the basis of this plain and unambiguous statutory language, a person of ordinary intelligence would reasonably know that filming the child's actions that were specifically depicted in the videos and described earlier is prohibited, absent the need to speculate regarding the meaning of "masturbation" as defined in the statute. The meaning of the statutory language can easily and fairly be ascertained by reference to dictionaries or the commonly accepted definitions of words. Reversal is unwarranted.

B. CSAA AND COMPUTER-CRIME CONVICTIONS—SUFFICIENCY OF THE EVIDENCE

Defendant also argues that the evidence was insufficient to support the CSAA and computer-crime convictions, considering the lack of evidence showing that the child was indeed engaged in acts of masturbation as videotaped by defendant. Viewing the direct and circumstantial evidence in a light most favorable to the prosecution, taking into consideration all reasonable inferences arising from the evidence, resolving all conflicts in the evidence in favor of the prosecution, and deferring to the jury's assessment of the weight of the evidence and the credibility of the witnesses, we conclude that a rational juror could find that the prosecution proved beyond a reasonable doubt that defendant knowingly videotaped the child while she was engaged in a listed sexual act, i.e., masturbation. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *Carines*, 460 Mich at 757; *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992); *People v Kanaan*, 278 Mich App 594, 618-619; 751 NW2d 57 (2008). The evidence supporting our conclusion included the videos themselves and the acts depicted therein as described earlier, the detective's characterization of the behavior seen in the videos, defendant's suggestive questions to the child during the videotaped conduct, the child's responses to defendant while being filmed, the inappropriate photographs of the child taken by defendant, testimony of the child's mother about a similar masturbatory act, and expert testimony about normal sexual behavior by children. The evidence supported both the CSAA and computer-crime convictions. Reversal

is unwarranted.[8]

IV. PROSECUTION'S REBUTTAL WITNESS—HEARSAY AND SCOPE OF TESTIMONY

Defendant next argues that the trial court erred by permitting the prosecution's rebuttal witness—an expert[9]—to testify beyond the scope of defendant's case and to testify to hearsay statements. Defendant also maintains that counsel was ineffective for failing to object to the hearsay testimony. With respect to the hearsay argument, defendant contends that the expert witness improperly alluded to statements made by the victim during her forensic interview, mentioning acts of fellatio and sexual contact unrelated to the charged counts of CSC-II for which defendant was convicted. With respect to the scope of rebuttal, defendant argues that at no time did he submit evidence suggesting or contending that the behaviors exhibited by the victim were inconsistent with the behaviors typically seen in sexually abused children, including in regard to the subject of delayed disclosure, and that he did not submit any evidence indicating that the victim was not credible on the basis of particular behaviors. Thus, according to defendant, when the rebuttal expert witness was allowed to testify on matters concerning typical patterns of behavior relative to sexually abused

[8] Defendant's associated arguments that counsel was ineffective for not presenting a vagueness argument below and for not following through with a motion for directed verdict on the CSAA and computer-crime charges are rejected, given that counsel is not ineffective for failing to advance meritless positions or pursue futile arguments. *People v Henry (After Remand)*, 305 Mich App 127, 141; 854 NW2d 114 (2014).

[9] The witness was qualified by the trial court as an expert in (1) forensic interviewing, (2) the dynamics and characteristics of child sexual abuse, and (3) suggestibility, source monitoring, and delayed disclosure.

children, it was not properly responsive to the evidence introduced or a theory developed by defendant.

A. HEARSAY

We first tackle the hearsay argument, which defendant bases on two instances during the rebuttal testimony of an expert witness. First, the expert responded as follows when queried by the prosecutor for some examples of source-monitoring questions[10] asked by the interviewer who conducted the victim's forensic examination:

> Well, specifically when she -- when [the victim] described that -- the penis in the mouth or the -- whatever it was in the mouth felt squishy like pizza, that was in response to a source monitoring question.

In the second instance cited by defendant, the prosecutor sought clarity in regard to an "incident" mentioned by the expert that had been communicated by the victim to the forensic interviewer. The prosecutor asked the expert, "And is she talking here about an incident where her dad took his pants off and put his peanut on her thing?" The expert responded, "Yes, she goes on to say that."

Defendant did not object to the testimony; therefore, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. As readily evident, the challenged statements did not constitute hearsay, given that they were not "offered in evidence to prove the truth of the matter asserted."

[10] The expert explained that "source monitoring" entails asking children "to derive information from their personal experience," such as asking "them questions about what something felt like, tasted like, [and] smelled like," which makes them "better able to distinguish between something that they heard or saw and something that was their real life experience."

MRE 801(c) (definition of hearsay); see also *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013) ("The two notes from Stafford were admissible because they were not offered into evidence 'to prove the truth of the matter[s] asserted' . . . .") (alteration in original). The statements were not offered to prove that defendant engaged in oral sex or sexual contact with the child. Rather, the first statement was offered as part of an explanation and discussion of source-monitoring questions posed to the child. And the second statement was offered to clarify what "incident" the expert was referring to in regard to communications made by the child to the forensic interviewer, all in the context of broader questioning concerning forensic-interviewing procedures. Accordingly, reversal based on defendant's hearsay argument is unwarranted.[11]

B. SCOPE OF REBUTTAL TESTIMONY

Defendant contends that the prosecution's expert's "testimony was the only testimony regarding the concept of delayed disclosure and the characteristics of a child sex abuse complainant" and that "[n]o other witness had proffered any such testimony, let alone any contrary testimony."

In *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996), our Supreme Court discussed the nature of rebuttal evidence, observing:

> Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. Because the scope of rebuttal is based on the trial judge's discretionary author-

[11] Additionally, because counsel is not ineffective for failing to raise a meritless or futile objection, we reject defendant's argument that counsel was ineffective for not making a hearsay objection. *Henry*, 305 Mich App at 141.

> ity to preclude the trial from turning into a trial of secondary issues, it is the trial court that must, of necessity, evaluate the overall impression that might have been created by the defense proofs. . . .
>
> * * *
>
> Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.
>
> Contrary to the dissent's insinuation, the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. [Citations omitted.]

With respect to the expert's being allowed to testify about delayed disclosure, as well as forensic interviewing, suggestibility, and source monitoring, defense counsel expressly indicated that he would "leave it to the Court's discretion," while objecting only to the expert's testifying in regard to the dynamics and characteristics of child sexual abuse.[12] Accordingly, the issue was waived for purposes of appeal. *Carter*, 462 Mich at 215. Regardless, even if the issue was preserved, any error was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The prosecution asked one question of the expert about delayed disclosure and made no attempt through further questioning to connect the issue to the case at bar.

[12] While delayed disclosure would appear to fit within this category, the prosecutor, trial court, and defense counsel spoke of and addressed delayed disclosure separately. See footnote 9 of this opinion.

In regard to the dynamics and characteristics of child sexual abuse, the expert's testimony was responsive and was properly admitted. She testified that it was consistent and not unusual for a child victim of sexual abuse to appear unafraid of the abuser, to have an apparently close and loving relationship with the perpetrator, to forget at some point what had occurred, and to believe that he or she had already told someone about the abuse, although not in formal reporting terms.[13] Defendant had introduced testimony from a niece and friend indicating that defendant and the victim had an appropriate, normal, and loving relationship. Their testimony painted defendant as an involved, devoted, and affectionate father. This relationship supposedly existed during the period of sexual abuse. The testimony was offered by defendant to assail the victim's credibility and have the jury question how the sexual abuse could have occurred given the ostensible father-daughter bond and the victim's

[13] We note that in *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), the Michigan Supreme Court ruled:

> In these consolidated cases, we are asked to revisit our decision in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), and determine the proper scope of expert testimony in childhood sexual abuse cases. The question that arises in such cases is how a trial court must limit the testimony of experts while crafting a fair and equitable solution to the credibility contests that inevitably arise. As a threshold matter, we reaffirm our holding in *Beckley* that (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in *Beckley* and now hold that (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.

lack of fear of defendant. The expert's testimony was properly offered to rebut any inferences arising from the testimony by defendant's niece and friend.

V. OPINION TESTIMONY REGARDING COACHING

Defendant next argues that the trial court erred by allowing the officer in charge of the investigation to give her opinion that the victim had not been coached. Defendant maintains that permitting the testimony violated the well-settled rule that one witness may not comment on the credibility of another witness while testifying at trial.

On direct examination of the officer, the prosecution did not elicit any opinion about coaching and only did so on redirect examination after defense counsel on cross-examination pursued a line of questioning suggesting that the victim had been coached in light of the number of persons who had spoken to her before the forensic interview. On redirect, the officer explained the methods used and questions asked by forensic interviewers in attempting to determine whether an alleged child CSC victim had been subjected to coaching, noting the signs that suggest a child had been coached. The prosecutor then asked the officer whether there was any indication that the victim here had been coached. Defendant objected to the prosecutor's question, asserting that the officer was not an expert in that area. The trial court then asked the prosecutor to establish a foundation for purposes of allowing a response by the officer, and the prosecutor proceeded to elicit information regarding the officer's training, experience, education, and background relative to forensic interviewing and coaching. The officer then testified, absent further objection by defendant or intervention by the court, that there was no indication

that the victim had been coached. It would thus appear that the court accepted the testimony as expert opinion, MRE 702, and not lay opinion testimony, MRE 701.

In *People v Musser*, 494 Mich 337, 349; 835 NW2d 319 (2013), our Supreme Court stated:

> Because it is the province of the jury to determine whether "a particular witness spoke the truth or fabricated a cock-and-bull story," it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial. Such comments have no probative value because "they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." As a result, such statements are considered "superfluous" and are "inadmissible lay witness[] opinion on the believability of a [witness's] story" because the jury is "in just as good a position to evaluate the [witness's] testimony." [Citations omitted; alteration in original.]

In *People v Douglas*, 496 Mich 557, 583; 852 NW2d 587 (2014), the Supreme Court held that the principle that it is improper for a lay or expert witness to comment on the credibility of another witness barred the testimony of an expert forensic interviewer who had opined that a child CSC victim had not been coached and was being truthful, and also precluded the testimony of a Children's Protective Services worker who had opined that there was no indication of coaching or that the victim was being untruthful.

As defendant did not object to the testimony on the basis of the particular argument now presented on appeal, our review is for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 309, 312; 684 NW2d 669 (2004). We initially note that it is unclear from *Douglas* whether the Court found problematic the testimony regarding coaching or whether

the main or sole concern was the testimony about the victim's truthfulness (or perhaps a combination thereof). Defendant makes no claim here that the officer ever opined at trial that the victim was telling the truth. In our view, giving an opinion that there was no indication that a child CSC victim was coached based on forensic-interview training, experience, education, and the totality of the circumstances, MRE 702 and MRE 703, is not the equivalent of opining that the victim was credible or telling the truth. Indeed, we believe that there is also a distinction between testifying that a child victim had not been coached, like the definitive conclusion made by the forensic interviewer in *Douglas*, 496 Mich at 570, 583, and testifying that *there is no indication* that a child victim was coached, as opined by the officer in this case. Additionally, defendant opened the door to the question whether there was any indication of coaching.

To the extent or assuming that *Douglas* directs a conclusion that the officer's testimony that there was no indication of coaching was inadmissible, we hold that defendant has not established the requisite prejudice under the plain-error rule. *Carines*, 460 Mich at 763-764. The officer's untainted responses to proper questions by the prosecutor leading up to the presumed improper question and response effectively revealed to the jury the officer's view that safeguards had been followed during the forensic interview as necessary to weed out any indications of coaching by others. The opinion itself added very little to the otherwise appropriate line of questioning. Moreover, we cannot conclude that any presumed error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. *Id*. at 763. Reversal is unwarranted.

VI. CROSS-EXAMINATION OF DEFENSE EXPERT

We begin with some background information in order to give context to defendant's argument on appeal. Defendant presented the testimony of a witness who was qualified as an expert in forensic psychology with expertise in forensic interviewing techniques, memory, suggestibility, child and adolescent development, and normative sexual behavior of children. The prosecutor, citing the principles in MRE 703, objected to the expert's testifying with respect to opinions and views regarding the victim's forensic interview unless the interview itself (on videotape) was admitted into evidence. Defense counsel indicated that he had no plans to ask for the admission of the forensic interview. Defendant's attorney explained to the court that his planned examination of his expert was intended to address whether the victim's accusations had been tainted by others or had been the result of coaching, *as based on evidence regarding events and interactions that transpired before the forensic examination*. Defense counsel agreed that he could not ask questions of the expert regarding materials that were not in evidence. Defense counsel then began backpedaling, arguing that the expert should be permitted to testify in relationship to the forensic interview to the extent that a prosecution witness had testified in regard to the interview. After extensive arguments, the trial court ruled, "The witness may testify and the Court will rule on what comes in and what doesn't come in afterwards." Defendant asserts on appeal that the trial court's ruling appeared or was understood by trial counsel to be a ruling that the expert could not testify regarding the forensic interview unless the recording of the interview was admitted into evidence. As gleaned from above, this is a gross mischaracterization

or a mistaken interpretation of the court's ruling; no such ruling was made. The expert proceeded to testify in support of a position that the child might have been coached given the numerous interactions with people before the forensic interview, but the expert did not explore the forensic interview itself.

Subsequently, on cross-examination of the expert, the prosecutor asked the expert if she had any concerns regarding whether the forensic interview of the victim had been conducted pursuant to established forensic interviewing protocol. Following an objection by defense counsel and a bench conference of unknown character, the trial court, without directly addressing or ruling on the objection, allowed the prosecutor to proceed with her questioning. Thereafter, the prosecutor engaged the expert in questioning concerning any criticisms the expert had about the forensic interview. The expert freely voiced her criticisms of asserted problematic aspects of the forensic interview. At one point, the expert acknowledged that the victim had told the interviewer that it felt squishy like pizza when defendant put his "buto" in her mouth. The cross-examination of the expert also entailed references to the victim's preliminary examination testimony and to the opinion by the officer in charge that there was no indication of coaching. On redirect examination, defendant asked questions of the expert pertaining to the forensic interview.

In his appellate brief, defendant argues that the cross-examination of the expert by the prosecution regarding the forensic interview was improper because it exceeded the scope of direct examination that had been curtailed by the trial court on the prosecutor's own demand that the expert should not be permitted to testify with respect to the forensic interview. Defen-

dant argues that the trial court, by improperly allowing the cross-examination about the forensic interview, effectively permitted the prosecutor to introduce hearsay and present to the jurors, *for a second time*, parts of the victim's preliminary examination testimony and the officer's opinion on coaching or lack thereof.

The factual predicate of defendant's argument is inaccurate, considering that the trial court did not rule that questions concerning the forensic interview could not be asked on direct examination. Moreover, MRE 611(c) provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility," with the court having the *discretion* to "limit cross-examination with respect to matters not testified to on direct examination." Furthermore, the prosecutor's questioning gave the expert a forum to voice her criticisms of the forensic interview, which defense counsel further explored on redirect examination. We cannot conclude that defendant was prejudiced; any error was harmless. MCL 769.26; *Lukity*, 460 Mich at 495-496. The trial's second injection of the opinion regarding whether the victim had been coached, even assuming its inadmissibility, and the repeated parts of the victim's preliminary examination testimony, which was otherwise entirely admissible, plainly did not prejudice defendant. Moreover, like our ruling regarding the prosecution witness's reference to fellatio, which came from the identical passage in the forensic interview, the expert's testimony was not hearsay given that it was not "offered in evidence to prove the truth of the matter asserted." MRE 801(c); see also *McDade*, 301 Mich App at 353. It was, as before, offered as a means of assessing the soundness of the forensic interview, not to prove that defendant had oral sex with the victim. Finally, under the circumstances described above, trial counsel was

not deficient on the matters argued by defendant, nor has prejudice been established. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

VII. MRE 404(b)

Defendant next argues that the trial court erred under MRE 404(b) by allowing the admission of other acts evidence. This evidence, according to defendant, included nude and semi-nude photographs of the child in various areas of the bathroom and evidence of allegations made by the child during the forensic interview. Defendant states in his appellate brief that these allegations were "that her father had punched her in the stomach while at the zoo, thrown her out of a window 100 times, stuck toothpicks in her butt and her eyes, taken his clothing off and put his peanut on her private part, licked his own private part and made her put his penis in her mouth."[14] Defendant additionally argues that his trial counsel was ineffective to the extent that he did not renew his pretrial objections to exclude the evidence. MRE 404(b)(1) provides:

> 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, preparation, 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.

"At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is

[14] The allegations of fellatio and sexual contact were the same as those addressed earlier in this opinion.

not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). The proponent of other-acts evidence must meet three requirements in order to introduce it under MRE 404(b). *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). The *Sabin* Court elaborated:

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a " 'determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision[s] of this kind under Rule 403.' " Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*Id*. (citations omitted; first alteration in original).]

With respect to the photographs, in pretrial motions defendant challenged the admission of the photos, and the trial court ruled that their admission would be "taken under advisement" and reviewed pursuant to *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973). At trial, when the prosecution moved to admit the photographs, defense counsel expressly indicated that there was no objection. It would thus appear that defendant waived the issue for purposes of appeal. *Carter*, 462 Mich at 215. However, given the pretrial objections and the fact that defendant bootstraps an ineffective-assistance claim onto the failure to object, we shall continue with our analysis. While the trial court specifically stated that it would entertain the admission of the photographs under *DerMartzex*, defendant makes no attempt to address *DerMartzex* in

his appellate brief; it is not cited anywhere in the brief. Accordingly, defendant's argument can reasonably be viewed as waived, but we shall continue our examination.

The Supreme Court in *DerMartzex*, 390 Mich at 413-415, after acknowledging MCL 768.27, which is essentially the statutory version of MRE 404(b), indicated that when a defendant is charged with unlawful sexual acts, it is proper to admit evidence of uncharged activities between the defendant and the victim when that evidence enhances credibility, shows familiarity, explains and gives context to the relationship, forms a link in the chain of events, allows the jury to appreciate the full range and nature of the interactions between the defendant and the victim, and otherwise provides the jurors with the full or entire story, instead of leaving the jurors to view events in a vacuum. All these reasons are especially relevant here. The photographs gave context to the videos, allowing for a better understanding of the events captured by the videos, including the acts of masturbation, and showing defendant's intent and motive in filming the victim. The photographs also enhanced the victim's credibility with respect to her CSC-II accusations. In sum, the photographs assisted in providing the jury the full story. The photographs were not admitted to demonstrate defendant's criminal propensity, and the probative value of the evidence was not substantially outweighed by the danger of any unfair prejudice, MRE 403.[15] The trial court did not err by admitting the

[15] To be clear, we are not applying a "res gestae exception" to MRE 404(b), but rather concluding that application of MRE 404(b) did not bar admission of the evidence, given that the photographs were admitted for purposes other than propensity. *People v Jackson*, 498 Mich 246, 274, 281; 869 NW2d 253 (2015) (concluding that no "res gestae exception" to the coverage of MRE 404(b) exists).

evidence, and trial counsel was not ineffective for failing to raise a futile objection. *People v Henry (After Remand)*, 305 Mich App 127, 141; 854 NW2d 114 (2014).

With respect to the forensic interview references to the child's having been punched in the stomach while at the zoo, thrown out of a window a hundred times, and stuck with toothpicks in her butt and her eyes and her claim that defendant had licked his own private part, this evidence was elicited by defendant himself and relied on by defendant in arguing that the victim's claims were nonsensical and that she could not be believed. Defendant has waived any appellate claims in regard to this evidence, *Carter*, 462 Mich at 215, and any assumed error in admitting the evidence is entirely harmless, *Carines*, 460 Mich at 763-764. The evidence was actually beneficial to defendant's claim of innocence. Furthermore, for that very reason, counsel's performance was not deficient and no prejudice resulted. *Carbin*, 463 Mich at 599-600.

With respect to the act of fellatio and unclothed sexual contact, we first note that this evidence would generally have been admissible to show defendant's propensity to commit a sexual assault against the victim under MCL 768.27a (addressing admission of other sexual assaults against a minor, supplanting MRE 404(b) in that context). *People v Watkins*, 491 Mich 450, 455-456, 470; 818 NW2d 296 (2012). *DerMartzex* would also support admission of the evidence. Additionally, given the fleeting and somewhat vague references (the victim "described . . . the penis in the mouth or the -- whatever it was in the mouth") and the context of the testimony, i.e., examining proper forensic examination techniques, we conclude that defendant has not established with respect to this

unpreserved claim of error that he suffered the requisite prejudice, that he is actually innocent, or that any error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 763. Likewise, unable to establish the requisite prejudice, defendant's accompanying claim of ineffective assistance of counsel is rejected. *Carbin*, 463 Mich at 599-600.

VIII. SENTENCING AND *ALLEYNE*

Finally, defendant contends that under *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), his constitutional rights under the Sixth and Fourteenth Amendments to a jury trial and to have the prosecution prove its case beyond a reasonable doubt were violated, given that the trial court engaged in impermissible judicial fact-finding in regard to scoring various variables under the sentencing guidelines. Defendant did not raise this issue below; therefore, "our review is for plain error affecting substantial rights." *Lockridge*, 498 Mich at 392. In *Lockridge*, our Supreme Court recently held:

> Because Michigan's sentencing guidelines scheme allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives, it violates the Sixth Amendment to the United States Constitution under *Alleyne*. We therefore reverse the judgment below . . . . To remedy the constitutional flaw in the guidelines, we hold that they are advisory only.
>
> To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her OV [offense variable] level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the

> applicable guidelines minimum sentence range. If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand to the trial court for that court to determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion.[16] If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant. [*Id*. at 399.]

In the present case, defendant's minimum sentence range as scored by the trial court was 51 to 85 months under the Class B sentencing grid, with a total prior record variable (PRV) assessment of 20 points, placing defendant at PRV Level C (10- to 24-point range), and a total OV assessment of 60 points, placing him at OV Level V (50- to 74-point range), absent any habitual-offender enhancement. See MCL 777.63. The trial court engaged in judicial fact-finding in assessing 10 points for OV 4, MCL 777.34(1)(a) (serious psychological injury to the victim) and 10 points for OV 19, MCL 777.49(c) (interference with the administration of justice). Neither the jury's verdict nor any admissions by defendant supported these scores. Deducting the 20 points from defendant's total OV assessment results in a total OV score of 40 points and "change[s] the applicable guidelines minimum sentence range," *Lockridge*, 498 Mich at 399, from 51 to 85 months to 45 to 75 months (OV Level IV and the same PRV level, giving a 35- to 49-point range). MCL 777.63.[17] Accordingly,

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[16] The Court referred to such remands as "*Crosby* remands" after the procedures outlined in *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005). *Lockridge*, 498 Mich at 395-399. "*Crosby* remands are warranted only in cases involving sentences imposed on or before July 29, 2015 . . . ." *Id*. at 397. Defendant here was sentenced before July 29, 2015.

[17] The trial court also assessed 15 points for OV 10, MCL 777.40(1)(a) (predatory conduct). We note that 10 points must be assessed for OV 10

defendant is entitled to a *Crosby* remand under *Lockridge*, and it is so ordered. Given our ruling, it is unnecessary to consider defendant's accompanying claim of ineffective assistance of counsel for failure to raise the *Alleyne* issue.

Affirmed with respect to defendant's convictions and remanded for compliance with *Lockridge* in regard to defendant's sentences. We do not retain jurisdiction.

GADOLA, J., concurred with MURPHY, P.J.

STEPHENS, J. (*concurring*). I write separately to address two points of the analysis of the majority. The first point regards the equivocation about whether the failure to object to the victim's testimony at the preliminary examination resulted in a waiver or forfeiture. I believe it was the latter. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000), clarified and gave direction to the courts of this state that waiver

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when a defendant exploits a victim's youth. MCL 777.40(1)(b). In *People v Needham*, 299 Mich App 251, 252; 829 NW2d 329 (2013), this Court held:

> When a person possesses child sexually abusive material, he or she personally engages in the systematic exploitation of the vulnerable victim depicted in that material. Evidence of possession therefore can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim's vulnerability due to the victim's youth.

An argument can be made that the jury's verdict on the CSAA charge, which necessarily included a finding that defendant engaged in child sexually abusive activity for the purpose of producing child sexually abusive material, supported at least a 10-point score for OV 10 relative to exploitation of youth, and perhaps even 15 points for predatory conduct. Given that the minimum sentence range is already altered by examination of OVs 4 and 19, mandating a *Crosby* remand regardless of consideration of OV 10, we decline to determine whether the jury's verdict encompassed a finding of exploitation or predatory conduct.

requires positive action or words while forfeiture results from incomplete or ineffective action or from complete inaction. In this case defense counsel, albeit for reasons of inadvertence, strategy, or courtesy, failed to object to the admission of the unsworn testimony given at the preliminary examination.

The second point addresses the ramifications of the forfeited error. I disagree with the majority that the forfeited error in this case was not structural. When our Supreme Court in *People v Cain*, 498 Mich 108, 117 n 4; 869 NW2d 829 (2015), discussed the class of trial error that could be labeled as structural, it offered a list of errors that had historically been placed within that class. It did not assert that the list was exhaustive. An examination of the historical list is instructive, however. It included items that affront our essential concept of system integrity—a biased judge, the absence of counsel, and the imposition of counsel when the defendant desires to self-represent. When the Kentucky Supreme Court, in *Peak v Commonwealth*, 197 SW3d 536, 547 (Ky, 2006), determined that the failure to administer an oath to a witness was not structural, it offered neither analysis nor reasoning and merely announced its conclusion, noting contrary federal authority. The concept that defendants should only be found guilty of crimes on the basis of the testimony of persons to whom some oath has been given is fundamental to our system of jurisprudence. The oath not only impresses the witness with the obligation to be truthful, but imposes grave penalties for a willful untruth. The oath serves to undergird public confidence in the integrity of our judicial system in much the same way that the promise of an unbiased judiciary and a jury of peers does. That said, as the majority notes, not all struc-

tural errors demand reversal. I concur with the majority's conclusion that reversal is not warranted in this case.

Special Orders

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered December 18, 2015:

PEOPLE v MASROOR, Docket No. 322280; 322281; and 322282. The Court orders that the order issued December 17, 2015 convening a special panel in this matter is vacated, a clerical error having been made in the polling conducted pursuant to MCR 7.215(J).

The Court further orders that a special panel shall not be convened pursuant to MCR 7.215(J) to resolve a conflict between this case and *People of MI v Alexander Jeremy Steanhouse*, 313 Mich App 1 (Docket No. 318329, issued October 22, 2015).