STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OTTAWA

PATRICK FLYNN, AJ RATERINK, PATRICIA LOOKS, BRIAN DOKTER, AND STEVE AND JAMIE LEMIEUX, Plaintiffs, v OTTAWA COUNTY DEPARTMENT OF PUBLIC HEALTH, LISA STEFANOVSKY, M. ED., in her official capacity as Administrative Health Officer for the Ottawa County Department of Public Health, AND THE OTTAWA COUNTY BOARD OF COMMISSIONERS, Defendants.	CASE NO. 21-6624-CZ HON. JON HULSING

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiffs
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
dtountas@shrr.com
jkoch@shrr.com

Douglas W. Van Essen (P33169)
SILVER & VAN ESSEN, P.C.
Attorneys for Defendants
300 Ottawa Avenue NW, Suite 600
Grand Rapids, MI 49503
616-988-5600
dwv@silvervanessen.com

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR IMMEDIATE DECLARATORY RELIEF AND MANDAMUS

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiffs

Date: November 29, 2021

SHRR\5384093v1

Table of Contents

Index of Authorities ii

Index of Exhibits vi

Introduction 1

Statement of Facts 2

Standard of Review 2

Argument 3

A. Under the plain language of MCL 333.2441, administrative orders like the Department's school mask mandates are "regulations" subject to the County Commission's approval 3

B. The APA is irrelevant to whether the Department's Mask Mandates are "regulations" under MCL 333.2441 8

C. The absurd-results rule doesn't apply here because MCL 333.2441 isn't ambiguous 9

D. Requiring the County Commission to approve of the Department's Mask Mandate isn't absurd 12

Conclusion & Relief Requested 16

Index of Authorities

CASES

AFSCME, AFL-CIO v Dep't of Mental Health, 451 Mich 1; 550 NW2d 190 (1996) 15

Ally Fin Inc v State Treasurer, 502 Mich 484; 918 NW2d 662 (2018) 3

Bisio v Clarkston, 506 Mich 37; 954 NW2d 95 (2020) 5

Brackett v Focus Hope, Inc, 482 Mich 269; 753 NW2d 207 (2008) 4

Busuito v Barnhill, ___ Mich App ___; ___ NW2d ___; 2021 WL 2171156 (Docket No. 353424, May 27, 2021).....11

By Lo Oil Co v Dep't of Treasury, 267 Mich App 19; 703 NW2d 822 (2005) 8, 9

Cadillac Mayor v Blackburn, 306 Mich App 512; 857 NW2d 529 (2014) 11

Cairns v East Lansing, 275 Mich App 102; 738 NW2d 246 (2007) 10

Cameron v Auto Club Ins Ass'n, 476 Mich 55; 718 NW2d 784 (2006) 10

City of Romulus v Mich Dep't of Envir Qual, 260 Mich App 54; 678 NW2d 444 (2003) 9

Clonlara, Inc v State Bd of Educ, 442 Mich 230; 501 NW2d 88 (1993).....15

Coffman v State Bd of Exam in Optometry, 331 Mich 582; 50 NW2d 322 (1951).....15, 16

Coleman v Gurwin, 443 Mich 59; 503 NW2d 435 (1993).....10

Corley v Detroit Bd of Ed, 470 Mich 274; 681 NW2d 342 (2004).....

Decker v Flood, 248 Mich App 75; 638 NW2d 163 (2001) 14

Detroit Int'l Bridge Co v Commodities Export Co, 279 Mich App 662; 760 NW2d 565 (2008).....12

Diallo v LaRochelle, 310 Mich App 411; 871 NW2d 724 (2015).....13

Farris v McKaig, 324 Mich App 349; 920 NW2d 377 (2018) .....

Four Zero One Associates LLC v Dept of Treasury, 320 Mich App 587; 907 NW2d 892 (2017).....10

Gauthier v Alpena Cnty. Prosecutor, 267 Mich App 167; 703 NW2d 818 (2005) 10

Halloran v Bhan, 470 Mich 572; 683 NW2d 129 (2004) .....

Hanselman v Killeen, 419 Mich 168; 351 NW2d 544 (1984) 8

Hecht v Nat'l Heritage Academies, Inc, 499 Mich 586; 886 NW2d 135 (2016)....4

Heller v DeJong, 2019 WL 2195003 (Mich App, May 21, 2019)....8

Honigman Miller Schwartz and Cohn LLP v Detroit, 505 Mich 284; 952 NW2d 358 (2020)....4

Iliades v Dieffenbacher North America Inc, 501 Mich 326; 915 NW2d 338 (2018) 3

In re Certified Question from US Court of Appeals for Sixth Circuit, 468 Mich 109; 659 NW2d 597 (2003) 10

In re Estate of Erwin, 503 Mich 1; 921 NW2d 308 (2018) 5

In re Settles, 218 A3d 235, 238 (DC App 2019)....5

Johnson v Recca, 492 Mich 169; 821 NW2d 520 (2012) 12

Joseph v Auto Club Ins Ass'n, 491 Mich 200; 815 NW2d 412 (2012)....12

Koontz v Ameritech Servs, Inc, 466 Mich 304; 645 NW2d 34 (2002)....11

Lansing Mayor v Pub. Serv. Comm., 470 Mich 154; 680 NW2d 840 (2004)....11

Lash v Traverse City, 479 Mich 180; 735 NW2d 628 (2007)....11

League Gen Ins Co v Michigan Catastrophic Claims Ass'n, 435 Mich 338; 458 NW2d 632 (1990) 8

Leek v Peterson, 355 P3d 722; 2015 WL 5009983 (Kan App Aug 14, 2015)....

Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999) ....

Maier v General Tel. Co of Mich, 466 Mich 879; 645 NW2d 654 (2002) 1

Maples v State, ___ Mich ___; ___NW2d ___; 2021 WL 3044411 (Docket No. 160740, July 20, 2021) ....

Mich Farm Bureau v Dep't of Environ Qual, 292 Mich App 106; 807 NW2d 866 (2011) 1

Mich Trucking Ass'n v Mich Public Serv Com'n, 225 Mich App 424; 571 NW2d 734 (1997) ....

Michigan Open Carry, Inc v Grand Rapids-Kent County Convention Arena Authority, 2018 WL 6185209 (Mich App Nov 27, 2018) ....

Nowell v Titan Ins Co, 466 Mich 478; 648 NW2d 157 (2002)....

Otto v Inn at Watervale, Inc., 501 Mich 1044; 909 NW2d 265 (2018) 4

Pace v Edel–Harrelson, 499 Mich 1; 878 NW2d 784 (2016) 10

People v Gardner, 482 Mich 41; 753 NW2d 78 (2008) 10

People v Hall, 499 Mich 446; 884 NW2d 561 (2016) 11

People v McIntire, 461 Mich 147; 599 NW2d 102 (1999) 10

People v Wood, 506 Mich 114; 954 NW2d 494 (2020) 3

Ranke v Mich Corp and Securities Com'n, 317 Mich 304; 26 NW2d 898 (1947) 16

Reidenbach v City of Kalamazoo, 327 Mich App 174; 933 NW2d 335 (2019) 12

Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000) 5

SBC Health Midwest, Inc v Kentwood, 500 Mich 65; 894 NW2d 535 (2017) 3

Schlega v Detroit Bd of Zoning Appeals, 147 Mich App 79; 382 NW2d 737 (1985) 8

Taylor v Lansing Bd of Water and Light, 272 Mich App 200; 725 NW2d 84 (2006) 10, 12

Tryc v Mich Veterans' Facility, 451 Mich 129; 545 NW2d 642 (1996) 10

Twichel v MIC Gen Ins Co, 469 Mich 524; 676 NW2d 616 (2004) 11

Villa v Civil Serv Co, 57 Mich App 754; 226 NW2d 718 (1975) 8

STATUTES

MCL 24.201 9

MCL 24.203(2) 9

MCL 333.2441 ..... *passim*

MCL 333.2451 ..... 1, 4, 6, 11

MCL 333.2453 ..... *passim*

MCL 333.2453(1) 7, 8, 11

MCL 333.2454 1

MICHIGAN COURT RULES

MCR 2.116(C)(8) 2

MCR 2.116(I)(2) 2

MICHIGAN ADMINISTRATIVE CODES

Mich Admin Code R 325.175(4) 1, 6

MISCELLANEOUS

Black's Law Dictionary (10th ed. 2004) 5

Black's Law Dictionary (10th ed. 2014) 5

Black's Law Dictionary (11th ed. 2019) 1, 4, 5, 6

Merriam Webster's Collegiate Dictionary (11th ed. 2014) 1, 5

Merriam-Webster's Collegiate Dictionary (11th ed. 2020) 5

Merriam-Webster's Dictionary of Law (2016) 1, 4

Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012) 3

The American Heritage Dictionary of the English Language (5th ed. 2018) 1, 5

The American Heritage Dictionary of the English Language (New College ed.) 5

The American Heritage Dictionary, 2nd College Ed 5

Index of Exhibits

Ex. 1, Plaintiffs' Motion for Summary Disposition

Ex. 2, *Maples v State*, ___ Mich ___; ___NW2d ___; 2021 WL 3044411 (Docket No. 160740, July 20, 2021)

Ex. 3, *Leek v Peterson*, 355 P3d 722; 2015 WL 5009983 (Kan App Aug 14, 2015)

Ex. 4, *Busuito v Barnhill*, ___ Mich App ___; ___ NW2d ___; 2021 WL 2171156 (Docket No. 353424, May 27, 2021)

Introduction

These cross-motions present a question of statutory interpretation. Our Supreme Court has provided judges and lawyers engaged in that task with well-established tools. The defendants ignore them. But, when the appropriate tools of statutory interpretation are used, it's clear the plaintiffs are entitled to judgment as a matter of law.

The central issue in this case is whether the Health Department's Mask Mandate orders, which were promulgated under MCL 333.2453,[1] are "regulations" within the meaning of MCL 333.2441. MCL 333.2441 doesn't define "regulation." As a result, it's appropriate to consult a dictionary to determine what that term means. Legal dictionaries define "regulation" is as "[a]n official rule or *order*, having legal force, usu. issued by an administrative agency."[2] Similarly, lay dictionaries define "regulation" as "a rule or *order* issued by an executive authority or regulatory agency of a government and having the force of law."[3] Under either of those definitions, then, the plain meaning of the term "regulation" expressly includes "orders" issued by administrative bodies like the Department. So, the school Mask Mandate orders are "regulations" under MCL 333.2441.[4]

In their motion, the defendants acknowledge that this case is about statutory interpretation, and that statutory interpretation focuses on the language of the statutory text. But they never

---

[1] The Department's Mask Mandates cited three purportedly applicable sources of authority: MCL 333.2451, MCL 333.2454, and Mich Admin Code R 325.175(4). But, in their motion, defendants only mention MCL 333.2453. Plaintiffs can only assume that defendants have abandoned their reliance on the remaining statute and rule.

[2] *Black's Law Dictionary* (11th ed. 2019); see also *Merriam-Webster's Dictionary of Law* (2016) (defining "regulation" as "an authoritative rule; *specif*: a rule or order issued by a government agency and often having the force of law.").

[3] *Merriam Webster's Collegiate Dictionary* (11th ed. 2014) (defining "regulation" as "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law."); *The American Heritage Dictionary of the English Language* (5th ed. 2018) (defining "regulation" as "[a] governmental order having the force of law.").

[4] Because the Mask Mandates are "regulations" under MCL 333.2441, the County Commission had a duty to approve or disapprove of them. That didn't happen here. So the mask mandates never "bec[a]me effective" under MCL 333.2441, which means they are invalid and unenforceable.

address the meaning of the plain language of MCL 333.2441. Nor do they explain why, as a textual matter, an "order" cannot be a "regulation" under MCL 333.2441. Instead, the defendants raise a slew of non-textual arguments that merely distract from the relevant statutory language. That's not how we interpret statutes in Michigan.

The Department's Mask Mandates are invalid and unenforceable. So, this Court should deny the defendants' motion for summary disposition and grant the plaintiffs' motion instead. What follows is the legal authority entitling the plaintiffs to this relief.

Statement of Facts

Plaintiffs adopt and incorporate the statement of facts set forth in their motion for summary disposition.[5]

Standard of Review

The defendants seek summary disposition under MCR 2.116(C)(8). A motion brought under that subrule tests the legal sufficiency of a plaintiff's claims.[6] When ruling on a (C)(8) motion, courts assess whether the well-pleaded factual allegations, accepted as true, "state a claim on which relief can be granted."[7] A (C)(8) motion can be granted only if the "claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery."[8] The plaintiffs' claims are valid. So, the defendants' motion for summary disposition should be denied.

Furthermore, under MCR 2.116(I)(2), where "it appears to the court that the opposing party, rather than the moving party, is entitled to judgment," then the "court may render judgment in favor of the opposing party." The relevant legal authorities entitle the plaintiffs to judgment on

[5] **Ex. 1**, Plaintiffs' Motion for Summary Disposition.
[6] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).
[7] *Id.*; *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).
[8] *Id.*

their claims. So, this Court should not only deny the defendants' motion, it should render judgment in favor of the plaintiffs, too.

Argument

A. Under the plain language of MCL 333.2441, administrative orders like the Department's school mask mandates are "regulations" subject to the County Commission's approval.

In their motion, defendants argue that the Department's Mask Mandate orders aren't subject to the County Commission's approval because they aren't "regulations" under MCL 333.2441. They're wrong.

When interpreting statutory language, "[t]he words of a governing text are of paramount concern."[9] That is, when interpreting statutes, this Court's primary "goal is to give effect to the Legislature's intent," which it does by "focusing first on the statute's plain language."[10] Courts must give meaning and effect to each word, phrase, and clause of a statute[11] and must avoid any interpretation of a statute that would render statutory language nugatory or surplusage.[12]

Where a statutory term is undefined, the court may rely on dictionary definitions to

[9] *Reading Law*, p 56; *People v Wood,* 506 Mich 114, 127; 954 NW2d 494 (2020) (This Court's "job is not to choose which definition the Legislature *should* have adopted to accomplish its goal in the best possible way; our goal is to interpret the text that is provided to us.").
[10] *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018) (citations omitted).
[11] *Nowell v Titan Ins Co*, 466 Mich 478, 483, 648 NW2d 157 (2002) ("In such a case of tension, or even conflict, between sections of a statute, it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them."); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 174 ("If possible, every word and every provision is to be given effect .... None should needlessly be given an interpretation that causes it to duplicate another provision ....").
[12] *Iliades v Dieffenbacher North Am. Inc*, 501 Mich 326, 336; 915 NW2d 338 (2018) ("This Court must give effect to every word, phrase, and clause in a statute, and, in particular, consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme, to avoid rendering any part of the statute nugatory or surplusage."); *SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017) ("This Court, as with all other courts, must give effect to every word, phrase, and clause in a statute, to avoid rendering any part of the statute nugatory or surplusage.").

determine its meaning.[13] "A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning."[14] But "[a] legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning."[15] "If the definitions are the same in both a lay dictionary and a legal dictionary, it is unnecessary to determine whether the phrase is a term of art, and it does not matter to which type of dictionary this Court resorts."[16]

Here, the Public Health Code doesn't define "regulation" for purposes of MCL 333.2441. Nor does it define "order" for purposes of MCL 333.2453 or MCL 333.2451. So, it's appropriate to consult dictionary definitions to discern the meaning of those terms.

Most legal and lay dictionaries define "regulation" to expressly include "orders" issued by an administrative body like the Health Department. For example, Black's Law Dictionary defines "regulation" as "[a]n official rule or order, having legal force, usu. Issued by an administrative agency."[17] Another well-established legal dictionary defines "regulation" as "an authoritative rule; *specif*: a rule or *order* issued by a government agency and often having the force of law."[18]

Similarly, a lay dictionary relied upon by the Michigan Supreme Court[19] defines "regulation" as "a rule or *order* issued by an executive authority or regulatory agency of a

---

[13] *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).
[14] *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008); *Farris v McKaig*, 324 Mich App 349, 354; 920 NW2d 377 (2018) ("Consulting a lay dictionary is proper when defining common words or phrases that lack a unique legal meaning.").
[15] *Brackett*, 482 Mich at 276; 753 NW2d 207 (2008) (citations omitted).
[16] *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135 (2016).
[17] *Black's Law Dictionary* (11th ed. 2019).
[18] *Merriam-Webster's Dictionary of Law* (2016) (emphasis added).
[19] See, e.g. *Maples v State*, ___ Mich ___; ___NW2d ___; 2021 WL 3044411 (Docket No. 160740, July 20, 2021) (**Ex. 2**), citing *Merriam-Webster's Collegiate Dictionary* (11th ed.); *Honigman Miller Schwartz and Cohn LLP v Detroit*, 505 Mich 284, 307, 311, 318; 952 NW2d 358 (2020), citing *Merriam Webster's Collegiate Dictionary* (11th ed.); *Otto v Inn at Watervale, Inc.*, 501 Mich 1044, 1045; 909 NW2d 265 (2018), quoting *Merriam Webster's Collegiate Dictionary* (11th ed.).

government and having the force of law."[20] Another lay dictionary regularly used by the Supreme Court[21] defines "regulation" as "[a] governmental *order* having the force of law."[22] At least one Michigan court (and several other courts) have applied the *Black's* definition of "regulation."[23] So, whether or not it's a common word or legal term of art, the dictionary definition of "regulation" expressly includes orders issues by administrative agencies like the Health Department.

And nothing about the plain meaning of "order" goes against it being a "regulation." For example, Black's Law Dictionary defines "order" as "[a] written direction or command delivered by a government official, esp. a court or judge"[24] and "administrative order" as "[a]n agency *regulation* that interprets or applies a statutory provision."[25] Likewise, lay dictionaries define "order" as, among other things, "a specific rule, *regulation*, or authoritative direction"[26] and "[a]n authoritative indication to be obeyed; a command or direction" and "[a] directive or command of a court."[27] Nothing in the meaning of the word "order" precludes the Department's mask mandate

---

[20] *Merriam Webster's Collegiate Dictionary* (11th ed. 2014) (emphasis added); *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020).
[21] *Bisio v Clarkston*, 506 Mich 37, 47; 954 NW2d 95 (2020), citing *The American Heritage Dictionary of the English Language* (New College ed.); *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), citing *American Heritage Dictionary, 2nd College Ed*; *In re Estate of Erwin*, 503 Mich 1, 10; 921 NW2d 308 (2018), citing *American Heritage Dictionary* (2d ed.).
[22] *The American Heritage Dictionary of the English Language* (5th ed. 2018) (emphasis added).
[23] See, e.g., *Michigan Open Carry, Inc v Grand Rapids-Kent County Convention Arena Auth.*, 2018 WL 6185209 (Mich App Nov 27, 2018), quoting *Black's Law Dictionary* (10th ed. 2014) ("A regulation is "[a]n official rule or order, having legal force, usu. issued by an administrative agency."); *Leek v Peterson*, 355 P3d 722; 2015 WL 5009983 at *3 (Kan App Aug 14, 2015) (**Ex. 3**), quoting *Black's Law Dictionary* (10th ed. 2004) (Stating that "the traditional definition of regulation…is "[a]n official rule or order, having legal force, usu[ally] issued by an administrative agency."); *In re Settles*, 218 A3d 235, 238 (DC App 2019), quoting *Black's Law Dictionary* (10th ed. 2004) (stating that "'regulation' nowadays naturally brings to mind rules promulgated by administrative agencies" and citing the Black's definition of "regulation" as "[a]n official rule or order, having legal force, usu. issued by an administrative agency").
[24] *Black's Law Dictionary* (11th ed. 2019).
[25] *Id*. (emphasis added).
[26] *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014) (emphasis added).
[27] *The American Heritage Dictionary of the English Language* (5th ed. 2018).

orders from being "regulations" under MCL 333.2441.

When you give the terms "regulation" and "order" their plain meaning, it's clear that an "order" issued by a local health department is a "regulation" under MCL 333.2441. That is, the Department's school Mask Mandates are "official rule[s] or order[s]" that have "legal force" and were "[i]ssued by an administrative agency."[28] And, by requiring that a local health department's "*regulations* shall be approved or disapproved" by its local governing entity, the plain language of MCL 333.2441 reveals that the Legislature intended to subject orders like the Mask Mandates to the County Commission's oversight and approval before they can obtain the force of law.[29]

In their motion, defendants don't grapple with plain meaning of MCL 333.2441 or MCL 333.2453.[30] Nor do they provide a plain-meaning definition of either "order" or "regulation." Instead, they argue that interpreting the Legislature's use of the term "regulation" in MCL 333.2441 to encompass orders issued under MCL 333.2453[31] would "nullify or negate MCL 333.2453, making the two statutes one and that one statute being MCL 333.2441(1)."[32] But that's simply not true.

MCL 333.2441 provides that "[a] local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department."[33] It then establishes a procedure by which those regulations become effective—i.e., approval by "the legal governing entity."[34] Nothing in MCL 333.2441 authorizes a local health

[28] *Black's Law Dictionary* (11th ed. 2019).
[29] See MCL 333.2441.
[30] And again, they ignore MCL 333.2451 and Mich Admin Code R 325.175(4).
[31] Again, although the Mask Mandate orders reference MCL 333.2453 and MCL 333.2451, defendants' motion only mentions MCL 333.2453. It's not clear why.
[32] Defendants' Motion for Summary Disposition at 4.
[33] MCL 333.2441.
[34] *Id.*

department to regulate a specific subject matter. Rather, it expressly limits a local health department's power to implementing "duties or functions vested by law"—i.e., specific grants of regulatory authority in *other statutes*.

MCL 333.2453 is one of those other statutes that authorizes local health departments to regulate a specific subject matter — epidemics that affect localities in Michigan. For that very reason, the authority granted by MCL 333.2453 to "prohibit the gathering of people for any purpose" and "establish procedures to be followed by persons, including a local governmental entity, during the epidemic to insure continuation of essential public health services and enforcement of health laws"[35] is one of the "duties or functions vested by law" in the local health department.[36]

Reading the two statutes together, then, it's clear that MCL 333.2453 provides a specific grant of regulatory authority, and MCL 333.2441 provide the way that specific exercise of regulatory authority becomes effective and gains the force of law. Since the two statutes can be read together harmoniously, there is no reason to depart from (or do violence to) the statutory text. And since the plain meaning of "regulation" compels the conclusion that MCL 333.2441's approval procedure applies to administrative orders like the Department's Mask Mandates, this Court should reject defendants' argument to the contrary and deny their motion for summary disposition.

[35] MCL 333.2453(1).
[36] MCL 333.2441.

B. The APA is irrelevant to whether the Department's Mask Mandates are "regulations" under MCL 333.2441.

Defendants spend much of their brief arguing that the Mask Mandate orders aren't regulations under MCL 333.2441 because they aren't "rules" under the Administrative Procedures Act, MCL 24.201 *et seq.* This argument is irrelevant for many reasons.

First, the APA is immaterial to the actions of county-level agencies like the Department. It's well-established that: (1) the APA only applies to *state* agencies;[37] and (2) local and county level municipal agencies aren't subject to the APA.[38] So, the APA simply doesn't apply here.

Second, even if it were theoretically applicable (it's not), the APA has nothing to do with the plain language of either MCL 333.2441 or MCL 333.2453. Put simply, whether a state agency's action is a "rule" under the APA has no bearing on whether the Ottawa County Health Department's Mask Mandate "orders" issued under MCL 333.2453(1) are "regulations" under MCL 333.2441. This is especially true because the case law cited in defendant's brief has nothing to do with the issues presented in this case (and doesn't stand for some propositions for which it's cited). Two of the three APA cases cited in defendant's motion—*By Lo Oil Co* and *City of*

[37] *League Gen Ins Co v Michigan Catastrophic Claims Ass'n*, 435 Mich 338, 343; 458 NW2d 632 (1990) (to be considered an "agency" under the APA, an entity "must be a 'state' unit or position."); *Hanselman v Killeen*, 419 Mich 168, 180-182; 351 NW2d 544 (1984) (to be an "agency" under the APA, a governmental body "must be a 'state' unit or position"); MCL 24.203(2) ("Agency' means a *state* department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." (emphasis added)).

[38] *Hanselman v Killeen*, 419 Mich 168, 171; 351 NW2d 544 (1984) (county concealed weapon licensing board was not an "agency" under the APA because it was not a "state…board"); *Schlega v Detroit Bd of Zoning Appeals*, 147 Mich App 79, 81; 382 NW2d 737 (1985) ("Plaintiff incorrectly assumes that the Detroit Zoning Board of Appeals is a state administrative agency. In fact, the board is a municipal administrative agency and the terms of the APA simply do not apply."); *Villa v Civil Serv Co*, 57 Mich App 754, 757-758; 226 NW2d 718 (1975) (The "terms of the state administrative procedures act do not apply to municipal agencies."); *Heller v DeJong*, 2019 WL 2195003, at *3 (Mich App, May 21, 2019) (county medical examiner was not a "state" entity because, among other things, county medical examiners are appointed by county boards of commissioners and "tend to function at a local, county level").

Romulus—didn't involve orders (they addressed whether a revenue "bulletin" and an unwritten "policy" were "rules").[39] And, while the third case—*Mich Trucking Ass'n*—did address whether an order was a "rule" under the APA, it didn't discuss the plain meaning of "order" or hold that an order can't be a "regulation."[40]

None of the APA-related case law cited in defendant's motion has anything to do with whether the Department's school Mask Mandates are "regulations" under MCL 333.2441. The defendants' motion should be denied for this reason alone.

C. The absurd-results rule doesn't apply here because MCL 333.2441 isn't ambiguous.

The defendants also rely on the so-called "absurd results" rule to make the extra-textual argument that, regardless whether the plain meaning of "regulations" literally encompasses administrative orders, this Court shouldn't reach that conclusion. More specifically, the defendants argue that it's absurd to conclude our state Legislature intended the County Commission's statutory authority to approve all Health Department "regulations" extends to these Mask Mandate orders. But, once again, defendants are dead wrong.

[39] *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 23, 47; 703 NW2d 822 (2005) (state department's "Revenue Administrative Bulletin" was not a "rule" subject to the APA's rulemaking procedures; no discussion of the meaning of "order" or "regulation."); *City of Romulus v Mich Dep't of Envir Qual*, 260 Mich App 54; 678 NW2d 444 (2003) (state department's "market-driven approach" policy for determining the need for a hazardous-waste-disposal facility was not a "rule" under the APA; no discussion of the meaning of "order" or "regulation").

[40] *Mich Trucking Ass'n v Mich Public Serv Com'n*, 225 Mich App 424, 429-430; 571 NW2d 734 (1997) (holding that motor carrier safety rating system order was not a "rule" under the APA; no discussion of the meaning of "order" or "regulation").

To begin with, it's not clear whether the "absurd result" rule is still followed in Michigan.[41] But, even if it is, "[t]he absurd-results rule applies only when statutes are ambiguous."[42] In other words, Michigan Courts do not have "authority to second-guess the wisdom or reasonableness of unambiguous legislative enactments even where the literal interpretation of the statute leads to an absurd result."[43] This is consistent with the "fundamental principle of statutory construction" that "a clear and unambiguous statute leaves no room for judicial construction or interpretation."[44] As a result, "[w]hen a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case."[45]

---

[41] See *People v McIntire*, 461 Mich 147, 155-159; 599 NW2d 102 (1999); *Maier v General Tel. Co of Mich*, 466 Mich 879; 645 NW2d 654 (2002) (Corrigan, J., concurring) (The Supreme Court has "repudiated nontextual modes of interpretation," including "the so-called 'absurd result' doctrine of avoiding the text of a statute when judges view the result as absurd or unjust."); *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 109; 718 NW2d 784 (2006) (KELLY, J., dissenting) (recognizing that *McIntire* abandoned the absurd results rule). But see *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008) (concluding that *Cameron* repudiated the holding in *McIntire* and concluding that the opinions of the dissenting Justices in *Cameron* were authoritative).

[42] *Four Zero One Associates LLC v Dept of Treasury*, 320 Mich App 587; 907 NW2d 892 (2017); *Gauthier v Alpena Cnty. Prosecutor*, 267 Mich App 167; 703 NW2d 818 (2005) ("However, the absurd result rule applies only when statutes are ambiguous"); *Cairns v East Lansing*, 275 Mich App 102, 118, 738 NW2d 246 (2007) (the absurd-results rule is inapplicable "in those circumstances in which a statute is unambiguous"); *Taylor v Lansing Bd of Water and Light*, 272 Mich App 200, 206; 725 NW2d 84 (2006) ("[O]ur Supreme Court has determined that the 'absurd result' rule applies only when statutes are ambiguous.").

[43] *Decker v Flood*, 248 Mich App 75, 84; 638 NW2d 163 (2001).

[44] *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 113; 659 NW2d 597 (2003); *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993) same); *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) ("[W]hen statutory language is unambiguous, judicial construction is not required or permitted."); *Pace v Edel–Harrelson*, 499 Mich 1, 6, 878 NW2d 784 (2016) ("When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted.").

[45] *In re Certified Question*, 468 Mich at 113; *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999) (same); *Tryc v Mich Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996) ("If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted.").

Here, nothing about the relevant statutory framework is ambiguous. A statute is "ambiguous only if it 'irreconcilably conflict[s]' with another provision, or when it is equally susceptible to more than a single meaning."[46] But nothing within the plain language of MCL 333.2441 "irreconcilably conflicts" with anything in MCL 333.2453.[47] Nor is the term "regulation" equally susceptible to more than one meaning.[48]

Defendants may argue that the term "regulation" is ambiguous simply because it's not defined for purposes of MCL 333.2441. But, "[a] statute is not ambiguous merely because a term it contains is undefined...."[49] Rather, courts "give undefined statutory terms their plain and ordinary meanings," which is accomplished by "consult[ing] dictionary definitions."[50] And, as noted above, the dictionary definitions of "regulation" unequivocally establishes that the term encompasses administrative orders like the Department's school mask mandates.

---

[46] *Lansing Mayor v Pub. Serv. Comm.*, 470 Mich 154, 166, 680 NW2d 840 (2004) (citations omitted); *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016) ("A statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning.").

[47] See *Hall*, 499 Mich at 454.

[48] *Id.*

[49] *Cadillac Mayor v Blackburn*, 306 Mich App 512, 516, 857 NW2d 529 (2014); *Lash v Traverse City*, 479 Mich 180, 188-189; 735 NW2d 628 (2007) (rejecting the defendant's argument that a statutory term was ambiguous because it was undefined and instead relying on the dictionary definition of the term to give it its plain meaning); *Busuito v Barnhill*, ___ Mich App ___; ___ NW2d ___; 2021 WL 2171156, at *9 (Docket No. 353424, May 27, 2021) (**Ex. 4**) ("Neither the constitution, nor the applicable statutes, define the term "ex officio" as it relates to President Wilson's status as an ex officio member of the Board. This fact does not make the term "ex officio" ambiguous, simply because it is undefined.'); *Twichel v MIC Gen Ins Co*, 469 Mich 524, 535 n 6; 676 NW2d 616 (2004) ("A word is not ambiguous merely because different dictionary definitions exist.").

[50] *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); *Diallo v LaRochelle*, 310 Mich App 411, 418; 871 NW2d 724 (2015) ("This Court may consult a dictionary to define terms that are undefined in the statute.").

Nothing about MCL 333.2441 or the term "regulation" is ambiguous. As a result, there isn't any aspect of the relevant statutory framework that would allow this Court to apply the so-called absurd-results rule to this case.

D. Requiring the County Commission to approve of the Department's Mask Mandate isn't absurd.

Even if the absurd-results rule were theoretically applicable, it wouldn't matter because "because there is simply no result here that is absurd."[51] Defendants claims that it would be absurd to require the Department to obtain the County Commission's approval for orders issued under MCL 333.2453 because doing so violates defendants' conception of "common sense." But, under Michigan law, a result is not absurd just because a party believes that it doesn't make sense.[52] Rather, "[t]o properly invoke the 'absurd results' doctrine," it must be shown "that it is *quite impossible* that the Legislature could have intended" a particular result.[53]

Here, however, it is simply not "impossible"—and, thus, not absurd—that the Legislature intended the County Commission's authority to extend to the Health Department's "orders." Indeed, not only is that result possible, it's compelled by the plain language of MCL 333.2441. Furthermore, the defendants' arguments as to why this Court should disregard the plain meaning of "regulation" as absurd—and, by doing so, rewrite the plain language of MCL 333.2441—are nothing but meritless distractions.

---

[51] *Joseph v Auto Club Ins Ass'n*, 491 Mich 200 216 n 38; 815 NW2d 412 (2012).

[52] *Taylor v Lansing Bd of Water and Light*, 272 Mich App 200, 207; 725 NW2d 84 (2006) (citations omitted) ("[T]he role of the Court [is] not to rewrite the law to obtain a more 'logical' or 'palatable' result, but instead [is] to give effect to the Legislature's intent by enforcing the provision as it [is] written.).

[53] *Johnson v Recca*, 492 Mich 169, 193; 821 NW2d 520 (2012) (emphasis added); *Reidenbach v City of Kalamazoo*, 327 Mich App 174, 188; 933 NW2d 335 (2019) (The "absurd-results doctrine…may only be invoked when it is 'quite impossible' that the Legislature could have intended the results.").

For example, defendants complain that subjecting orders issued under MCL 333.2453 to the County Commission's approval is absurd because "an administrative order…requires factual findings typically based on private health information."[54] In contrast, they maintain that a "public health 'regulation' does not involve private health information" and "an administrative order…requires factual findings typically based on private health information."[55] The defendants swing and miss here, too.

As a general matter, it's not clear how an order issued under MCL 333.2453(1) that "prohibit[s] the gathering of people for any purpose" or "establish[es] procedures to be followed…during the epidemic to insure continuation of essential public health services and enforcement of health laws" could ever involve private health information.[56] And, as a specific matter, the Department's Mask Mandates—which apply to anyone who sets foot in an Ottawa County school, youth camp, childcare center, or preschool—have nothing to do with private health information.

The defendants also complain that subjecting orders issued under MCL 333.2453 to the 45-day approval timeline in MCL 333.2441 would prevent the Department from doing its job because it would be "impossible" for the Department to obtain the County Commission's approval "in time for [an epidemic] order to even be effective to achieve its goals of stopping the temporal spread."[57] This argument is misguided, too.

[54] Defendants' Motion for Summary Disposition at 3-4.
[55] Defendants' Motion for Summary Disposition at 3-4.
[56] The same is true of an order "specify[ing] action to be taken or prohibit[ing] the presence of individuals in locations or under conditions where the imminent danger exists" that's issued under MCL 333.2451(1).
[57] Defendant's Motion for Summary Disposition at 5.

Although it's true that a regulation generally takes effect "45 days after approval by the local health department's governing entity," MCL 333.2441 also provides that a regulation can become effective "at a time specified by the local health department's governing entity."[58] As a general matter, nothing in the plain language of MCL 333.2441 prevents local governing entities from specifying that an approved regulation become effective within a very short time, or even immediately. So defendants' temporal argument doesn't establish that applying MCL 333.2441's approval procedure to orders issued under MCL 333.2441 is an absurd result.

More importantly, though, this case reveals the flaws with (and moral hazard created by) the defendants' argument in this regard. Here, when the Department issued its first Mask Mandate, it had known about the COVID-19 pandemic for more than a calendar year—and almost one-and-a-half school years. Yet, for some reason, it waited until *three days* before the start of the 2021 school year to issue its mask mandate. Given that the Department never sought or obtained the County Commission's approval, this delay clearly had nothing to do with the requirements of MCL 333.2441. As a result, the Department's claim that the County Commission's oversight prevents it from "urgently and quickly" issuing pandemic orders is more than a little dubious.[59] In any event, the temporal flexibility embodied in MCL 333.2441 means that it's not impossible for the Department to efficiently respond to epidemics while still obtaining the County Commission's approval.

Finally, defendants claim that subjecting the Department's orders to the County Commission's oversight is absurd because "Commissioners are not qualified to be public health officers."[60] In like manner, the defendants assert that it would be absurd for "epidemic orders (or

[58] MCL 333.2441.
[59] Defendant's Motion for Summary Disposition, Motion at 3.
[60] Defendant's Motion for Summary Disposition at 2, 4.

any other order) to be subject [to] town hall democracy," and "sophomoric" to claim otherwise.[61] But, yet again, they are wrong.

Essentially, the defendants assert that administrative agencies like the Department should not be accountable to anyone who isn't a subject-matter expert with an advanced professional degree, including elected representatives of the people. Their position isn't just legally wrong—it's also downright un-American. Our Supreme Court has bluntly said that "without public oversight and scrutiny of legislative action undertaken by administrative agencies, such agencies would rule without the normal safeguards of our republic."[62] And the Court has referred to statutes codifying legislative oversight over administrative agencies as "a bulwark of liberty" that "ensur[es] that the law is promulgated by persons accountable directly to the people."[63] Put another way, legislative oversight of administrative agencies is enshrined in Michigan's Constitution, embodied in statutes like the APA and MCL 333.2441,[64] and fundamental to our form of government.

Furthermore, in Michigan, "[a]dministrative boards, commission, and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication."[65] That is, an administrative agency's authority

[61] Defendant's Motion for Summary Disposition at 6.
[62] *AFSCME, AFL-CIO v Dep't of Mental Health*, 451 Mich 1, 14-15; 550 NW2d 190 (1996), quoting *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 256; 501 NW2d 88 (1993) (Riley, J. concurring in part and dissenting in part).
[63] *AFSCME, AFL-CIO v Dep't of Mental Health*, 451 Mich 1, 14-15; 550 NW2d 190 (1996), quoting *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 256; 501 NW2d 88 (1993) (Riley, J. concurring in part and dissenting in part).
[64] Const 1963, Art. 4, § 37 ("The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session."); MCL 24.201 *et seq.*
[65] *Coffman v State Bd of Exam in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951).

"derives from powers that the Michigan Legislature has granted."[66] And, "an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by statute, the source of its power."[67] So, the defendants' contention that unelected administrative actors shouldn't be constrained by oversight from the people's elected representatives runs contrary to well-established Michigan law on the source (and limits) of administrative authority, too.

Here's the bottom line: defendants' claim that it would be absurd to conclude that the Legislature subjected the Department's orders to the County Commission's approval falls apart in the face of the reality that the Legislature subjected the Department's regulations the County Commission's approval. It cannot be absurd or impossible for the Legislature to require the County Commission to provide oversight over one way in which the Department exercises administrative authority (i.e., issuing orders), when it's undisputed that the Legislature requires the County Commission to provide oversight when the Department exercises its administrative authority by adopting regulations, generally.

For all these reasons, the defendants' "absurd results" argument is baseless. Their motion for summary disposition should be denied.

Conclusion & Relief Requested

The plaintiffs respectfully request that this Honorable Court deny the defendants' motion for summary disposition; grant the plaintiffs' counter-motion for summary disposition; declare

[66] *Mich Farm Bureau*, 292 Mich App at 128-130 (citations omitted).
[67] *Coffman*, 331 Mich 582, 589-590 (citations omitted); *Ranke v Mich Corp and Sec. Com'n*, 317 Mich 304, 309; 26 NW2d 898 (1947) (citations omitted) ("It is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power.").

that the Mask Mandate orders are invalid and unlawful; and provide any other relief deemed to be equitable and just.

Date: November 29, 2021

By: */s/ D. Adam Tountas*

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiffs
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
616-774-2461 (fax)
dtountas@shrr.com
jkoch@shrr.com

EXHIBIT 1

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OTTAWA

PATRICK FLYNN, AJ RATERINK, PATRICIA LOOKS, BRIAN DOKTER, AND STEVE AND JAMIE LEMIEUX,

Plaintiffs,

v

OTTAWA COUNTY DEPARTMENT OF PUBLIC HEALTH, LISA STEFANOVSKY, M. ED., in her official capacity as Administrative Health Officer for the Ottawa County Department of Public Health, AND THE OTTAWA COUNTY BOARD OF COMMISSIONERS,

Defendants.

CASE NO. 21-6624-CZ

HON. JON HULSING

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
dtountas@shrr.com
jkoch@shrr.com

Douglas W. Van Essen (P33169)
SILVER & VAN ESSEN, P.C.
Attorneys for Defendants
300 Ottawa Avenue NW, Suite 600
Grand Rapids, MI 49503
616-988-5600
dwv@silvervanessen.com

Plaintiffs' Motion for Summary Disposition

Date: November 4, 2021

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiffs

NOW COME the Plaintiffs, Patrick Flynn ("Mr. Flynn"), AJ Raterink ("Ms. Raterink"), Patricia Looks ("Ms. Looks"), Brian Dokter ("Mr. Dokter"), and Steve and Jamie LeMieux (the "LeMieuxes"), (collectively, the "Plaintiffs"), by and through their counsel, Smith Haughey Rice & Roegge, P.C., and hereby move this Court for Summary Disposition on their claims against the Defendants. In support of their motion, the Plaintiffs rely on the legal authorities and exhibits offered in the attached brief in support.

WHEREFORE, the Plaintiffs respectfully request that this Honorable Court enter an order (1) granting the declaratory relief requested in their amended complaint; and (2) a writ of mandamus that orders the County Commission to fulfil its statutory duty and approve or disapprove of Health Department orders issued under these circumstances.

Date: November 4, 2021

By: _____

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiffs
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
616-774-2461 (fax)
dtountas@shrr.com
jkoch@shrr.com

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OTTAWA

PATRICK FLYNN, AJ RATERINK, PATRICIA LOOKS, BRIAN DOKTER, AND STEVE AND JAMIE LEMIEUX,

Plaintiffs,

v

OTTAWA COUNTY DEPARTMENT OF PUBLIC HEALTH, LISA STEFANOVSKY, M. ED., in her official capacity as Administrative Health Officer for the Ottawa County Department of Public Health, AND THE OTTAWA COUNTY BOARD OF COMMISSIONERS,

Defendants.

CASE NO. 21-6624-CZ

HON. JON HULSING

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
dtountas@shrr.com
jkoch@shrr.com

Douglas W. Van Essen (P33169)
SILVER & VAN ESSEN, P.C.
Attorneys for Defendants
300 Ottawa Avenue NW, Suite 600
Grand Rapids, MI 49503
616-988-5600
dwv@silvervanessen.com

Plaintiffs' Brief in Support of Motion for Summary Disposition

Date: November 4, 2021

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiffs

Table of Contents

Introduction 1

Statement of Facts 2

Standard of Review 4

I. Argument I – Plaintiffs Have Pleaded an Actual Controversy 5

A. The "actual controversy" requirement, generally 5

B. Michigan parents have a protected interest in their children's care, custody, welfare, and education, and a fundamental right to make related decisions 7

C. Plaintiffs have pleaded an "actual controversy" 9

II. Argument II – The Department's Mask Mandates are Invalid 10

A. Administrative authority, generally 10

B. The Health Department's authority is statutorily derived. And, the operative statute requires the Board of County Commissioners the "approve or disapprove" of the Health Department's regulations before they become effective 11

C. Relevant principles of statutory construction 13

D. The Mask Mandate order is a "regulation" under MCL 333.2441 14

E. Plaintiffs are entitled to declaratory relief and to a writ of mandamus requiring the Board of Commissioners to approve or disapprove of the Mask Mandate as required by MCL 333.2441 17

Conclusion and Relief Requested 18

Index of Authorities

CASES

Ally Fin Inc v State Treasurer, 502 Mich 484; 918 NW2d 662 (2018) 13

Arabo v Michigan Gaming Control Bd, 310 Mich App 370; 872 NW2d 223 (2015) 6-7

Brackett v Focus Hope, Inc, 482 Mich 269; 753 NW2d 207 (2008) 14

Bisio v Clarkston, 506 Mich 37; 954 NW2d 95 (2020) 15

Casco Twp. v Secretary of State, 472 Mich 566; 701 NW2d 102 (2005) 14

Citizens for Common Sense in Gov't v Attorney General, 243 Mich App 43; 620 NW2d 546 (2000) 5-6, 10

Clonlara, Inc v State Bd of Educ, 442 Mich 230; 501 NW2d 88 (1993) 11

Coffman v State Bd of Exam in Optometry, 331 Mich 582; 50 NW2d 322 (1951) 10-11

Crawford County v Secretary of State, 160 Mich App 88; 408 NW2d 112 (1987) 6

Czymbor's Timber, Inc v City of Saginaw, 478 Mich 348; 733 NW2d 1 (2007) 11

Durant v State Dept of Educ, 238 Mich App 185; 605 NW2d 66 (1999) 6-7

Farish v Dept of Talent and Econ Dev, ___ Mich App ___; ___ NW2d ___; 2021 WL 1044353 (Docket No. 350866, Mar 18, 2021) 7

Farrington v. Total Petroleum, Inc., 442 Mich 201; 501 N.W.2d 76 (1993) 17

Farris v McKaig, 324 Mich App 349; 920 NW2d 377 (2018) 14

Frowner v Smith, 296 Mich App 374; 820 NW2d 235 (2012) 8

Gorman v American Honda Motor Co., Inc., 302 Mich App 113; 839 NW2d 223 (2013) 5

Guardian Environmental Servs., Inc. v Bureau of Const. Codes & Fire Safety, Dep't. of Labor & Economic Growth, 279 Mich App 1; 755 NW2d 556 (2008) 14

Halloran v Bhan, 470 Mich 572; 683 NW2d 129 (2004) 14

Hayes v Parole Bd, 312 Mich App 774; 886 NW2d 725 (2015) 18

Hecht v Nat'l Heritage Academies, Inc, 499 Mich 586; 886 NW2d 135 (2016) 14

Hobbs v McLean, 117 US 567, 579 (1886) 17

Honigman Miller Schwartz and Cohn LLP v Detroit, 505 Mich 284; 952 NW2d 358 (2020) 15

Iliades v Dieffenbacher North America Inc, 501 Mich 326; 915 NW2d 338 (2018) 13

In re Estate of Erwin, 503 Mich 1; 921 NW2d 308 (2018) 15

In re Fisher, 2020 WL 3886195 (Mich App July 9, 2020) 8

In re MacDonald, 2012 WL 6720569 (Mich App Dec 27, 2012) 8

In re Sanders, 495 Mich 394; 852 NW2d 524 (2014) 8

In re Qual of Serv Standards for Regulated Telecom Servs, 204 Mich App 607; 516 NW2d 142 (1994) 11

Jones v Dep't of Corrections, 486 Mich 646; 664 NW2d 717 (2003) 18

Kircher v Ypsilanti, 296 Mich App 224; 712 NW2d 738 (2005) 7

Lansing Sch Educ Ass'n v Lansing Bd of Educ, 487 Mich 349; 792 NW2d 686 (2010) 9

Lash v Traverse City, 479 Mich 180; 735 NW2d 628 (2007) 7, 9

League of Women Voters of Michigan v Secretary of State, 506 Mich 561; 957 NW2d 731 (2020) 6, 10

Malpass v. Dep't of Treasury, 494 Mich 237; 833 N.W.2d 272 (2013) 17

Maples v State, ___ Mich ___; ___NW2d ___; 2021 WL 3044411 (Docket No. 160740, July 20, 2021) 17

Meyer v Nebraska, 262 US 390, 399, 401 (1923) 8

Michigan Ambulatory Surg Ctr v Farm Bureau, ___ Mich App ___; ___ NW2d ___; 2020 WL 6811671 at *4 (No. 349706, Nov 19, 2020) 17

Mich Assoc of Home Builders v City of Troy, 504 Mich 204; 934 NW2d 713 (2019) 5-6

Mich Farm Bureau v Dep't of Environ Qual, 292 Mich App 106; 807 NW2d 866 (2011) 15

Michigan Open Carry, Inc v Grand Rapids-Kent County Convention Arena Authority, 2018 WL 6185209 (Mich App Nov 27, 2018) 1, 15

Morales v Michigan Parole Board, 260 Mich App 29; 676 NW2d 221 (2003) 18

Nickola v MIC Gen Ins Co, 500 Mich 115; 894 NW2d 552 (2017) 13, 17

Nims v Grand Trunk Western R Co, 326 Mich 371; 40 NW2d 188 (1949) 6

Nowell v Titan Ins Co, 466 Mich 478; 648 NW2d 157 (2002) 13

Otto v Inn at Watervale, Inc., 501 Mich 1044; 909 NW2d 265 (2018) 15

Parham v JR, 442 US 584, 602 (1979) 9

Pearsol v Bd of Sup'rs of Eaton Cty, 71 Mich 438; 39 NW 578 (1888) 11

People v Pinkney, 501 Mich 259; 912 NW2d 535 (2018) 17

People v Wood, 506 Mich 114; 954 NW2d 494 (2020) 13

Phillips v Warden, 153 Mich App 557; 396 NW2d 482, 486 (1986 18

Pierce v Society of Sisters, 268 US 510, 534-535 (1925) 8

Ranke v Mich Corp and Securities Com'n, 317 Mich 304; 26 NW2d 898 (1947) 11

Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000) 15

Ronnisch Construction Group, Inc v Lofts on the Nine, LLC, 499 Mich 544; 886 NW2d 113 (2016) 13

SBC Health Midwest, Inc v Kentwood, 500 Mich 65; 894 NW2d 535 (2017) 13

Santosky v Kramer, 455 US 745, 753 (1982) 9

Shavers v Kelley, 402 Mich 554; 267 NW2d 72 (1978) 11

Smith v Behrendt, 278 Mich 91; 270 NW 227 (1936) 11

Smith v Globe Life Ins. Co., 460 Mich 446; 597 NW2d 28 (1999) 11

Teasel v Dep't of Mental Health, 419 Mich 390; 355 NW2d 75 (1984) 11

Troxel v Granville, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000) 8

UAW v Central Mich Univ Trustees, 295 Mich App 486; 815 NW2d 132 (2012) 5-7, 9

Varran v Granneman, 312 Mich App 591; 880 NW2d 242 (2015) 11

Washington v Glucksberg, 521 US 702, 719-720 (1997) 8

Welfare Employees Union v Michigan Civil Service Com'n, 28 Mich App 343; 184 NW2d 247 (1970).....6

Wisconsin v Yoder, 406 US 205, 232 (1972) 8

In re Settles, 218 A3d 235, 238 (DC App 2019).....15

Leek v Peterson, 355 P3d 722; 2015 WL 5009983 at *3 (Kan App Aug 14, 2015).....15

STATUTES

MCL 8.3a 14

MCL 15.602(2).....7

MCL 333.2406(a).....12

MCL 333.2413 12

MCL 333.2428 .....12, 19

MCL 333.2433 .....11, 19

MCL 333.2435(d),(i).....11

MCL 333.2441 ..... *passim*

MCL 333.2443 10

MCL 333.2451 .....2, 16, 19

MCL 333.2453 .....2, 16, 19

MICHIGAN COURT RULES

MCR 2.116(C)(10) 4-5, 19

MCR 2.604(A)(1).....

MICHIGAN ADMINISTRATIVE CODES

Mich Admin Code R 325.175(4).....

MISCELLANEOUS

Black's Law Dictionary (10th ed. 2004) .....

Black's Law Dictionary (10th ed, 2014).....1, 15

Black's Law Dictionary (11th ed. 2019) 1, 14-15

Merriam Webster's Collegiate Dictionary (11th ed. 2014) 1, 15

Merriam-Webster's Collegiate Dictionary (11th ed. 2020).....15

Merriam-Webster's Dictionary of Law (2016) 1, 15

Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012) 13, 17

The American Heritage Dictionary of the English Language (5th ed. 2018) 1, 15-16

The American Heritage Dictionary of the English Language (New College ed.) 15

The American Heritage Dictionary, 2nd College Ed.....15

Vinay Prasad, The Downsides of Masking Young Students Are Real, The Atlantic, 9/2/21 9

Index of Exhibits

Ex. 1, Original Mask Mandate

Ex. 2, Plaintiffs' Original Complaint

Ex. 3, 8/24/21 MLive Article

Ex. 4, 8/25/21 MLive Article

Ex. 5, Commissioner Bergman's 8/25/21 Statement.

Ex. 6, 9/22/21 MLive Article

Ex. 7, 9/22/21 WZZM13 Article

Ex. 8, 9/21/21 Holland Sentinel Article

Ex. 9, Reconciled Mask Mandate

Ex. 10, Defendants' Answer to Plaintiffs' Original Complaint.

Ex. 11, Plaintiffs' Amended Complaint

Ex. 12, *Farish v Dept of Talent and Econ Dev*

Ex. 13, *In re MacDonald*

Ex. 14, *In re Fisher*

Ex. 15, *Vinay Prasad*, The Downsides of Masking Young Students Are Real, The Atlantic, 9/2/21

Ex. 16, *Maples v State*

Ex. 17, *Leek v Peterson*

Ex. 18, *Michigan Ambulatory Surg Ctr v Farm Bureau*

Introduction

This lawsuit is about government overreach in the face of clear statutory limitations.

MCL 333.2441 requires that the County Commission "shall approve or disapprove" of any "regulations" adopted by the Health Department before those regulations "become effective." So, the central question before this Court is whether the Health Department's school mask mandate orders are "regulations" within the plain meaning of MCL 333.2441. The answer is, unequivocally, "Yes."

MCL 333.2441 doesn't define "regulation." So, it's appropriate to consult dictionaries to determine what that term means. Legal dictionaries define "regulation" to expressly include "orders" issued by administrative bodies like the Health Department.[1] That is, a "regulation" is as "[a]n official rule or order, having legal force, usu. issued by an administrative agency."[2] Lay dictionaries basically say the same thing.[3] Plainly, then, the term "regulation" encompasses orders like the school mask mandates issued by the Health Department. Since the Department's school mask mandates are "regulations" under MCL 333.2441, the County Commission had a statutory duty to approve or disapprove of them. But that didn't happen here. As a result, those mask mandates never "bec[a]me effective" under the plain language of MCL 333.2441. They are procedurally invalid and unenforceable as a matter of law.

For all these reasons, Plaintiffs are entitled to: (1) a judicial declaration that the August 20, 2021 Mask Mandate and October 8, 2021 Reconciled Mask Mandate are invalid and unenforceable; and (2) a

---

1 *Michigan Open Carry, Inc v Grand Rapids-Kent County Convention Arena Authority*, 2018 WL 6185209 (Mich App Nov 27, 2018), quoting *Black's Law Dictionary* (10th ed, 2014).

2 *Black's Law Dictionary* (11th ed. 2019); see also *Merriam-Webster's Dictionary of Law* (2016) (defining "regulation" as "an authoritative rule; *specif*: a rule or order issued by a government agency and often having the force of law.")

3 *Merriam Webster's Collegiate Dictionary* (11th ed. 2014) (defining "regulation" as "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law."); *The American Heritage Dictionary of the English Language* (5th ed. 2018) (defining "regulation" as "[a] governmental order having the force of law.").

writ of mandamus directing the County Commission to comply with its statutory duty to either approve or disapprove of the Health Department's mask mandates as required by MCL 333.2441. Summary disposition is appropriate.

Statement of Facts

In late August 2021—three days before the scheduled start of the school year—the Health Department issued a Mask Mandate requiring every educational institution in Ottawa County to ensure that its students in "Pre-Kindergarten through Grade 6 consistently and properly wear a facial covering while inside any enclosed building or structure of the institution."[4] The Mask Mandate also requires every educational institution in Ottawa County to ensure that "all persons, regardless of vaccination status, providing service to any persons in Pre-Kindergarten through Grade 6 properly and consistently wear a facial covering while inside an enclosed building or structure of the institution."[5] Aside from "students" and "teachers," the Mask Mandate applies to pretty much anyone who sets foot in a school in Ottawa County.[6] And it isn't limited to just schools—the term "education institutions" also includes "youth camps, youth programs, child care centers, [and] preschools."[7] At the time, the Health Department claimed that its authority to issue the Mask Mandate from three sources: MCL 333.2451; MCL 333.2453; and Mich Admin Code R 325.175(4).[8] The Mask Mandate also included several factual "determinations" and "findings" related to COVID-19 and mask wearing as a mitigation technique.[9]

The public's reaction to the Mask Mandate was swift and definitive with over 1,000 people attending

---

[4] **Ex. 1**, Original Mask Mandate
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

the next County Commission meeting on August 24, 2021.[10] Most of those who showed up expressed their outrage over the mask mandate and asked the County Commissioners to do something about it.[11] At the meeting, several Commissioners said that they were powerless to do anything about the Mask Mandate.[12] The next day, the Commission's Chairman, Roger Bergman, doubled-down on that alleged powerlessness in a public statement by claiming that there is "no question that the [County Commission] cannot make this decision and cannot reverse this decision."[13]

In September 2021, Plaintiffs filed this lawsuit challenging the Mask Mandate on several grounds.[14] First, they argued that it didn't contain the specific factual determinations and findings necessary to trigger the authority provided by the statutes and rule relied on.[15] Second, Plaintiffs alleged that the Mask Mandate was procedurally invalid because it hadn't been approved by the County Commission under MCL 333.2441, which requires local health department "regulation[s]" to "be approved or disapproved by the local governing entity" before they become effective.[16]

After the filing of the lawsuit, representatives of Ottawa County continued to assert that the County Commission has no authority to provide oversight regarding the Mask Mandate.[17] And, in early October

---

[10] **Ex. 2**, Plaintiffs' Original Complaint, ¶4; see also **Ex. 3**, 8/24/21 MLive Article (available at https://www.mlive.com/news/grand-rapids/2021/08/large-crowd-tells-ottawa-county-elected-leaders-to-unmask-our-kids.html).

[11] **Ex. 2**, Plaintiffs' Original Complaint, ¶4; **Ex. 4**, 8/25/21 MLive Article (available at https://www.mlive.com/news/grand-rapids/2021/08/ottawa-county-elected-officials-cannot-reverse-health-departments-school-mask-mandate.html).

[12] **Ex. 2**, Plaintiffs' Original Complaint, ¶5.

[13] *Id.*; **Ex. 5**, Commissioner Bergman's 8/25/21 Statement

[14] See generally, **Ex. 2**, Plaintiffs' Original Complaint.

[15] **Ex. 2**, Plaintiffs' Original Complaint, ¶52-69.

[16] **Ex. 2**, Plaintiffs' Original Complaint, ¶41-51MCL 333.2441

[17] **Ex. 6**, 9/22/21 MLive Article (available at https://www.mlive.com/news/grand-rapids/2021/09/parents-sue-ottawa-county-over-mask-mandate-county-attorney-calls-lawsuit-nonsense.html); **Ex. 7**, 9/22/21 WZZM13 Article (available at https://www.wzzm13.com/article/news/this-isnt-right-state-rep-supports-lawsuit-against-ottawa-county-mask-mandate/69-b2208e48-cca7-41c3-83d6-9a0590483310); **Ex. 8**, 9/21/21 Holland Sentinel Article (available at

2021, the Health Department issued a new order (the "Reconciled Mask Mandate") that made several "factual determinations" that attempted to reconcile previous orders, including the Mask Mandate, with "current facts and law."[18] In other words, the Reconciled Mask Mandate tried to clean up the Health Department's previous mandates to help them survive judicial scrutiny. The Reconciled Mask Mandate "supersede[d] the…August 20, 2021 Order where inconsistent," but it also "incorporate[d] by reference all provisions of the…August 20, 2021 Order that [were] not inconsistent."[19] In other words, the Reconciled Mask Mandate left the original Mask Mandate's restrictions fully intact. The Reconciled Mask Mandate was issued without County Commission approval, too. So, the original Mask Mandate's procedural flaw remained.

When Defendants answered Plaintiffs' complaint a few days later, they relied upon the Reconciled Mask Mandate.[20] They also reiterated their belief that the Department can issue school mask mandate orders without the County Commission's approval.[21] Plaintiffs thereafter filed an amended complaint that focuses exclusively on challenging whether the Department can issue school mask mandate orders without first obtaining the County Commission's approval.[22] That challenge is now before this Court for resolution.

Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) tests a claim's factual support.[23] Summary disposition is proper under (C)(10) where "there is no genuine issue as to any material fact, and

---

https://www.hollandsentinel.com/story/news/politics/government/2021/09/21/ottawa-county-sued-over-k6-mask-mandate/5798348001/)

[18] **Ex. 9**, Reconciled Mask Mandate.

[19] *Id.*

[20] **Ex. 10**, Defendants' Answer to Plaintiffs' Original Complaint.

[21] *Id.*

[22] **Ex. 11**, Plaintiffs' Amended Complaint.

[23] *Smith v Globe Life Ins. Co.*, 460 Mich 446, 454; 597 NW2d 28 (1999).

the moving party is entitled to judgment or partial judgment as a matter of law."[24] "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."[25]

I. Argument I – Plaintiffs Have Pleaded an Actual Controversy.

A. The "actual controversy" requirement, generally.

MCR 2.605(A)(1) authorizes this Court to "declare the rights and other legal relations of an interested party seeking a declaratory judgment" in "a case of actual controversy."[26] It "was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people."[27] A declaratory judgment "enable[s] the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants."[28]

Under MCR 2.604(A)(1), "the existence of an 'actual controversy' is condition precedent to invocation of declaratory relief."[29] The essential requirement an "actual controversy" is that the plaintiff pleads an "adverse interest necessitating the sharpening of the issues raised."[30] Thus, an actual controversy exists "where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights."[31] Or, stated differently, "an actual controversy exists where a

---

[24] MCR 2.116(C)(10).
[25] *Gorman v American Honda Motor Co., Inc.*, 302 Mich App 113, 115; 839 NW2d 223 (2013).
[26] See *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 54-55; 620 NW2d 546 (2000);
[27] *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978).
[28] *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132 (2012) (citations omitted, emphasis in original).
[29] *Citizens for Common Sense in Gov't*, 243 Mich App at 54-55 (citations omitted).
[30] *UAW*, 295 Mich App at 495
[31] *Mich Assoc of Home Builders v City of Troy*, 504 Mich 204, 225-226; 934 NW2d 713 (2019)

declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights."[32]

An actual controversy exists where a plaintiff suffers past or ongoing injuries. For example, an "actual controversy" can be based on past tax and fee assessments.[33] Similarly, an actual controversy exists where the parties took adverse positions in past negotiations.[34] Furthermore, an "actual controversy" exists where the a declaratory-judgment plaintiff's "interests have already been affected by [an agency's] alleged misapplication of [Michigan law].[35] However, an actual controversy can also exist "before actual injuries or losses have occurred."36 All that's required is "a present legal controversy, not one that is merely hypothetical or anticipated in the future."[37] So, while an "actual controversy" exists where the plaintiff has already been injured, "by granting declaratory relief in order to guide or direct future conduct, courts are not precluded from reaching issues before actual injuries or losses have occurred."[38]

---

[32] *Citizens for Common Sense in Government*, 243 Mich App at 55; *League of Women Voters of Michigan v Secretary of State*, 506 Mich 561, 585-586; 957 NW2d 731 (2020) (same).

[33] *Mich Assoc of Home Builders*, 504 Mich at 225-226 (the plaintiffs' claim "that the City's building inspection fees…were assessed" in the past in violation of Michigan "would constitute an 'actual controversy' for the purposes of an action for a declaratory judgment."); *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370, 395-396; 872 NW2d 223 (2015) (holding that plaintiffs "set forth an actual controversy" for declaratory-judgment purposes "by challenging the assessment of fees" that had previously been assessed by the Gaming Control Board); *Nims v Grand Trunk Western R Co*, 326 Mich 371, 373-374; 40 NW2d 188 (1949) (holding that there was "an actual controversy over the legality of a [past] tax assessment and one which ordinarily permits adjudication by a declaratory judgment.").

[34] *Durant v State Dept of Educ*, 238 Mich App 185, 204; 605 NW2d 66 (1999) ("The differing positions of the parties with regard to how the Legislature is to satisfy the state's art. 9, §§ 11 and 29 funding obligations raise an actual justiciable controversy for purposes of the declaratory judgment rule."); *Welfare Employees Union v Michigan Civil Service Com'n*, 28 Mich App 343, 351; 184 NW2d 247 (1970) (an "[a]ctual controversy existed" where "[t]he defendants took a position adverse to that of the plaintiff and rejected negotiation attempts.").

[35] *Crawford County v Secretary of State*, 160 Mich App 88, 92-93; 408 NW2d 112 (1987) (an "actual controversy" existed where "plaintiffs' interests have already been affected by defendants' alleged misapplication of § 531 of the FRA.").

[36] *League of Women Voters*, 506 Mich at 585-586 (citations and footnotes omitted);

[37] *Id.* (citations and footnotes omitted).

[38] *UAW*, 295 Mich App at 495.

Consistent with these principles, Michigan's appellate courts have consistently found that a plaintiff pleads an actual controversy where they allege that an invalid rule or illegal action jeopardizes one of their rights or interests even if they haven't already been arrested or fined. For example, an "actual controversy" existed where the plaintiffs claimed that: (1) a municipality violated state law by imposing a residence requirement as a condition for employment;[39] a municipality illegally applied engineering fees as a property tax and treated them as a tax lien;[40] a state agency deducted their benefits in violation of federal law;[41] a state administrative board's fee assessment violated the law;[42] a state agency and the plaintiffs took "differing positions" about how the Legislature could satisfy its constitutional funding obligations;[43] and that public university officials promulgated a policy in violation of a state statute.[44]

B. Michigan parents have a protected interest in their children's care, custody, welfare, and education, and a fundamental right to make related decisions.

---

[39] *Lash v Traverse City*, 479 Mich 180, 196-197; 735 NW2d 628 (2007) ("In this case, plaintiff's claim is that defendant's residency requirement, made a condition of plaintiff's employment, was in violation of MCL 15.602(2). Such a claim would constitute an 'actual controversy' for the purposes of an action for a declaratory judgment.")

[40] *Kircher v Ypsilanti*, 296 Mich App 224; 712 NW2d 738 (2005) (an "actual controversy" existed whether the defendant illegally applied engineering fees as property taxes and treated them as tax liens even though it later removed those charges because "Plaintiff challenged defendant's practices of assessing the fees, not merely the specific charges that defendant removed" and "[w]hen defendant removed those charges, it did not repudiate its practice or concede that they were unauthorized"; rather, it "expressed a willingness to reapply the same fees in the future.").

[41] *Farish v Dept of Talent and Econ Dev*, ___ Mich App ___; ___ NW2d ___; 2021 WL 1044353 at *8 (Docket No. 350866, Mar 18, 2021) (**Ex. 12**) ("The 'actual controversy' requirement is easily satisfied in this case because deductions from plaintiffs' benefits were being made in violation of federal law. Further, it is well established that declaratory actions may be brought to determine issues of statutory construction.")

[42] *Arabo*, 310 Mich App at 395-396 ("Plaintiff set forth an actual controversy by challenging the assessment of fees by the Board as violative of § 4 of the FOIA.")

[43] *Durant*, 238 Mich App at 205 ("The differing positions of the parties with regard to how the Legislature is to satisfy the state's art. 9, §§ 11 and 29 funding obligations raise an actual justiciable controversy for purposes of the declaratory judgment rule.").

[44] *UAW*, 295 Mich App at 496-497 ("There is an actual controversy between the parties because the CMU officials promulgated a policy that is allegedly at odds with a state statute. And although no university employee has yet sought to run for office, it is appropriate for the Union to seek an adjudication of its members' rights and responsibilities before the candidacy policy causes actual injury or ripens into a violation of the law by interfering with the employees' ability to engage in off-duty political activity.")

Michigan's appellate courts recognize that parents have a protected interest in raising their children.[45] That is, "[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."[46] Indeed, "[t]he preeminence of a parent's precious right to raise his or her child is so firmly rooted in our jurisprudence that it needs no further explication."47

The United States Supreme Court has similarly recognized the "constitutional dimension to the right of parents to direct the upbringing of their children."48 The "liberty interest" of parents "in the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court."[49] A parent's liberty interest includes "the right of parents to 'establish a home and bring up children' and 'to control the education of their own"[50] and the "right 'to direct the upbringing and education of children under their control.'"[51] Indeed, the right of parents to make decisions regarding their children's care, control, and education is established by "a long line of cases" in which the Supreme Court "held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] ... to direct the education and upbringing of one's children."[52]

---

[45] *In re MacDonald*, 2012 WL 6720569 at *2-*3 (Mich App Dec 27, 2012) (**Ex. 13**) ("The right of parents to make decisions regarding the care, custody, and control of their children is well-recognized as a fundamental right protected by…the Fourteenth Amendment."); *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014) (holding that the Fourteenth Amendment protects the fundamental "the right of parents to make decisions concerning the care, custody, and control of their children"); *In re Fisher*, 2020 WL 3886195 at *2 (Mich App July 9, 2020) (**Ex. 14**) (citations omitted) ("Natural parents possess a fundamental liberty interest, protected by the Fourteenth Amendment, in the care, custody, and management of their child.").

[46] *Varran v Granneman*, 312 Mich App 591, 605; 880 NW2d 242 (2015).

[47] *Frowner v Smith*, 296 Mich App 374, 382; 820 NW2d 235 (2012).

[48] *Troxel v Granville*, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000).

[49] *Troxel*, 530 US at 65-66

[50] *Id.*, quoting *Meyer v Nebraska,* 262 US 390, 399, 401 (1923).

[51] *Id.*, quoting *Pierce v Society of Sisters,* 268 US 510, 534–535 (1925).

[52] *Washington v Glucksberg*, 521 US 702, 719-720 (1997); see, e.g., *Wisconsin v Yoder,* 406 US 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for

C. Plaintiffs have pleaded an "actual controversy."

Based on that case law, Ottawa County parents have a protected interest in choosing what's best for their children and the right to make decisions about their children's health, safety, and education. That right allows parents to decide that the risk posed by the COVID-19 pandemic warrants instructing their child to wear a mask while at school. It also entitles parents to decide that the educational and developmental costs of masking at school outweigh the benefits.[53] The Reconciled Mask Mandate, however, eliminates that choice by requiring every Ottawa County student in "Pre-Kindergarten through Grade 6"—including Plaintiffs' children—to "consistently and properly wear a facial covering while inside any enclosed building or structure of the institution."[54] By doing so, the Reconciled Mask Mandate interferes with Plaintiffs' fundamental right to decide what's best for the health, safety, welfare, and education of their children.

It follows that, as the parents of Ottawa County school children, Plaintiffs have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large…."[55] And, since they allege that the instrument of that interference with their fundamental parental rights—the Reconciled Mask Mandate—is legally invalid, Plaintiffs have pleaded the sort of "adverse interest" necessary to establish an "actual controversy."[56]

More importantly, though, an "actual controversy" exists here because "a declaratory judgment is

---

the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Parham v JR,* 442 US 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of…broad parental authority over minor children."); *Santosky v Kramer,* 455 US 745, 753 (1982) (acknowledging "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child")

[53] See, **Ex. 15**, *Vinay Prasad*, The Downsides of Masking Young Students Are Real, The Atlantic, September 2, 2021, available at https://www.theatlantic.com/ideas/archive/2021/09/school-mask-mandates-downside/619952/.

[54] **Ex. 1**, Original Mask Mandate; **Ex. 9**, Reconciled Mask Mandate.

[55] *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010).

[56] *Lash*, 479 Mich at 196; *UAW*, 295 Mich App at 496-497.

necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights."[57] Violations of a local health department's regulations or orders can result in criminal penalties—i.e., "a person who violates a regulation of a local health department or order of a local health officer under this act is guilty of a misdemeanor punishable by imprisonment for not more than 6 months or a fine of not more than $200.00, or both."[58] So, Plaintiffs (or their children) are subject to criminal liability if they decide that masking at school isn't in their children's best interests. It follows that a declaratory judgment as to the Reconciled Mask Mandate's validity it is necessary to guide Plaintiffs' future conduct.

II. Argument II – The Department's Mask Mandates are Invalid.

A. Administrative authority, generally.

An administrative regulation must "substantively valid" to be enforced.[59] In Michigan, "[a]dministrative boards, commission, and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication."[60] Rather, an administrative agency's authority "derives from powers that the Michigan Legislature has granted."[61] And, while the Legislature can give agencies authority to adopt regulations to "effectuate" their delegated authority, "[a] statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such statute must be granted plainly, because doubtful power does not exist."[62]

---

[57] *Citizens for Common Sense in Government*, 243 Mich App at 55; *League of Women Voters*, 506 Mich at 585-586.
[58] MCL 333.2443.
[59] *Mich Farm Bureau v Dep't of Environ Qual*, 292 Mich App 106, 129; 807 NW2d 866 (2011).
[60] *Coffman v State Bd of Exam in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951).
[61] *Mich Farm Bureau*, 292 Mich App at 128-130 (citations omitted).
[62] *Id.* (citations omitted); *Smith v Behrendt*, 278 Mich 91, 95; 270 NW 227 (1936) (citations omitted) ("It is too well settled to need the citation of supporting authorities that the Legislature, within limits defined in the law, may confer authority on an administrative officer of board to make rules as to details, to find facts, and to exercise some discretion, in the administration of a statute.")

Thus, although administrative agencies have implied authority to adopt regulations necessary to exercise "expressly granted" powers, "an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by statute, the source of its power."[63] Further, "a statute that grants power to an administrative agency is strictly construed."[64] Thus, "[a]dminstrative authority must be granted affirmatively or plainly, because doubtful power does not exist."[65] For more than a century,[66] Michigan courts have held that an agency's regulation, rule, or action is invalid if it exceeds the agency's statutory authority.[67]

B. The Health Department's authority is statutorily derived. And, the operative statute requires the Board of County Commissioners the "approve or disapprove" of the Health Department's regulations before they become effective.

The Health Department is a "local health department" under the Public Health Code. As such, its authority is limited and explicitly defined by statute. A local health department shall "[i]mplement and enforce laws for which responsibility is vested in the local health department" and "[h]ave powers necessary or appropriate to perform the duties and exercise the powers given by law to the local health officer and which are not otherwise prohibited by law."[68] A local health department may also adopt regulations "to properly safeguard the public health and to prevent the spread of diseases and sources of contamination"[69]

---

[63] *Coffman*, 331 Mich 582, 589-590 (citations omitted); *Ranke v Mich Corp and Securities Com'n*, 317 Mich 304, 309; 26 NW2d 898 (1947) (citations omitted) ("It is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power.").

[64] *In re Qual of Serv Standards for Regulated Telecom Servs*, 204 Mich App 607; 516 NW2d 142 (1994).

[65] *Id.*

[66] *Pearsol v Bd of Sup'rs of Eaton Cty*, 71 Mich 438, 444; 39 NW 578 (1888) ("But when the exercise of [governmental] authority is limited by statute, and its exercise affects the private rights of individuals by divesting them of property or valuable rights, the record of the proceedings must show that the act by which this is done is within the limits of the power conferred.")

[67] *Clonlara, Inc v State Bd of Educ*, 442 Mich 230; 501 NW2d 88 (1993); *Czymbor's Timber, Inc v City of Saginaw*, 478 Mich 348, 356; 733 NW2d 1 (2007) (an administrative agency "cannot exceed the authority granted by the Legislature" and its authority is limited by the "plain language" of the governing statutes)

[68] MCL 333.2433(2)(a) and (f).

[69] MCL 333.2435(d),(i).

or that are "necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department."[70]

The Public Health Code also provides that the Health Department's administrative officer acts on its behalf. That is, the "local health officer shall act as the administrative officer of the Board of Health and local health department and may take actions and make determinations necessary or appropriate to carry out the local health department's functions under this part or functions delegated under this part and to protect the public health and prevent diseases."[71]

Under Michigan law, "local health departments" are created by a "local governing entity."[72] The County Commission is a "local governing entity" under the Public Health Code.[73] Thus, the County Commission has primacy over—and is statutorily obligated to oversee—the Health Department. To that end, the Legislature requires that, when a local health department adopts a "regulation," it "shall be approved or disapproved by the local governing entity."[74]

The local governing entity's approval isn't optional. That is, a local health department's "regulations" don't "become effective" until "45 days after approval by the local health department's governing entity or at a time specified by the local health department's governing entity."[75] As a result, the plain language of the Public Health Code requires that local governing entities like the County Commission oversee, and ultimately approve (or disapprove) any "regulations" issued by a local health department before they obtain the force of the law.

---

[70] MCL 333.2441.
[71] MCL 333.2428.
[72] MCL 333.2413.
[73] MCL 333.2406(a).
[74] MCL 333.2441.
[75] MCL 333.2441.

C. Relevant principles of statutory construction.

When interpreting statutory language, "[t]he words of a governing text are of paramount concern."[76] That is, when interpreting statutes, this Court's primary "goal is to give effect to the Legislature's intent," which it does by "focusing first on the statute's plain language."[77] Courts must give meaning and effect to each word, phrase, and clause of a statute[78] and must avoid any interpretation of a statute that would render statutory language nugatory or surplusage.[79] As a result, a court cannot second-guess the Legislature's decision to include or omit something from the statute based on some vague conception of the statute's purpose.[80] Nor can make assumptions about what the Legislature "would have wanted."[81] Statutory interpretation that ignores this principle and disregards the plain language of the statutory text is "illegitimate."[82]

---

[76] *Reading Law*, p 56; *People v Wood,* 506 Mich 114, 127; 954 NW2d 494 (2020) (This Court's "job is not to choose which definition the Legislature *should* have adopted to accomplish its goal in the best possible way; our goal is to interpret the text that is provided to us.")

[77] *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018) (citations omitted)

[78] *Nowell v Titan Ins Co*, 466 Mich 478, 483, 648 NW2d 157 (2002) ("In such a case of tension, or even conflict, between sections of a statute, it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them."); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 174 ("If possible, every word and every provision is to be given effect .... None should needlessly be given an interpretation that causes it to duplicate another provision ....").

[79] *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 336; 915 NW2d 338 (2018) ("This Court must give effect to every word, phrase, and clause in a statute, and, in particular, consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme, to avoid rendering any part of the statute nugatory or surplusage."); *SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017) ("This Court, as with all other courts, must give effect to every word, phrase, and clause in a statute, to avoid rendering any part of the statute nugatory or surplusage."); *Reading Law*, p 67 ("The presumption of validity disfavors interpretations that would nullify the provision….").

[80] *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125 n 25; 894 NW2d 552 (2017), quoting *Reading Law*, pp 57-58 ("[T]he limitations of a text—what a text chooses *not* to do—are as much a part of its 'purpose' as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose.")

[81] *Reading Law*, p 95 ("The search for what the legislature 'would have wanted' is invariably either a deception or a delusion.")

[82] *Ronnisch Construction Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 572 n 12; 886 NW2d 113 (2016) (Young, C.J., dissenting).

D. The Mask Mandate order is a "regulation" under MCL 333.2441.

In Michigan, courts "accord to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning or is defined in the statute."[83] In ascertaining the plain and ordinary meaning of an undefined statutory term, the court may rely on dictionary definitions.[84] "A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning."[85] But "[a] legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning."[86] "If the definitions are the same in both a lay dictionary and a legal dictionary, it is unnecessary to determine whether the phrase is a term of art, and it does not matter to which type of dictionary this Court resorts."[87]

Here, the central question is whether the Health Department's Mask Mandate order is a "regulation" under the plain meaning of MCL 333.2441. The Public Health Code doesn't define "regulation" for purposes of MCL 333.2441. Nor does it define "order." So, it's appropriate to consult dictionary definitions to discern the meaning of those terms.

Most legal and lay dictionaries define "regulation" to expressly include "orders" issued by an administrative body like the Health Department. For example, Black's Law Dictionary defines "regulation" as "[a]n official rule or order, having legal force, usu. Issued by an administrative agency."[88] Another legal dictionary defines "regulation" as "an authoritative rule; *specif*: a rule or order issued by a government

---

[83] *Guardian Environmental Servs., Inc. v Bureau of Const. Codes & Fire Safety, Dep't. of Labor & Economic Growth*, 279 Mich App 1, 6; 755 NW2d 556 (2008), citing *Casco Twp. v Secretary of State*, 472 Mich 566, 593 n. 44; 701 NW2d 102 (2005); MCL 8.3a.
[84] *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).
[85] *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008); *Farris v McKaig*, 324 Mich App 349, 354; 920 NW2d 377 (2018) ("Consulting a lay dictionary is proper when defining common words or phrases that lack a unique legal meaning.")
[86] *Brackett*, 482 Mich at 276; 753 NW2d 207 (2008) (citations omitted).
[87] *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135 (2016).
[88] *Black's Law Dictionary* (11th ed. 2019).

agency and often having the force of law."[89] Along the same lines, a lay dictionary relied on by the Michigan Supreme Court[90] defines "regulation" as "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law."[91] Another dictionary used by the Supreme Court[92] defines "regulation" as "[a] governmental order having the force of law."[93] At least one Michigan court (and several other courts) have applied the *Black's* definition of "regulation."[94] So, regardless of whether it's a common word or legal term of art, the dictionary definition of "regulation" expressly includes orders issues by administrative agencies like the Health Department.

And nothing about the plain meaning of "order" is inconsistent with it being a "regulation." For example, Black's Law Dictionary defines "order" as "[a] written direction or command delivered by a government official, esp. a court or judge"[95] and "administrative order" as "[a]n agency regulation that

---

[89] *Merriam-Webster's Dictionary of Law* (2016).
[90] See, e.g. *Maples v State*, ___ Mich ___; ___NW2d ___; 2021 WL 3044411 (Docket No. 160740, July 20, 2021) **(Ex. 16)**, citing *Merriam-Webster's Collegiate Dictionary* (11th ed.); *Honigman Miller Schwartz and Cohn LLP v Detroit*, 505 Mich 284, 307, 311, 318; 952 NW2d 358 (2020), citing *Merriam Webster's Collegiate Dictionary* (11th ed.); *Otto v Inn at Watervale, Inc.*, 501 Mich 1044, 1045; 909 NW2d 265 (2018), quoting *Merriam Webster's Collegiate Dictionary* (11th ed.)
[91] *Merriam Webster's Collegiate Dictionary* (11th ed. 2014); *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020).
[92] *Bisio v Clarkston*, 506 Mich 37, 47; 954 NW2d 95 (2020), citing *The American Heritage Dictionary of the English Language* (New College ed.); *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), citing *The American Heritage Dictionary, 2nd College Ed*; *In re Estate of Erwin*, 503 Mich 1, 10; 921 NW2d 308 (2018), citing *American Heritage Dictionary* (2d ed.).
[93] *The American Heritage Dictionary of the English Language* (5th ed. 2018)
[94] See, e.g., *Michigan Open Carry, Inc v Grand Rapids-Kent County Convention Arena Authority*, 2018 WL 6185209 (Mich App Nov 27, 2018), quoting *Black's Law Dictionary* (10th ed, 2014) ("A regulation is "[a]n official rule or order, having legal force, usu. issued by an administrative agency."); *Leek v Peterson*, 358 P3d 722; 2015 WL 5009983 at *3 (Kan App Aug 14, 2015) **(Ex. 17)**, quoting *Black's Law Dictionary* (10th ed. 2004) (Stating that "the traditional definition of regulation…is "[a]n official rule or order, having legal force, usu[ally] issued by an administrative agency."); *In re Settles*, 218 A3d 235, 238 (DC App 2019), quoting *Black's Law Dictionary* (10th ed. 2004) (stating that "'regulation' nowadays naturally brings to mind rules promulgated by administrative agencies" and citing the Black's definition of "regulation" as "[a]n official rule or order, having legal force, usu. issued by an administrative agency")
[95] *Black's Law Dictionary* (11th ed. 2019)

interprets or applies a statutory provision."[96] Likewise, lay dictionaries define "order" as, among other things, "a specific rule, regulation, or authoritative direction"[97] and "[a]n authoritative indication to be obeyed; a command or direction" and "[a] directive or command of a court."[98] Thus, nothing in the meaning of "order" precludes the Department's mask mandate orders from being "regulations" under MCL 333.2441.

Given their plain meaning, a "regulation" under MCL 333.2441 includes an "order" issued by a local health department. And, by requiring that a local health department's "*regulations* shall be approved or disapproved" by its local governing entity, the plain language of MCL 333.2441 makes clear that the Legislature intended to subject the Health Department's orders to the County Commission's oversight and approval before they can obtain the force of law.[99]

Here, the Health Department never sought the County Commission's approval for the original or Reconciled Mask Mandate. And the County Commission never gave its approval for those orders. Indeed, several commissioners have taken the position they can't. But they are just plain wrong: The County Commission has the authority—and, indeed, the *duty*—to approve or disapprove of the Mask Mandate. And, since the Mask Mandate hasn't been approved by the County Commission, it never became effective under the plain language of MCL 333.2441. So, as it currently stands, the Mask Mandate is legally invalid and unenforceable.

The County Commission may argue that MCL 333.2441's approval requirement doesn't apply to the Mask Mandate because it's an emergency pandemic or imminent danger order issued under MCL 333.2451 and MCL 333.2453. But that argument is textually unsupportable. The plain language of MCL

---

[96] *Id.*
[97] *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014)
[98] *The American Heritage Dictionary of the English Language* (5th ed. 2018)
[99] See MCL 333.2441.

333.2441 doesn't qualify or limit the term "regulation." The statute doesn't require County Commission to approve "non-emergency regulations" or "regulations promulgated in the normal course of business" or "non-pandemic regulations." So, the approval requirement applies to any and all regulations—and, thus, any and all orders, even emergency pandemic orders—issued by the Health Department. And, since the Legislature didn't modify or limit the term "regulation," neither this Court nor the Health Department can read such limitations into the statute because that would be an impermissible usurpation of the Legislative power.[100] Nor can the omission of any qualifying language from MCL 333.2441 be construed as inadvertent.[101]

In sum, because the Departments school mask mandates are "regulations" under MCL 333.2441, the County Commission has a statutory duty to approve them before they can be enforced. That didn't happen here, however. So, the Health Department's school mask mandate orders are ineffective and unenforceable as a matter of law. Plaintiffs are therefore entitled to the declaratory relief requested in Count I of their amended complaint.

E. Plaintiffs are entitled to declaratory relief and to a writ of mandamus requiring the Board of Commissioners to approve or disapprove of the Mask Mandate as required by MCL 333.2441.

---

[100] *People v Pinkney*, 501 Mich 259, 286 n 67; 912 NW2d 535 (2018); see also *Malpass v. Dep't of Treasury*, 494 Mich 237, 251, 833 N.W.2d 272 (2013) (" '[T]o supply omissions transcends the judicial function.' ") (citations omitted); *Michigan Ambulatory Surg Ctr v Farm Bureau*, ___ Mich App ___; ___ NW2d ___, 2020 WL 6811671 at *4 (No. 349706, Nov 19, 2020) (**Ex. 18**) (the canon of construction "*casus omissus pro omisso habendus est* (nothing is to be added to what the text states or reasonably implies)…prohibits courts from supplying provisions omitted by the Legislature."); see also *Hobbs v McLean*, 117 US 567, 579 (1886) ("When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.").

[101] *Nickola*, 500 Mich 115, 125 ("The omission of a provision in one part of a statute that is included in another part of the same statute should be construed as intentional."); *Farrington v. Total Petroleum, Inc.*, 442 Mich. 201, 210, 501 N.W.2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."); *Reading Law*, p 93 ("Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*).") (formatting altered).

In addition to the requested declaratory relief, this Court should also issue a writ of mandamus ordering the Board of Commissioners to carry out its statutory duty. "Mandamus is the appropriate remedy where the plaintiff, lacking adequate legal remedy, alleges a clear legal right to the performance of a specific duty by the defendant, and the defendant has an incontrovertible legal duty to act in the manner so requested."[102] It is the proper remedy where "(1) the party seeking the write has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act required, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result."[103] Thus "[w]here an official has a clear legal duty to act and fails to do so, the appropriate remedy is an order of mandamus."[104]

"Mandamus can be used to compel the use of discretion where there is a duty to use discretion," although it "cannot be issued to control how that discretion is used."[105] Thus, mandamus can be used "to require a [governmental] body or an officer charged with a duty to take action in the matter, notwithstanding the fact that the execution of that duty may involve some measure of discretion."[106] Specifically, mandamus can be used "to compel a county board of supervisors to act in their executive capacity" and comply with "an obligation imposed by law."[107]

Here, the County Commission has a clearly legal duty under the plain language of MCL 333.2441 it "shall approve or disapprove" of the Department's regulations, including its school mask mandate orders. So, although the decision whether to approve or disapprove of those orders lies within the County

---

[102] *Phillips v Warden*, 153 Mich App 557; 396 NW2d 482, 486 (1986).
[103] *Morales*, 260 Mich App 29, 41; 676 NW2d 221; *Hayes v Parole Bd*, 312 Mich App 774, 778; 886 NW2d 725 (2015).
[104] *Jones v Dep't of Corrections*, 486 Mich 646, 658; 664 NW2d 717 (2003).
[105] *Teasel v Dep'. of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984).
[106] *Id.* at 410
[107] *Id.*

Commission's discretion, it can't abdicate its duty to make that decision in the first place. Mandamus is appropriate under these circumstances.

Conclusion and Relief Requested

For the reasons stated above, Plaintiffs are entitled to summary disposition under MCR 2.116(C)(10) as a matter of law. As a result, they respectfully request that this Honorable Court enter an order declaring that:

a. Under MCL 333.2441, the County Commission has a mandatory statutory duty to exercise oversight over the Health Department's regulations;

b. Any orders promulgated by the Health Department under MCL 333.2451, MCL 333.2453, MCL 333.2433, and MCL 333.2428(2) are "regulations" within the plain meaning of MCL 333.2441; and

c. Under the plain language of MCL 333.2441, the Health Department's Reconciled Mask Mandate is a "regulation" subject to the County Commission's approval or disapproval.

d. The Health Department's Reconciled Mask Mandate is procedurally invalid and legally inoperative because it was never approved by the County Commission.

Plaintiffs also ask this Court to issue a writ of mandamus that orders the County Commission to fulfill its statutory duty and approve or disapprove of any Health Department school mask mandate.

Date: November 4, 2021

By: _____

D. Adam Tountas (P68579)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiffs
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
616-774-2461 (fax)
dtountas@shrr.com
jkoch@shrr.com

EXHIBIT 2

2021 WL 3044411
Only the Westlaw citation is currently available.
Supreme Court of Michigan.

David A. MAPLES, Plaintiff-Appellant,

v.

STATE of Michigan, Defendant-Appellee.

No. 160740
|
Argued on application for
leave to appeal April 7, 2021
|
Decided July 20, 2021

Synopsis

Background: Claimant, after obtaining federal habeas relief regarding conviction for delivery of cocaine, 427 F.3d 1020, brought action for compensation against State under Wrongful Imprisonment Compensation Act (WICA). The Court of Claims, Michael J. Talbot, J., granted State's motion for summary disposition. Claimant appealed. The Court of Appeals, 328 Mich.App. 209, 936 N.W.2d 857, affirmed. Leave to appeal was granted.

[Holding:] The Supreme Court, McCormack, C.J., held that pretrial hearing at which exculpatory evidence was presented was not a proceeding leading to conviction, and thus, the evidence was new evidence.

Reversed and remanded.

Zahra, J., filed a dissenting opinion, with which Viviano, J., agreed.

West Headnotes (9)

[1] **Criminal Law** Newly discovered evidence

Evidence is not newly discovered, as would be required for relief from judgment in a criminal case based on newly-discovered evidence, if the defendant or defense counsel was aware of the evidence at the time of trial.

[2] **Criminal Law** Review De Novo

The interpretation of a statute is reviewed de novo.

[3] **Statutes** Intent

When interpreting a statute, the court's primary task is to determine and give effect to the Legislature's intent.

[4] **Statutes** Language and intent, will, purpose, or policy

The most reliable indicator of legislative intent is usually the statute's text.

[5] **Statutes** Undefined terms

When a term in statutory text is undefined, the court applies its plain and ordinary meaning.

[6] **Statutes** Language and intent, will, purpose, or policy

Statutes Plain Language; Plain, Ordinary, or Common Meaning

The court analyzes the ordinary meaning of statutory language in the context of the entire statute, to give it the reasonable construction that best accomplishes the purpose of the statute.

[7] **States** State expenses and charges and statutory liabilities

Pretrial hearing at which exculpatory evidence was presented, but at which trial court rejected motion to dismiss based on entrapment defense to charge of delivery of cocaine, did not determine claimant's guilt, and thus, the pretrial hearing was not a proceeding "leading to" claimant's conviction, for purposes of Wrongful Imprisonment Compensation Act's (WICA) definition of "new evidence" as evidence that was not presented in the proceedings leading to

a claimant's conviction. Mich. Comp. Laws Ann. §§ 691.1752(b), 691.1755(1)(c).

1 Cases that cite this headnote

[8] **States** State expenses and charges and statutory liabilities

Claimant failed to establish existence of new evidence that had not been presented in proceedings leading to his conviction, and claimant therefore was not entitled to compensation under Wrongful Imprisonment Compensation Act (WICA), relating to imprisonment for delivery of cocaine, where claimant merely asserted that witness would have offered exculpatory testimony, without presenting an affidavit or other offer of proof showing what witness would have said. Mich. Comp. Laws Ann. §§ 691.1752(b), 691.1755(1)(c).

[9] **Statutes** Articles

When "the" and an indefinite article are used within the same statutory provision, they should not be read to mean the same thing.

BEFORE THE ENTIRE BENCH

OPINION

McCormack, C.J.

The Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq.*, allows people who were wrongfully imprisoned to seek compensation for the harm they suffered. The WICA limits eligibility for compensation to claimants who can prove (among other things) that new evidence shows that they were wrongfully convicted. This appeal is about what "new evidence" means under the act.

The WICA defines "new evidence," in relevant part, as "any evidence that was not presented in the proceedings leading to plaintiff's conviction ...." MCL 691.1752(b). David Maples, the WICA plaintiff here, relies on exculpatory evidence that was unavailable to present at his originally scheduled trial but *was* considered by the court at a pretrial hearing. We hold that this is new evidence under the WICA because it was not presented to a trier of fact during a proceeding that determined guilt—a trial or a plea hearing. We therefore reverse the decision of the Court of Appeals and remand this case to that Court for further proceedings.

I. FACTS AND PROCEEDINGS

***4** Maples, Lawrence Roberts, and James Murphy were at a bar when Murphy sold cocaine to an undercover officer. Maples and Roberts claimed they did not know about the drug sale but were arrested after they left the bar together. The charges against Roberts were eventually dismissed; the charges against Maples were not.

Shortly after his arrest, Murphy wrote a letter to the trial court, explaining that Maples and Roberts had nothing to do with the crime. During a pretrial hearing on Murphy's motion to dismiss his own charges based on an entrapment defense, which Maples joined, Murphy testified that Maples was neither involved in nor aware of the drug deal. (Murphy later signed affidavits swearing to the same.) The trial court denied that motion. Maples also moved to dismiss his case for a speedy-trial violation but did not prevail.

After the trial court denied his entrapment and speedy-trial motions, Maples planned to present Murphy as a defense witness at his trial. But the day before it was set to begin, he learned that Murphy had promised the prosecution he would not testify on Maples's behalf as part of his own plea deal. And Roberts—Maples's only other witness—couldn't be found. With no available witnesses, and relying on his counsel's advice that he could still appeal the speedy-trial violation, Maples pled guilty to delivery of cocaine.

Maples's appeal did not succeed in the Court of Appeals, and this Court denied leave; his attorney's advice that he could challenge the speedy-trial violation on appeal after pleading guilty was wrong. See *People v. Maples*, unpublished per curiam opinion of the Court of Appeals, issued November 4, 1997 (Docket No. 196975), p. 1, 1997 WL 33339368; *People v. Maples*, 459 Mich. 867, 584 N.W.2d 738 (1998). He filed a habeas corpus petition in federal court alleging ineffective assistance of counsel based on that incorrect advice, and the United States Court of Appeals for the Sixth Circuit granted him relief. *Maples v. Stegall*, 427 F.3d 1020, 1034 (C.A. 6,

2005). The panel concluded that Maples had been prejudiced by his trial's uncommonly long delay because both Roberts and Murphy likely would have testified favorably for him but were unavailable by the time of trial. *Id.* at 1033-1034. Since Maples's speedy-trial-violation claim had merit, his attorney was constitutionally ineffective for advising him to plead guilty when doing so waived his right to appeal the claim, and he was entitled to habeas relief on that basis. *Id.* at 1034. The Macomb Circuit Court then dismissed Maples's criminal charges and vacated his conviction.

Maples filed his WICA complaint in the Court of Claims shortly after the WICA became law in 2017, seeking compensation from the state for his wrongful imprisonment. Maples argued that he met the WICA's requirements for compensation because new evidence demonstrated that he did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction. The new evidence that resulted in the vacation of his convictions and the dismissal of the charges against him, according to Maples, was the exculpatory testimony of Murphy and Roberts that he was unable to present at a trial. Maples relied on Murphy's testimony at the entrapment hearing, Murphy's affidavits, and Murphy's letter to the trial court to support his claim. Maples did not include a similar offer of proof to establish Roberts's purported testimony, though he argued that Roberts would have testified favorably for him.

***5** The state moved for summary disposition, which the Court of Claims granted under MCR 2.116(C)(10). The court determined that neither Murphy's nor Roberts's testimony was new evidence. Alternatively, the court found that it was Maples's trial counsel's deficient performance and the speedy-trial violation that had "resulted in" the vacation of his conviction, not Murphy's proffered testimony.

The Court of Appeals affirmed. *Maples v. Michigan*, 328 Mich. App. 209, 213, 936 N.W.2d 857 (2019). The panel agreed that Murphy's testimony was not new evidence because it had been presented at the entrapment hearing. *Id.* at 221, 936 N.W.2d 857. It also agreed that Roberts's alleged testimony was not new evidence because Maples had offered no proof of what that testimony would have been. *Id.* at 221-222, 936 N.W.2d 857. Therefore, the panel held that the Court of Claims did not err by granting summary disposition in the state's favor. *Id.* at 222, 936 N.W.2d 857. Because it found that Maples had not carried his burden of proof by supporting his claim with new evidence, the panel did not address the alternative ground proffered by the Court of Claims for dismissing his case. *Id.* This appeal followed.

II. THE WICA'S "NEW EVIDENCE" REQUIREMENT

New evidence is the key to prevailing on a claim for compensation. To receive an award under the WICA, the plaintiff must prove by clear and convincing evidence that (1) new evidence demonstrates that they did not perpetrate the crime; (2) new evidence resulted in their conviction being reversed or vacated; and (3) new evidence resulted in either the dismissal of the charges or in an acquittal of all the charges on retrial. MCL 691.1755(1)(c). The WICA defines new evidence as follows:

> "New evidence" means any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction. New evidence does not include a recantation by a witness unless there is other evidence to support the recantation or unless the prosecuting attorney for the county in which the plaintiff was convicted or, if the department of attorney general prosecuted the case, the attorney general agrees that the recantation constitutes new evidence without other evidence to support the recantation. [MCL 691.1752(b).]

The WICA does not further define any of these terms. It does not explain what "proceedings" might "lead[ ] to [the] plaintiff's conviction."

[1] We have long required criminal defendants seeking relief from judgment based on new evidence to show that the evidence is not just new, but that it is newly discovered. See *People v. Cress*, 468 Mich. 678, 692, 664 N.W.2d 174 (2003). As this Court has explained, "evidence is not newly discovered if the defendant or defense counsel was aware of the evidence at the time of trial." *People v. Rao*, 491 Mich. 271, 281, 815 N.W.2d 105 (2012). Had the Legislature intended to exclude evidence like Murphy's exculpatory testimony from the definition of "new evidence" because it was known at the time of trial, it could have simply adopted our well-established standard for newly discovered evidence. The WICA's text, however, includes no discovery timing requirement.

The Legislature chose not to incorporate this Court's definition of new evidence into the WICA even though it was aware of our judge-made standard for newly discovered evidence. See *Reed v. Breton*, 475 Mich. 531, 540, 718 N.W.2d 770 (2006) ("[T]he Legislature is held to be aware of this state's law ...."). The WICA's definition of new evidence turns not on when it was discovered, but on whether the evidence was presented in certain proceedings.

III. ANALYSIS

***6** **[2]** **[3]** **[4]** **[5]** **[6]** We review the interpretation of the WICA de novo. *Sanford v. Michigan*, 506 Mich. 10, 14, 954 N.W.2d 82 (2020). As always, our primary task is to determine and give effect to the Legislature's intent. *Id.* at 14-15, 954 N.W.2d 82. The most reliable indicator of intent is usually the statute's text. *Badeen v. PAR, Inc.*, 496 Mich. 75, 81, 853 N.W.2d 303 (2014). When a term in that text is undefined, we apply its plain and ordinary meaning. *Honigman Miller Schwartz & Cohn LLP v. Detroit*, 505 Mich. 284, 305-306, 952 N.W.2d 358 (2020). And we analyze the ordinary meaning of statutory language in the context of the entire statute, *TOMRA of North America, Inc. v. Dep't of Treasury*, 505 Mich. 333, 339, 952 N.W.2d 384 (2020), to give it "the reasonable construction that best accomplishes the purpose of the statute," *People v. Feezel*, 486 Mich. 184, 205, 783 N.W.2d 67 (2010) (quotation marks and citation omitted).

[7] The meaning of "new evidence" under the WICA depends on what "proceedings lead[ ] to [a] plaintiff's conviction." If the entrapment hearing was a proceeding that led to Maples's conviction, his complaint would fail as a matter of law because Murphy's exculpatory testimony would not be new evidence under the WICA.

The text of MCL 691.1752(b) in isolation makes this a hard question. But the text isn't isolated, and we "must construe its meaning in light of the context of its use." *South Dearborn Environmental Improvement Ass'n, Inc. v. Dep't of Environmental Quality*, 502 Mich. 349, 367-368, 917 N.W.2d 603 (2018). The term's context in the statute and the statute's remedial purpose make the answer clear.

[8] We start with the text. The WICA defines new evidence as "any evidence that was not presented in the proceedings leading to plaintiff's conviction ...." MCL 691.1752(b). This definition has three elements: (1) "any evidence";[1] (2) "that was not presented"; (3) "in the proceedings leading to plaintiff's conviction." The third element is the only one that has been disputed. The Court of Appeals held that "the proceedings leading to plaintiff's conviction" means *any* proceeding in the case (including pretrial hearings) that "brought about the [plaintiff's] conviction." *Maples*, 328 Mich. App. at 220, 936 N.W.2d 857. The panel reasoned that since the information about Murphy's exculpatory evidence was presented at the entrapment hearing and the court denied that motion, the hearing was a proceeding that brought about the conviction. *Id.* Maples has consistently argued (and the Attorney General ultimately endorsed) that "the proceedings leading to plaintiff's conviction" include only the proceedings that determined guilt—that is, the trial or a guilty or no-contest plea. We agree with Maples and the Attorney General.

[9] First, the definition is limited to "*the* proceedings leading to plaintiff's conviction." If the Legislature intended to include all preconviction proceedings, it could have written MCL 691.1752(b) to bar evidence that was presented in "*any* proceeding leading to plaintiff's conviction." The indefinite article "any" means "one, some, or all indiscriminately of whatever quantity." *Merriam-Webster's Collegiate Dictionary* (11th ed.). This contrasts with "the," a definite article, which has "a specifying or particularizing effect." *Massey v. Mandell*, 462 Mich. 375, 382 n. 5, 614 N.W.2d 70 (2000) (quotation marks and citation omitted). When "the" and an indefinite article are used within the same statutory provision, they should not be read to mean the same thing. *Id.* See also *United States Fidelity Ins. & Guaranty Co. v. Mich. Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich. 1, 14, 795 N.W.2d 101 (2009) ("When the Legislature uses different words, the words are generally intended to connote different meanings."). Such is the case here: MCL 691.1752(b) states that new evidence is "*any* evidence that was not presented in *the* proceedings ...." MCL 691.1752(b) (emphasis added). "Any" and "the" are not synonymous. Similarly, if the Legislature meant to include all proceedings in a case, it could have defined new evidence as "any evidence that was not presented in the original proceedings." But it cabined "the proceedings" to those "*leading to plaintiff's conviction.*" "The" proceedings leading to a conviction, therefore, must be a subset of all proceedings in a case.

***7** That the proceedings leading to the plaintiff's conviction can't mean all the proceedings in the case gets us only so far; it doesn't tell us what subset of proceedings are included in the definition. The Court of Appeals aptly recognized this when it sought to limit "the proceedings" from all proceedings to

only those that "brought about the conviction." *Maples*, 328 Mich. App. at 220-221, 936 N.W.2d 857.

We agree with the panel that a "criminal proceeding" is "[a] judicial hearing, session, or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment; a criminal hearing or trial." *Black's Law Dictionary* (10th ed.). But we disagree with the panel's understanding of "leading."

The panel selected a definition of "lead"—"to bring to some conclusion," see *Merriam-Webster's Collegiate Dictionary* (11th ed.), p. 706—that defines the word in one of its transitive senses. "Leading" in MCL 691.1752(b), however, is used as an intransitive verb. See Strunk & White, *The Elements of Style* (Needham Heights: Allyn & Bacon, 2000), p. 95 (a transitive verb is "[a] verb that requires a direct object to complete its meaning"). When used as a transitive verb, "leading" may mean: (1) "to guide on a way" (e.g., *he led the officers to his hiding place*); (2) "to direct the operations, activity, or performance of" (e.g., *the director is leading the orchestra*); or (3) "to bring to some conclusion or condition" (e.g., *they led me to believe otherwise*). Merriam-Webster.com Dictionary, *Lead* <https://www.merriam-webster.com/dictionary/lead> (accessed July 9, 2021) [https://perma.cc/9UD3-5N6P]. The direct objects in these examples—"the officers," "the orchestra," and "me"—receive the action from the verb "leading" and are necessary to give it meaning. In contrast, "leading" as used in MCL 691.1752(b) doesn't require a direct object to complete its meaning. "[T]he proceedings leading to plaintiff's conviction" doesn't have a direct object that receives the action from the verb—here, "leading" is an intransitive verb. The verb's form informs our interpretation; we can't rely on the definition for a transitive verb when the statute uses the intransitive form.

The relevant definition of "lead" when used as an intransitive verb is "to tend toward or have a result." *Merriam-Webster's Collegiate Dictionary* (11th ed.). It also is synonymous with "cause." See Cambridge Dictionary, *Lead* <https://dictionary.cambridge.org/us/dictionary/english/lead> (accessed June 4, 2021) [https://perma.cc/SKJ8-636L] (defining "lead," in relevant part, as "to prepare the way for something to happen; cause," noting that this sense of the word can be used transitively or intransitively, and providing the following example of the word being used intransitively: "Ten years of scientific research led to the development of the new drug").

A conviction *results from* or is *caused by* a guilty verdict by a judge or jury following a trial or from the defendant's admission of guilt in a plea hearing. Those are the subset of proceedings that result in or cause a conviction; no other proceeding in a criminal case does that. Pretrial hearings do not result in a conviction; they can result in the dismissal of charges or in setting the parameters for a trial.

The Court of Appeals correctly observed that if the trial court had granted the entrapment motion, Maples never would have been convicted. See *Maples*, 328 Mich. App. at 221, 936 N.W.2d 857. Thus, the panel held, the entrapment hearing was a proceeding leading to Maples's conviction. *Id.* It is true that but for the trial court's denial of the entrapment motion, Maples's conviction would not have occurred. Not prevailing at the entrapment hearing meant that Maples's case proceeded—but the same can be said for an arraignment, a preliminary examination, and every other pretrial court proceeding that doesn't end in the case being dismissed. For this reason, the Court of Appeals' conclusion that the entrapment hearing led to a conviction because it did not end the case does not provide any limiting principle to define the subset of proceedings that lead to a conviction. The panel did not explain why a motion hearing on an entrapment claim is different from any other pretrial proceeding that does not end in the case being dismissed.[2] Despite the panel's effort to cabin "the proceedings" to a specific subset of the criminal proceedings, its definition and application did not do so.[3]

***8** Moreover, the WICA's broader context and statutory scheme show that "leading to" does not mean "to cause" as in but-for cause. And as always, we must analyze the definition "in harmony with the whole of the statute, construed in light of history and common sense." *Honigman*, 505 Mich. at 295, 952 N.W.2d 358 (quotation marks and citation omitted). The WICA uses the term "new evidence" elsewhere and in a pivotal way. To receive WICA compensation, the plaintiff must prove that (1) new evidence demonstrates that they didn't perpetrate the crime; (2) new evidence "*results in* the reversal or vacation of the charges in the judgment of conviction"; and (3) new evidence "*results in* either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial." MCL 691.1755(1)(c) (emphasis added). A plaintiff's entitlement to compensation thus turns on whether they can prove that the new evidence caused a different result after their original conviction was set aside. It is hard to

imagine how a plaintiff could make this showing unless "new evidence" refers only to evidence that was not presented to the trier of fact when it convicted the plaintiff in the first place. Given this context, when it defined "new evidence," the Legislature was concerned with whether the evidence was considered by the trier of fact when it convicted the WICA plaintiff—not whether it was presented at a pretrial hearing.

Finally, this construction of "new evidence" is the one that best gives effect to the WICA's purpose. *People v. Sharpe*, 502 Mich. 313, 326, 918 N.W.2d 504 (2018) ("When interpreting a statute, our primary goal is to ascertain and give effect to the Legislature's intent."). The WICA's remedial purpose is "to provide compensation and other relief for individuals wrongfully imprisoned for crimes ...." 2016 PA 343, title.

A hypothetical is useful. Imagine a pretrial defense motion alleging that the prosecution is withholding exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and requesting that the court order that the evidence be disclosed. The trial court conducts an *in camera* review of the evidence and erroneously concludes that production is not required, so the evidence is never considered by the jury. If, after their conviction, the defendant eventually prevailed on the *Brady* claim and filed a complaint under the WICA, they would not be entitled to compensation under the Court of Appeals' interpretation of "new evidence"; the *in camera* review would be a proceeding that led to their conviction. But a defendant who never made a pretrial motion because they learned of the suppressed evidence *after* their conviction would be eligible for compensation. Both cases are examples of wrongful convictions, because the evidence was improperly kept from the jury when it decided the defendant's guilt. Denying compensation in the first case because the evidence is not "new" would frustrate the Legislature's stated intent to compensate people who were convicted and imprisoned for "crimes that [they] did not commit." MCL 691.1753.

Whether to provide compensation for wrongful imprisonment and who is entitled to that compensation are policy questions for the Legislature to decide—not this Court. And we have recognized that WICA compensation isn't available for every wrongful conviction: "there are only so many dollars to fill the WICA bucket, after all, and the Legislature had to decide how best to allocate limited funding." *Ricks v. Michigan*, ___ Mich. ___, ___, ___ N.W.2d ___, 2021 WL 2842048 (2021) (Docket No. 160657); slip op. at 10. See also *Sanford*, 506 Mich. at 17, 954 N.W.2d 82 (the WICA gives "a defined class of wrongfully imprisoned people a path to limited compensation"). But while the WICA offers limited compensation, there is no principled reason why plaintiffs who are otherwise similarly situated should be treated differently when exculpatory evidence was offered at a pretrial proceeding but not considered by the trier of fact.

The WICA doesn't make this distinction, so we can't. So long as the evidence was not presented at a proceeding where guilt was decided—that is, a trial or a hearing where a plea was entered—the WICA considers it "new."

IV. CONCLUSION

***9** Murphy's proposed testimony is new evidence under the WICA because it was not presented at a proceeding that adjudicated guilt. See *People v. D'Angelo*, 401 Mich. 167, 176, 257 N.W.2d 655 (1977) (a defendant's guilt or innocence "is irrelevant" to the entrapment determination). We therefore reverse the decision of the Court of Appeals and remand this case to that Court for further proceedings.

Richard H. Bernstein C.J., Elizabeth T. Clement, Megan K. Cavanagh, Elizabeth M. Welch, JJ. concur.

Zahra, J. (dissenting).

I respectfully dissent from the majority's decision reversing the judgment of the Court of Appeals. At issue is whether plaintiff has presented "new evidence," as is required to establish a case for compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq.* I agree with the Court of Appeals that he has not. MCL 691.1752(b) provides, in pertinent part, that "new evidence" is "any evidence that was not presented in the proceedings leading to plaintiff's conviction ...." The evidence that plaintiff relies on in this WICA action was presented at a pretrial entrapment hearing in the criminal case against plaintiff that led to his guilty plea. Contrary to the majority's conclusion, "the proceedings leading to plaintiff's conviction" are not limited to a plea hearing or trial, but more broadly include all events or actions that, taken together, tend toward, result in, or cause the plaintiff's conviction. This necessarily includes pretrial hearings. The evidence proffered by plaintiff was therefore presented at "the proceedings leading to plaintiff's conviction" and cannot qualify as "new evidence" under MCL 691.1752(b), meaning his WICA claim fails. I dissent

from the majority's contrary conclusion and would affirm the result of the Court of Appeals.[1]

I. STANDARD OF REVIEW AND APPLICABLE PRINCIPLES OF STATUTORY INTERPRETATION

Whether plaintiff has proffered "new evidence" under the WICA presents an issue of statutory interpretation that we review de novo.[2] When reviewing questions of statutory interpretation, the role of the Court is to "ascertain the legislative intent that may reasonably be inferred from the words in a statute."[3] "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent."[4] "When the statutory language is clear and unambiguous, judicial construction is limited to enforcement of the statute as written."[5]

II. ANALYSIS

***10** MCL 691.1755 sets forth the threshold requirements that a plaintiff must establish in order to receive compensation under the WICA:

> (1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves all of the following by clear and convincing evidence:
>
> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.

At issue is whether plaintiff has proffered "new evidence," as is required to satisfy MCL 691.1755(1)(c). The WICA defines "new evidence" as follows:

> "New evidence" means any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction. New evidence does not include a recantation by a witness unless there is other evidence to support the recantation or unless the prosecuting attorney for the county in which the plaintiff was convicted or, if the department of attorney general prosecuted the case, the attorney general agrees that the recantation constitutes new evidence without other evidence to support the recantation.[6]

The "new evidence" that plaintiff relies on is the testimony of James Murphy, who has averred that plaintiff had no involvement in the drug transaction that resulted in plaintiff's plea-based conviction of delivery of cocaine, a conviction that was reversed on appeal[7] and subsequently vacated. Murphy testified similarly at the February 1994 hearing on his entrapment motion, which plaintiff joined, in which Murphy sought dismissal of the criminal charges against him. Because Murphy already testified at the entrapment hearing, because Murphy's affidavit is substantively the same as his testimony at the entrapment hearing, and because plaintiff offers no additional new evidence,[8] the key question is whether Murphy's testimony at the February 1994 pretrial entrapment hearing was presented in "the proceedings leading to plaintiff's conviction" for purposes of MCL 691.1752(b). If so, then Murphy's testimony cannot constitute "new evidence" to satisfy MCL 691.1752(b) and MCL 691.1755(1)(c). The majority concludes that Murphy has presented "new evidence" because only a plea hearing or trial, not a pretrial hearing, can constitute "the proceedings leading to plaintiff's conviction." I disagree.

***11** To resolve this case, we must reasonably construe the phrase "the proceedings leading to plaintiff's conviction" as used in MCL 691.1752(b). The WICA does not define the terms "proceedings" or "leading to," so I turn to dictionary definitions of these terms.[9] In concluding that pretrial hearings do not constitute "proceedings leading to

plaintiff's conviction," the majority first cites the definition used by the Court of Appeals for a "criminal proceeding," which is "[a] judicial hearing, session, or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment; a criminal hearing or trial."[10] But reliance on this definition is misplaced because MCL 691.1752(b) uses the term "proceedings," not "criminal proceeding." Because "proceedings" is a legal term of art, consulting legal dictionaries is appropriate.[11] *Black's Law Dictionary* (11th ed.) defines "proceeding," in pertinent part, as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment" and as "[a]n act or step that is part of a larger action."[12] Merriam-Webster's online legal dictionary defines "proceeding," in pertinent part, as "a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations," including "an action, hearing, trial, or application before the court," and as "a criminal prosecution or investigation[.]"[13] These definitions do not restrict "proceedings" to the final guilty plea hearing or trial in a criminal case at which guilt is ultimately determined. To the contrary, they contemplate a broader, more expansive understanding of the term that also encompasses the other events and actions prior to the conviction; this broader understanding certainly includes a pretrial hearing.[14] After all, a pretrial hearing is part of the "regular and orderly progression of a lawsuit" and constitutes an event between the commencement of an action and the entry of judgment. It is surely one of the "series of steps" in a criminal prosecution.[15] The statute's use of the plural "proceedings" rather than the singular "proceeding" further supports this interpretation, as the term "proceedings" contemplates multiple events or actions and is not limited to the singular proceeding of a plea hearing or trial.[16]

***12** While the meaning of "proceedings" is expansive, that word precedes the modifying phrase "leading to plaintiff's conviction." It is only evidence presented at the proceedings "leading to plaintiff's conviction" that is excluded from constituting "new evidence." Unlike the term "proceedings," "leading to" does not have a definition specific to the legal field, so consulting lay dictionaries to ascertain the meaning of the term is appropriate. The *New Oxford American Dictionary* defines "lead to" in this context as "culminate in (a particular event): *closing the plant will lead to the loss of 300 jobs.*"[17] *Merriam-Webster's Collegiate Dictionary* defines the term as "to tend toward or have a result," as in, "study *leading* to a degree[.]"[18] Merriam-Webster's online dictionary defines "lead to" as "to result in (something)."[19] The examples provided include, "[A] course of study *leading* to a degree in agriculture"; "Her investigations ultimately *led* to the discovery of the missing documents"; and "His volunteer work in the hospital *led* to a career in nursing."[20] The Cambridge online dictionary defines "lead" as "to prepare the way for something to happen; cause" and gives the example, "*Ten years of scientific research led to the development of the new drug.*"[21] Lastly, the Macmillan online dictionary defines "lead to" as "to begin a process that causes something to happen," as in: "*There is no doubt that stress can lead to physical illness*"; and "[*A*] *process of negotiation leading to a peaceful settlement*[.]"[22]

These definitions belie the majority's conclusion that the modifying phrase "leading to plaintiff's conviction" limits the aforementioned "proceedings" to the final, singular proceeding that results in a determination of guilt, i.e., the plea hearing or trial. Under its plain meaning, "lead to" means to "culminate in," "tend toward or have a result," "to result in something," or "to begin a process that causes something to happen." The majority itself similarly defines this term as to "tend toward," "have a result," or "cause." None of those definitions is so restrictive to suggest that "lead to" references only the single, immediate event that most directly results in the end product—here, the conviction. Instead, these definitions more sweepingly include the series of events that "tends toward" or "results in" the conviction. Many of the usage examples confirm this expansive interpretation.[23]

Thus, the definitions of both "proceedings" and "leading to" are broad, and when read together, they simply do not support the majority's conclusion that "proceedings leading to plaintiff's conviction" refers only to the one event that most directly results in plaintiff's conviction. Rather, "proceedings leading to plaintiff's conviction" as used in MCL 691.1752(b) refers to all events or actions that tend toward, result in, or cause the plaintiff's conviction, not the singular final event of the plea hearing or trial. This necessarily includes pretrial hearings, including those pertaining to the admissibility of evidence or the viability of defenses; such hearings "tend toward" or "result in" a conviction by causing the case to be directed toward the conviction, as opposed to another direction.[24] These proceedings contribute to the conviction, regardless of whether each individual proceeding can independently establish guilt. The evidence and defenses

(or lack thereof) presented at these pretrial proceedings shape the criminal prosecution against the accused and collectively culminate or result in a conviction. Further, as described above, because "proceedings" is used in the plural rather than the singular, it contemplates that there are multiple events or actions that, when taken together, result in the conviction. For these reasons, I conclude that a pretrial hearing is indeed a proceeding that leads toward a plaintiff's conviction, and I disagree with the majority's holding that evidence presented in such pretrial hearings can constitute "new evidence" for purposes of the WICA.[25]

***13** In awarding plaintiff compensation, it is the majority who expands the statute to make distinctions that the statute does not itself make. No language in the WICA defines "new evidence" as "evidence that was not admitted at the plea hearing or trial" or "evidence that was not presented to the jury." The Legislature easily could have chosen these definitions if that is what it intended.[26] Having specified which proceedings are relevant—"proceedings leading to a conviction"—the Legislature did not restrict them further by limiting them only to proceedings in which guilt was determined.

Finally, the majority says that its interpretation comports with the "remedial purpose" of the WICA. But this Court has declined to rely on the remedial nature of the WICA to "place a thumb on the scale in favor of one party over the other," instead making clear that "this Court will take a reasonable-construction approach in giving meaning to the unambiguous language of the WICA."[27] It is therefore unnecessary to refer to the purpose of the WICA in this case because, as is demonstrated above, the plain language of the statute clearly supports the conclusion that "new evidence" does not include evidence presented in pretrial hearings. I decline to expand the state's waiver of sovereign immunity beyond the conditions set forth by the Legislature in the WICA.[28]

Applying the above understanding, plaintiff has not proffered "new evidence" for purposes of MCL 691.1752(b). Plaintiff joined the entrapment hearing at which Murphy offered the pertinent testimony. The evidence was therefore introduced not just in Murphy's pretrial hearing, but in plaintiff's pretrial hearing as well. For the reasons discussed above, such a pretrial proceeding is a "proceeding leading to plaintiff's conviction." By joining the entrapment hearing, plaintiff asserted a defense that, if granted, would have resulted in the dismissal of all charges. The trial court instead denied the motion and allowed the case to proceed to trial, bringing plaintiff's case closer to a conviction. The pretrial entrapment hearing was one proceeding in the series of proceedings that resulted in plaintiff's decision to plead guilty. Accordingly, because plaintiff seeks to admit the same testimony that was presented during a "proceeding leading to [his] conviction," I agree with the Court of Appeals that Murphy's testimony is not "new evidence" for purposes of the WICA.

III. CONCLUSION

***14** I disagree with the majority's holding that "the proceedings leading to plaintiff's conviction" as used in MCL 691.1752(b) are limited to a plea hearing or trial. "Proceedings" is a broad term that encompasses all actions and events that occur in a plaintiff's criminal prosecution, which necessarily includes pretrial hearings. "Leading to" does not limit the "proceedings" to the plea hearing or trial where guilt is definitively determined. Rather, it refers to those actions or events that collectively result in the conclusion of the proceedings, i.e., plaintiff's conviction. With this understanding, plaintiff has not presented "new evidence" for purposes of MCL 691.1752(b), because the evidence he claims as "new" was presented at his pretrial entrapment hearing, which was one of the proceedings leading to his conviction. Because plaintiff has not presented "new evidence," his WICA claim fails under MCL 691.1755(1)(c). I would affirm the result reached by the Court of Appeals. Because the majority reverses that judgment, I dissent.

David F. Viviano, J., agrees.

All Citations

--- N.W.2d ----, 2021 WL 3044411

Footnotes

1 Evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact ...." *Black's Law Dictionary* (11th ed.). Maples's claim that Roberts would also provide new evidence fails for the reason identified by the courts below: because Maples has not presented an affidavit or other offer of proof showing

what Roberts would say, Maples has failed to prove that Roberts would have offered exculpatory testimony that could be considered "new evidence" under the WICA.

2 A defendant who does not prevail at an entrapment hearing is no differently situated than one who never raised an entrapment defense—no conclusion is brought about in either case. In both cases, the prosecutor would still need to secure a conviction to bring the case to some conclusion.

3 For the same reason, we fail to see how Justice Zahra's broader interpretation of "the proceedings leading to plaintiff's conviction" sufficiently distinguishes between all the proceedings in a criminal case and those that result in a conviction.

1 While the Attorney General has conceded in this Court that plaintiff has proffered "new evidence" under MCL 691.1752(b), this Court is not bound by that concession. See *People v. Reed*, 449 Mich. 375, 395, 535 N.W.2d 496 (1995). As Justice Viviano noted in his dissenting statement in *People v. Altantawi*, 507 Mich. ——, ——, 954 N.W.2d 518 (2021) (Viviano, J., dissenting), citing *Young v. United States*, 315 U.S. 257, 258-259, 62 S. Ct. 510, 86 L. Ed. 832 (1942), "a prosecutor's confession of error 'does not relieve this Court of the performance of the judicial function,' and while the opinion of the prosecutor is entitled to some weight, 'our judicial obligations compel us to examine independently the errors confessed.' ... The public interest in the 'proper administration of the criminal law cannot be left merely to the stipulation of parties.' " Because I disagree with and am not bound by the Attorney General's interpretation of the WICA in this case, I decline to adopt it.

2 *Sanford v. Michigan*, 506 Mich. 10, 14, 954 N.W.2d 82 (2020).

3 *Id.* at 14-15 (quotation marks and citation omitted).

4 *Id.* at 15 (quotation marks and citation omitted).

5 *Id.* (quotation marks and citation omitted).

6 MCL 691.1752(b).

7 *Maples v. Stegall*, 427 F.3d 1020 (C.A. 6, 2005).

8 I agree with the majority that Roberts's purported testimony is not "evidence" at all given that plaintiff has not presented an affidavit or other offer of proof supporting the existence of that testimony. It therefore cannot qualify as "new evidence" for purposes of MCL 691.1752(b).

9 " 'An undefined statutory term must be accorded its plain and ordinary meaning.' " *Sanford*, 506 Mich. at 21 n. 19, 954 N.W.2d 82, quoting *Brackett v. Focus Hope, Inc.*, 482 Mich. 269, 276, 753 N.W.2d 207 (2008), citing MCL 8.3a. " 'A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning.' " *Sanford*, 506 Mich. at 21 n. 19, 954 N.W.2d 82, quoting *Brackett*, 482 Mich. at 276, 753 N.W.2d 207. In contrast, "[a] legal term of art. is a technical word or phrase that has acquired a particular and appropriate meaning in the law." *People v. Law*, 459 Mich. 419, 425 n. 8, 591 N.W.2d 20 (1999). See also MCL 8.3a. "[A] legal term of art. 'must be construed in accordance with its peculiar and appropriate legal meaning.' " *Sanford*, 506 Mich. at 21 n. 19, 954 N.W.2d 82, quoting *Brackett*, 482 Mich. at 276, 753 N.W.2d 207, citing MCL 8.3a. "Courts should ordinarily use a dictionary that is contemporaneous with the statute's enactment." *Sanford*, 506 Mich. at 21 n. 19, 954 N.W.2d 82, citing *Ronnisch Constr. Group, Inc. v. Lofts on the Nine, LLC*, 499 Mich. 544, 563 n. 58, 886 N.W.2d 113 (2016). Given that the WICA was enacted only four years ago, online dictionaries prove useful in interpreting the terms used in the act, as they easily describe how terms have been used in the last several years.

10 *Black's Law Dictionary* (10th ed.).

11 I conclude that "proceedings" is a term of art. because lay dictionaries consistently refer to "proceedings" generally as a "legal action," suggesting that the term, as used in this context, is specific to the legal context. See *New Oxford American Dictionary* (3d ed.) (defining "proceedings" in a legal context as "action taken in a court to settle a dispute: *criminal proceedings were brought against him*"); *Webster's New World College Dictionary* (4th ed.) ("legal action" or "the taking of legal action"); *Merriam-Webster's Collegiate Dictionary* (11th ed.) (defining the singular "proceeding" as a "legal action," i.e., "a divorce proceeding"); Cambridge Dictionary, *Proceedings* <https://dictionary.cambridge.org/us/dictionary/english/proceedings> (accessed June 28, 2021)> [https://perma.cc/M42Y-QFHB] ("legal action"; for example, "*Allegations of sexual harassment have led to disciplinary proceedings being taken against three naval officers*"; and "*I started legal proceedings to try to have him taken away from his parents permanently*") (emphasis omitted); Macmillan Dictionary, *Proceedings* <https://www.macmillandictionary.com/us/dictionary/american/proceedings> (accessed June 28, 2021) [https://perma.cc/NGX8-M7SC] (defining "proceedings" as a legal term meaning "the actions taken, usually in court, to settle a legal matter") (emphasis omitted).

12 *Black's Law Dictionary* (11th ed.) also contains the following commentary on the term:

> "Proceeding" is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action,' but it may include

in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment. As applied to actions, the term 'proceeding' may include — (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort. [Quoting Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3–4 (2d ed., 1899) (quotation marks omitted).]

13 Merriam-Webster.com Dictionary, *Proceeding* <https://www.merriam-webster.com/dictionary/proceeding#legalDictionary> (accessed June 28, 2021) [https://perma.cc/C5BU-ES99].

14 The commentary provided by *Black's Law Dictionary* (11th ed.) supports this interpretation in that it refers to the word "proceeding" as a "comprehensive" term that "may include in its general sense *all* the steps taken or measures adopted in the prosecution or defense of an action, *including the pleadings and judgment.*" (Emphasis added.) Pretrial hearings clearly fall within this description.

15 While labeling "proceedings" a legal term of art. as used in this context is seemingly noncontroversial given that neither the majority nor the parties have relied on a lay definition of the term, I submit that a pretrial hearing would fall under the lay definitions of the term as well because such hearings are certainly part of a "legal action."

16 The majority focuses heavily on the Legislature's use of the word "the" instead of "any" before "proceedings," interpreting this as a signal of the Legislature's intent to use the term "proceedings" narrowly. But even if the word "the" was used to limit "proceeding," a conclusion that I do not find obvious, the Legislature immediately negated any narrowing effect by using the plural form of the word "proceedings." In my view, it is not the word "the" before "proceedings" that does the limiting work in MCL 691.1752(b), but the subsequent phrase "leading to plaintiff's conviction."

17 *New Oxford American Dictionary* (3rd ed.).

18 *Merriam-Webster's Collegiate Dictionary* (11th ed.). See also *Webster's New World College Dictionary* (4th ed.) (defining "lead" as "to be or form a way (*to*, *from*, *under*, etc.); tend in a certain direction; go").

19 Merriam-Webster.com Dictionary, *Lead to* <https://www.merriam-webster.com/dictionary/lead% 20to> (accessed June 29, 2021) [https://perma.cc/9ZAE-V7TB].

20 *Id.*

21 Cambridge Dictionary, *Lead* <https://dictionary.cambridge.org/us/dictionary/english/lead> (accessed June 29, 2021) [https://perma.cc/SKJ8-636L] (emphasis omitted).

22 Macmillan Dictionary, *Lead to* https://www.macmillandictionary.com/us/dictionary/american/lead-to (accessed June 29, 2021) [https://perma.cc//XR6R-4M3L] (emphasis omitted).

23 For instance, the example of "study leading to a degree" would include not just the studying required to pass the last set of final exams, but also the studying required to pass all previous courses that contributed to the earning of the degree. A "process of negotiation leading to a peaceful settlement" would not be limited to only the final successful agreement, but would include preliminary discussions and prior rejected offers. The usage examples therefore indicate that "leading to" encompasses all events that ultimately result in the conclusion.

24 Of course, we are approaching the case in the context of a plaintiff who has been wrongfully convicted, meaning that he or she was convicted in the first place. If a pretrial hearing results in the dismissal of charges, we would have no reason to discuss the WICA.

In taking a hardline stance that no pretrial hearing can constitute a proceeding leading to a conviction, the majority accuses the Court of Appeals of applying a type of "but for" causation analysis. In making this accusation, the majority suggests there can only be one "cause" of a conviction. Such a narrow interpretation is simply not supported by the words used by the Legislature, which, as discussed above, contemplate a series of actions or events leading to a conviction. It is only by taking an overly narrow stance that the majority can conclude that a pretrial hearing, even one that led to plaintiff's decision to plead guilty, cannot tend toward a conviction.

25 Contrary to plaintiff's assertion, this interpretation does not render nugatory the words "leading to plaintiff's conviction" in MCL 691.1752(b). The "leading to plaintiff's conviction" modifier restricts the proceedings to those in plaintiff's criminal prosecution. It excludes related civil proceedings or other criminal proceedings unrelated to the prosecution that ultimately results in plaintiff's conviction at issue. It likely even excludes postconviction proceedings, such as sentencing or appellate proceedings, as the limitation of "leading to plaintiff's conviction" would suggest that only the evidence presented *before* the conviction should be considered. Thus, the "leading to plaintiff's conviction" language is significant under this

interpretation. And it is for these same reasons that I disagree with the majority that the Court of Appeals' interpretation does not contain "any limiting principle."

26 For similar reasons, I am not persuaded by the majority's observation that the Legislature would have used the well-established term "newly discovered evidence" rather than "new evidence" had it wanted to exclude evidence that was known at the time of trial from the definition of "new evidence" in MCL 691.1752(b). That the Legislature could have used that phrase does not impact our reading of the words it actually chose, which are much broader than the majority suggests. Rather than importing the term "newly discovered evidence" from other contexts, the Legislature explicitly defined the term "new evidence" to broadly include "the proceedings leading to plaintiff's conviction."

27 *Sanford*, 506 Mich. at 18, 954 N.W.2d 82.

28 See *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 405, 605 N.W.2d 300 (2000) (Courts may not "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature.").

End of Document

EXHIBIT 3

355 P.3d 722 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Kenneth LEEK, Appellant,

v.

Brett PETERSON, et al., Appellees.

No. 112,704.
|
Aug. 14, 2015.

Appeal from Leavenworth District Court; Dan K. Wiley, Judge.

Attorneys and Law Firms

Kenneth D. Leek, appellant pro se.

Sherri Price, special assistant attorney general/legal counsel, Lansing Correctional Facility, for appellee.

Before PIERRON, P.J., McANANY, J., and BURGESS, S.J.

MEMORANDUM OPINION

***1** PER CURIAM.

After the authorities at Lansing Correctional Facility refused to allow Kenneth Leek access to a certain handbook, Leek filed a petition for mandamus in the district court. Although he originally argued that the Kansas Open Records Act (KORA) allowed him access to the handbook, Leek ultimately claimed that another statute required the facility to turn over the handbook. The district court found no clearly defined duty by the facility and denied the petition. Leek appeals. We affirm.

Factual and Procedural Background

While incarcerated at Lansing Correctional Facility, Leek requested disclosure of the Disciplinary Procedure Handbook for Use in the Inmate Disciplinary Procedure by Correctional Staff and Hearing Officers (Handbook). The warden's office refused, reasoning that the Handbook was "Staff Read Only" and therefore not available to Leek.

In response to this decision, Leek filed a formal grievance. The unit team manager for the facility responded that the Handbook was both " 'Staff Read Only' " and " 'Confidential and Privileged Attorney–Client Communication' " and not available for dissemination. Dissatisfied with this outcome, Leek forwarded his grievance to the warden's office, but the warden responded that the unit team's response was appropriate. Leek appealed this decision to the Secretary of Corrections, whose designee deemed the facility's response to be appropriate.

Having exhausted his administrative remedies, Leek continued to pursue disclosure of the Handbook by filing a petition for mandamus with the district court that requested access to the Handbook under KORA. However, filing and procedural issues hampered Leek's prosecution of the petition, and the facility filed multiple motions to dismiss. At a hearing on the matter, Leek argued not that KORA obligated disclosure but that he was entitled to review any policy or procedure used by the correctional facility as long as that policy did not pertain to security matters. The district court responded that unless Leek could demonstrate a duty by the facility to turn over the Handbook he could not succeed in a mandamus action. In a subsequent motion response and a memorandum of law supporting his petition for mandamus, Leek relied almost entirely on a different, non-KORA statute and contended that the Handbook constituted a rule or regulation that required disclosure by the facility.

Over 1 year after Leek first sought disclosure of the Handbook, the district court denied his petition. The district court determined that Leek failed to provde supporting authority under KORA. Moreover, the district court ruled that, on its face, the Handbook did not appear to be a rule or regulation and that any uncertainty as to the Handbook's classification eliminated the possibility that the facility was duty bound to disclose it. Without such a duty, the district court determined that mandamus relief was not available to Leek.

Leek timely appealed.

Analysis

Did the district court err in denying Leek's petition for mandamus?

***2** On appeal, Leek presents two arguments as to why the district court erred in denying his petition. First, he contends that the district court needed to conduct an in camera inspection of the Handbook to determine whether it was privileged. Second, he argues that the Handbook is definitely a rule or regulation with the force and effect of law and that, as such, the facility had a clearly defined duty to disclose it. These two arguments, although briefed separately, are actually intertwined.

Starting with Leek's first issue, Leek requested in a motion response that the district court conduct an in camera review of the Handbook. The record is unclear whether the district court indeed conducted this review, as the order denying the petition discusses both the facility's description of the Handbook and the Handbook's facial appearance. However, both parties seem to agree on appeal that the district court never inspected the Handbook. For purposes of this opinion it is assumed that the district court never reviewed the Handbook.

KORA permits the district court to conduct an in camera inspection of the records at issue "on its own motion, or on motion of either party." K.S.A.2014 Supp. 45–222(b). But this language does not require in camera inspection of disputed documents; instead, it merely authorizes such a review. See *Cypress Media, Inc. v. City of Overland Park,* 268 Kan. 407, 429, 997 P.2d 681 (2000); *Harris Enterprises, Inc. v. Moore,* 241 Kan. 59, 67, 734 P.2d 1083 (1987). Because the district court is open to decide whether to review the documents in controversy, this decision lies within the district court's discretion which is only abused when the district court's decision is arbitrary, fanciful, or unreasonable. See *Northern Natural Gas Co. v. ONEOK Field Services Co.,* 296 Kan. 906, 935, 296 P.3d 1106, *cert. denied* 134 S.Ct. 162 (2013) (defining abuse of discretion).

Aside from a few blanket assertions that the facility needed to better demonstrate the Handbook's privileged nature, Leek has never offered any serious justifications for the district court to conduct an in camera inspection. Additionally, Leek more or less abandoned this privilege argument in order to argue that another statute—namely, K.S.A. 75–5256(b)–required disclosure regardless of the outcome under KORA. While Leek originally relied on KORA terminology to compel the Handbook's disclosure, he changed tactics during the hearing before the district court and continued to rely on this new legal theory in his subsequent filings. In fact, in his response to the facility's motion to dismiss, Leek contended that K.S.A. 75–5256(b) required disclosure despite the privilege claim, and his memorandum of law supporting the petition focuses on why that statute compels the Handbook's disclosure. In other words, Leek essentially abandoned disclosure under KORA in order to pursue his claim under K.S.A. 75–5256(b).

This statute provides in relevant part:

> ***3** "All rules and regulations or orders for the government of a correctional institution and the enforcement of discipline therein adopted or issued by the secretary of corrections and all orders issued by the warden of the correctional institution shall be published and made available to all inmates, other than rules or regulations and orders relating to emergency or security procedures." K.S.A. 75–5256(b).

Relying heavily on this language, Leek contends that the Handbook must be disclosed because it is a rule or regulation. Additionally, the question of whether the Handbook constitutes a rule or regulation plays into Leek's argument concerning the lack of in camera inspection. Leek argues that the district court ruled on the Handbook's contents "without ever seeing the document."

Under the rules and regulations filing act, the terms rule and regulation are defined as "a standard, requirement or other policy of general application that has the force and effect of law, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation." K.S.A.2014 Supp. 77–415(c)(4). This definition is very similar to the traditional definition of regulation, which is "[a]n official rule or order, having legal force, usu[ally] issued by an administrative agency." Black's Law Dictionary 1475 (10th ed.2014). Similarly, a rule is "[a] regulation governing a court's or an agency's internal procedures; esp[ecially], the whole or any part of an agency statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy or to describe the organization, approval, or practice requirements of the agency." Black's Law Dictionary 1529 (10th ed.2014).

With these definitions in mind, this court has previously held that the policies and handbooks of the Sexual Predator Treatment Program (SPTP) are not rules and regulations. In

Lovingood v. Kansas Dept. of SRS, No. 105,225, 2011 WL 3250595 (Kan.App.2011) (unpublished opinion), an SPTP patient challenged a policy found in one of the program's handbooks, arguing in part that the policy needed to be formally promulgated as a rule or regulation. Although the dispositive issue on appeal concerned the patient's standing, this court also determined that the policy in question did not constitute a rule or regulation. 2011 WL 3250595, at *2–3. Instead, the court reasoned that because the policy was "limited to cover only the few people within the confines of the [SPTP] and no one else," it was not one of general application across the state and therefore fell outside the definition of a rule or regulation. 2011 WL 3250595, at *3.

Later, this court applied the same reasoning to other SPTP policies and handbooks. *Merryfield v. Sullivan,* No. 108,805, 2013 WL 4404416, at *3–4 (Kan.App.2013) (unpublished opinion). There, a patient argued that the SPTP's property and clothing handbook constituted a rule or regulation and needed to be promulgated accordingly. The district court reasoned that the handbook and policies were " 'established for internal management of the treatment program and agency, and not as a policy of general public application,' " and this court agreed. 2013 WL 4404416, at *4. After specifically referencing *Lovingood,* this court held:

> ***4** "[T]he policies and handbook that [patient] complains about are not rules of general application. In fact, the policies and handbook only apply to the limited number of residents in the SPTP program.... [T]he polices and handbook do not fit within the definition of a rule or regulation. Moreover, the SPTP policies and handbook do not have the force and effect of law." 2013 WL 4404416, at *4.

Although Leek is not a patient in the SPTP, this court's rationale in *Lovingood* and *Merryfield* is still relevant. The instant facility describes the Handbook in this case as a document "created to assist Department of Corrections' hearing officers to comply with the legal mandates applicable to the inmate disciplinary processes and procedures." This description indicates that the Handbook is not one of general application but rather one that applies only to certain employees of the Department of Corrections. Additionally, nothing in this description suggests that the Handbook carries the force and effect of law. If anything, it is described merely as a procedural guidebook. If the Handbook is not a rule or regulation, it is exempt from the mandate of K.S.A. 75–5256(b), and the facility is under no obligation to disclose it.

It is on this basis that the district court found that mandamus relief was inappropriate and rejected the petition. Generally speaking, "[m]andamus is a proceeding to compete some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." K.S.A. 60–801. But mandamus cannot require performance of a discretionary act or enforce a right that is in dispute. *Schmidtlien Electric, Inc. v. Greathouse,* 278 Kan. 810, 833, 104 P.3d 378 (2005). Instead, mandamus can compel only "the performance of a clearly defined duty." 278 Kan. at 833. Additionally, the burden of snowing the right to mandamus relief is on the petitioner. *Kansas Medical Mut. Ins. Co. v. Svaty,* 291 Kan. 597, 620, 244 P.3d 642 (2010).

As previously explained, Leek changed legal horses midstream and relied entirely on K.S.A. 75–5256(b) to establish a duty. But because the Handbook is not a rule and regulation, this statute did not obligate the facility to disclose its contents. Without such a duty, mandamus relief is not appropriate. See *Schmidtlien Electric, Inc.,* 278 Kan. at 833. Therefore, the district court did not err in denying the petition.

Returning to Leek's argument regarding in camera inspection of the Handbook against this backdrop demonstrates that the district court did not abuse its discretion. Because Leek abandoned his KORA argument, the only remaining reason for the district court to inspect the Handbook was to establish whether it constituted a rule or regulation. However, as demonstrated by the foregoing analysis, the Handbook clearly lies somewhere outside that definition. Therefore, the district court had no reason to review the Handbook in order to classify it, and the decision to forgo such a review was not arbitrary, fanciful, or unreasonable. See *Northern Natural Gas Co.,* 296 Kan. at 935.

***5** Leek's decision to rely solely on K.S.A. 75–5256(b) instead of KORA leaves open the question of whether the facility's claim of privilege would have withstood the scrutiny of district and appellate court review. But as the district court observed in its order, Leek provided no relevant KORA authority to compel disclosure or combat the claim of privilege. Instead, he relied on a different statute, and the duty described in that statute applies only to rules and regulations, not the Handbook. Accordingly, Leek failed to demonstrate the availability of mandamus relief. See *Svaty,* 291 Kan. at 620.

Affirmed.

All Citations

355 P.3d 722 (Table), 2015 WL 5009983

End of Document

EXHIBIT 4

2021 WL 2171156
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

Michael BUSUITO, Anil Kumar, Sandra Hughes O'Brien, and Dana Thompson, Plaintiffs-Appellants,

v.

Bryan C. BARNHILL, II, Mark Gaffney, Marilyn Kelly, Kim Trent, M. Roy Wilson, Wayne State University, and Wayne State University Board of Governors, Defendants-Appellees.

No. 353424
|
May 27, 2021, 9:10 a.m.

Synopsis

Background: Elected members of public university's board of governors who boycotted board meeting brought action against members who voted at meeting, university, university's president, and board, alleging that board violated Open Meetings Act (OMA) by determining quorum where none existed and holding closed session without necessary board approval. The Court of Claims, Cynthia Diane Stephens, J., 2019 WL 10374243, denied boycotting members' motion for preliminary injunction and temporary restraining order (TRO) and issued summary disposition in favor of voting members on some claims, and subsequently entered summary disposition in favor of voting members on remaining claims, 2020 WL 5521011. Boycotting members appealed.

Holdings: The Court of Appeals, Jansen, J., held that:

[1] trial court did not abuse its discretion in finding that boycotting members' claim based on voting members' alleged violation of OMA could not serve as the basis for injunctive relief;

[2] OMA does not apply to meetings of governing boards of public universities;

[3] boycotting members failed to meet their burden of a particularized showing of irreparable harm requiring injunctive relief with respect to OMA claim;

[4] president was a member of board by virtue of his office; and

[5] president counted as a member of the board for purposes of establishing a quorum.

Affirmed.

Krause, J., concurred in result only.

West Headnotes (19)

[1] Education Meetings

Statutory provision stating that business which university's board of governors could perform "shall be conducted in compliance" with Open Meetings Act (OMA) was inconsistent with constitutional authority of board, and thus could not be enforced, in action brought by elected members of board who boycotted board meeting against members who voted at meeting, university, university's president, and board, alleging that board violated OMA by holding closed session without necessary board approval. Mich. Const. art. 8, § 4; Mich. Comp. Laws Ann. §§ 15.261 - 15.275, 390.645(2).

[2] Appeal and Error Preliminary injunction; temporary restraining order

Appellate court reviews a trial court's decision concerning a preliminary injunction for an abuse of discretion. Mich. Ct. R. 3.310(A).

[3] Judgment Absence of issue of fact

Judgment Existence or non-existence of fact issue

A trial court has the authority to grant summary disposition sua sponte, as long as one of the two conditions of the rule governing summary

disposition is satisfied: either the pleadings show that a party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. Mich. Ct. R. 2.116(I)(1).

[4] **Judgment** Weight and sufficiency

In determining whether to grant summary disposition, the trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition. Mich. Ct. R. 2.116(C)(10).

[5] **Judgment** Admissibility

In a trial court's determination of whether to grant summary disposition, only the substantively admissible evidence actually proffered may be considered. Mich. Ct. R. 2.116(C)(10).

[6] **Injunction** Governing bodies and officials

Trial court did not abuse its discretion in finding that claim, asserted by members of public university's board of governors who boycotted board meeting, alleging that members who voted at meeting violated Open Meetings Act (OMA) by holding closed session, did not have likelihood of success on the merits, and thus could not serve as basis for injunctive relief, although constitutional provision governing higher education institutions provided that formal sessions of governing boards of such institutions were required be open to public; application of OMA to governing boards of public universities was beyond realm of legislative authority, and Legislature was not delegated task of defining phrase "formal sessions" for purposes of constitutional provision. Mich. Const. art. 8, §§ 4, 5, 6; Mich. Comp. Laws Ann. § 15.267(1).

[7] **Education** Meetings

Open Meetings Act (OMA) does not apply to meetings of governing boards of public universities. Mich. Comp. Laws Ann. § 15.261 et seq.

[8] **Injunction** Preservation of status quo

A preliminary injunction should only issue to preserve the status quo, not to change it; only after the matter has been resolved on the merits is it appropriate to alter the "status quo," being the last actual, peaceable noncontested status which preceded the pending controversy. Mich. Ct. R. 3.310(A).

[9] **Education** Powers, duties, and liabilities

A public university's board is given exclusive authority over the management and control of its institution.

[10] **Injunction** Governing bodies and officials

Members of public university's board of governors who boycotted board meeting failed to meet their burden of a particularized showing of irreparable harm requiring injunctive relief with respect to claim that members who voted at meeting violated Open Meetings Act (OMA) by holding closed session, which resulted in tuition increase and entering into sublease of property; boycotting members failed to address why, if they eventually succeeded on merits of their claim, canceling sublease or issuing tuition refund would constitute inadequate legal remedies. Mich. Comp. Laws Ann. § 15.267(1); Mich. Ct. R. 3.310(A)(4).

[11] **Injunction** Unclear, unlikely, doubtful or speculative injury

Injunction Irreparable injury

A particularized showing of irreparable harm is an indispensable requirement to obtain a preliminary injunction; the mere apprehension of further injury or damage cannot be the basis for injunctive relief. Mich. Ct. R. 3.310(A).

[12] **Injunction** Adequacy of remedy at law

A preliminary injunction should not issue where an adequate legal remedy is available. Mich. Ct. R. 3.310(A).

[13] **Constitutional Law** Meaning of Language in General

In examining constitutional provisions, appellate court's objective is to determine the text's original meaning to the ratifiers, the people, at the time of ratification; the primary rule is that of common understanding, which requires appellate court to examine the intent of the ratifiers.

[14] **Statutes** Superfluousness

When determining the legislature's intent appellate court must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.

[15] **Education** Appointment, qualification, and tenure

Public university's president, while not one of eight elected members of university's board of governors, was a member of board by virtue of his office; statute pertaining to board established president as "ex officio" member of board, and dictionary defined "ex officio" as "by virtue or because of an office." Mich. Comp. Laws Ann. § 390.643.

[16] **Statutes** Undefined terms

Fact that term in statute is not defined by constitution or applicable statutes does not make the term ambiguous simply because it is undefined.

[17] **Statutes** Legal terms; legal meaning

When a term in a statute is a legal term of art it is appropriate for courts to construe the term in accordance with its peculiar and appropriate legal meaning.

[18] **Constitutional Law** Judicial "reading into" or "out of" statutory language

Appellate court refrains from reading anything into a statute that is not within the intent of the Legislature apparent from the language of the statute itself; in other words, appellate court must not judicially legislate by adding into a statute provisions that the Legislature did not include.

[19] **Education** Meetings

Public university's president, as ex officio member of university's board of governors, counted as member of board for purposes of establishing a quorum, although president was constitutionally divested of right to vote, where university's bylaws required five members of board to establish a quorum, president was member of board, and neither statute governing board nor bylaws limited quorum to a majority of the voting or elected members of the board. Mich. Const. art. 8, § 5; Mich. Comp. Laws Ann. § 390.645(2).

West Codenotes

Held Unconstitutional
Mich. Comp. Laws Ann. § 390.645(2)

Court of Claims, LC No. 19-000111-MZ

Before: Jansen, P.J., and Ronayne Krause and Gadola, JJ.

Opinion

Jansen, P.J.

***1** Plaintiffs, Michael Busuito, Anil Kumar, Sandra Hughes O'Brien, and Dana Thompson, appeal as of right the order of the Court of Claims granting summary disposition in favor of defendants, Bryan C. Barnhill, II, Mark Gaffney, Marilyn

Kelly, Kim Trent, M. Roy Wilson, Wayne State University, and the Wayne State University Board of Governors, under MCR 2.116(C)(10). On appeal, plaintiffs also challenge a prior order of the Court of Claims denying plaintiffs' request for injunctive relief and granting summary disposition in favor of defendants under MCR 2.116(I)(1). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

All individual plaintiffs and defendants, with the exception of Wilson, Wayne State University (WSU), and the Wayne State University Board of Governors (the Board) are all elected members of the Board. The Board has general supervision of WSU, as afforded by the Michigan Constitution. See Const. 1963, Art. 8, § 5. The Board is comprised of "8 members who shall be nominated and elected in accordance with the election laws of this state." MCL 390.643. Wilson, the President of WSU, is "the principal executive officer" of WSU: President Wilson is considered an "ex-officio member of the [B]oard without the right to vote" and presides over meetings of the Board. See Const. 1963, Art. 8, § 5; MCL 390.643.

During a Board meeting on April 5, 2019, the Board considered the purchase of the real property located at 400 Mack Avenue in Detroit, Michigan (400 Mack Avenue). Plaintiffs voted "no" to the acquisition of that property. However, on June 19, 2019, the sublease of the 400 Mack Avenue property, with an option to purchase, was added to the executive meeting agenda for the upcoming June 21, 2019 meeting. Plaintiffs maintain that this last-minute addition to the agenda was made because Governor Kumar would not be able to attend the meeting, and therefore defendants believed that they would be able to outvote plaintiffs 4-3 in favor of entering into the sublease for the 400 Mack Avenue property. In response, Governors Busuito, O'Brien, and Thompson boycotted the June 21, 2019 meeting in hopes that the Board would be unable to establish a quorum and transact business.

The June 21, 2019 meeting went forward with defendant Governors in attendance. Additionally, President Wilson was counted as a member of the Board to establish a quorum. During the open session, the Board approved a tuition increase for the upcoming 2019-2020 academic year. President Wilson, despite being counted for a quorum, did not vote. Plaintiffs maintain that the Board violated the Open Meetings Act (the OMA), specifically MCL 15.267(1), by then moving into a closed executive session without holding a roll call vote or a 2/3 majority vote. During the closed executive session, the sublease for the 400 Mack Avenue property was approved.

Plaintiffs originally filed a three-count complaint in Ingham Circuit Court. The case was removed to the Court of Claims and subsequently dismissed without prejudice because plaintiffs failed to strictly comply with the notice-and-verification requirements contained in MCL 600.6431(1). Plaintiffs subsequently re-filed the instant action: a verified three-count complaint and a motion for a temporary restraining order and a preliminary injunction. In their motion, plaintiffs argued that "[a]s a result of the individual [d]efendants' actions in both determining a quorum where none existed, and in holding a closed session without the necessary board approval, the entire June 21, 2019, meeting of the Board of Governors of Wayne State University is null, void, and without effect." Plaintiffs asked the Court of Claims to enter an order under MCR 3.310(B) temporarily restraining defendants from taking ay action with regard to the decisions made at the June 21, 2019 meeting.

***2** In their three-count complaint, plaintiffs went on to allege that neither President "Wilson, nor his predecessors, had ever been counted as a member of the Board to determine a quorum previous to June 21, 2019." Plaintiffs went on to offer the opinion that it was "nonsensical to count a non-voting, unelected ex-officio member for that purpose," and that doing so violated the Michigan Constitution, the WSU Bylaws, and "longstanding principles of democracy." Therefore, in Count I, plaintiffs argued they were entitled to a declaration that the Board did not have a quorum sufficient to hold the June 21, 2019 meeting, and a declaration that without a quorum, any decisions made at the June 21, 2019 meeting are null, void, and without effect. In Count II, plaintiffs sought injunctive relief, specifically an order under MCL 15.271, enjoining defendants from acting upon any decisions made in the closed session of June 21, 2019. Finally, in Count III, plaintiffs alleged a violation of the OMA. Specifically, plaintiffs alleged that by entering into a closed executive session without a 2/3 majority vote or a roll call vote violated MCL 15.267(1), and that no exception exists when considering a purchase or lease of real property under MCL 15.267(1) and MCL 15.268(d). The defendant Governors, alleged plaintiff, are thus liable for actual and exemplary damages of not more than $500 total, plus costs and attorney fees, under MCL 15.273.

On August 2, 2019, the Court of Claims issued an opinion and order denying plaintiffs' motion for a temporary restraining order and preliminary injunction, and granting summary

disposition in favor of defendants under MCL 2.116(I)(1), finding that plaintiffs' OMA claim fails as a matter of law. With respect to whether plaintiffs were entitled to injunctive relief, the Court of Claims found:

> [a]s it concerns plaintiffs' ability to prevail on the merits, there are two issues to be examined: (1) Whether Wilson should have been counted as a member of the Board of Governors for purposes of establishing a quorum and, if the answer to that question is "no," whether any resulting decision of the Board is void for the reason that no quorum was achieved? (2) Whether any decisions reached in the "closed session" of the June 21, 2019 meeting were reached in violation of the OMA?

First, the Court of Claims found that plaintiffs "cannot demonstrate any likelihood of success on the merits of the OMA claim [because] [t]he OMA does not apply to meetings of university boards. *Federated Publications, Inc. v. Mich. State Univ. Bd. of Trustees*, 460 Mich. 75, 84, 594 N.W.2d 491 (1999); *Detroit Free Press Inc. v. Univ. of Michigan Regents*, 315 Mich. App. 294, 298, 889 N.W.2d 717 (2016). Although Const. 1963, art. 8, § 4 requires "[f]ormal sessions of governing boards of such institutions" to be open to the public, the Court of Claims determined that this requirement "is not the equivalent of, nor does it invoke the application of, the OMA." Citing *Federated Publications*, the Court of Claims explained that " '[g]iven the constitutional authority to supervise the institution generally, application of the OMA to the governing boards of our public universities is [ ] beyond the realm of legislative authority.' " *Federated Publications*, 460 Mich. at 89, 594 N.W.2d 491.

[1] The Court of Claims further relied on *Detroit Free Press*, 315 Mich. App. at 298, 889 N.W.2d 717, in which this Court "explained that the holding in *Federated Publications* defined the 'scope of the Legislature's power to regulate public universities' in general." The Court of Claims went on to conclude that "the scope of that power does not permit the Legislature to apply the OMA to the boards of public universities, regardless of ... the circumstances[,]" and that

> In *Detroit Free Press*, the Court of Appeals recognized that "[t]he Constitution permits defendant to hold informal meetings in private; defendant is only required to hold its formal meetings in public." *Id.* [at 298-299], 315 Mich.App. 294. But the constitutional requirement to hold formal meetings in public does not bring about the application of the OMA. *Id.*
>
> In light of the above, plaintiffs' OMA claim cannot serve as the basis for injunctive relief. The OMA claim will be dismissed pursuant to MCR 2.116(I)(1) because an OMA claim cannot be asserted against the ... Board as a matter of law.[1]

***3** The Court of Claims next addressed the likelihood of plaintiffs' ability to succeed on the claim arising out of the defendant Governors' determination that President Wilson could be counted to establish a quorum. The Court of Claims found constitutional and statutory support for and against counting President Wilson when determining a quorum. However, the court ultimately concluded that it

> acknowledges that the plaintiffs' case on quorum as plead is neither frivolous nor lacking any support. If the doctrine of expressio unius est exclusion alterius is deemed inapplicable because of the numerous instances in statute and by-laws where the board membership and presidential duties are addressed separately there is an ambiguity best determined on the merits[,] not preliminarily. The burden on a plaintiff to establish the likelihood of success on the merits is not the burden of proving the claim before the court. However, the court on the record before it does not believe that the plaintiff's likelihood of success for the proposition that the inclusion of President Wilson in a quorum is erroneous is substantial nor the harm of such magnitude that the rare remedy of injunctive relief should apply.

Finally, the Court of Claims determined that plaintiffs failed to establish irreparable harm, and therefore, "[a]s a result, injunctive relief will not issue in this case." Plaintiffs moved to file an application for leave to appeal the Court of Claims' order in this Court, but the application was denied for "failure to persuade th[is] Court of the need for immediate appellate review." See *Busuito v. Barnhill*, unpublished order of the Court of Appeals, entered September 11, 2019 (Docket No. 350111).

On January 30, 2020, defendants moved for summary disposition on the remaining portions of the complaint under MCR 2.116(C)(8) and (10), MCR 2.116(I)(1), and MCR 2.605(F). Defendants argued that the only remaining issue in this case was the issue of "whether President Wilson, as an *ex officio* member of the board, is counted for a quorum." Defendants argued that the Court of Claims had already concluded that "plaintiffs did not have a likelihood of success on the merits of this issue, and failed to show irreparable harm necessary for an injunction." Therefore, the Court of Claims

should conclude that "[t]here was a quorum as a matter of Michigan law; the events which plaintiffs seek to enjoin have already occurred, making the complaint legally moot; and the elements for an injunction do not exist."

In support of their position that President Wilson could be counted for purposes of establishing a quorum, defendants noted that § 1.3 of the WSU Bylaws provide that "[a] quorum for business shall be five members of the Board." Similarly, MCL 390.645(2) provides that "[a] majority of the members of the board shall form a quorum for the transaction of business." Defendants explained that under Const. 1963, art. 8, § 5, the Board is to "elect a president of the institution under its supervision," and that the president "shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board." Likewise, MCL 390.643 provides that the "president of the university shall be ex[-]officio a member of the board without the right to vote and shall preside at meetings of the board." The WSU Bylaws, in § 2.2, also classify the president as an ex-officio member of the board.

***4** Thus, defendants argued, "since President Wilson is a member of the board, the plain language of these authorities compels the conclusion that he is counted to determine a quorum for business." No constitutional or statutory authority, and no provision in the WSU Bylaws, conclude that a quorum for business shall be comprised of five voting members. Nor do they provide that an ex-officio member of the board cannot count for quorum purposes. If the Legislature or the university wished to limit a quorum to five voting members of the board, it could have done so.

Further, defendants argued, a quorum existed under Robert's Rules of Order, which govern under the WSU Bylaws. Indeed, § 4.1 of the WSU Bylaws provide that "[i]n the absence of specific provisions to the contrary, the rules of parliamentary procedure which shall be followed by the Board and its committees shall be the procedure prescribed in Robert's Rules of Order." Under Robert's Rules, there are two classes of ex-officio board members, and defendants argued that because President Wilson is an employee of WSU, was elected by the Board, and has an obligation to preside over board meetings, he qualifies as an ex-officio board member "under the authority of" WSU. Therefore, defendants argued, there is no distinction between President Wilson and the other elected board members when determining a quorum. Accordingly, President Wilson was properly considered in determining whether a quorum existed to hold the June 21, 2019 board meetings, and where all actions at such meetings required only a majority vote of the board members in attendance, under § 1.3 of the WSU Bylaws, all "requisites were met for valid board and executive committee meetings and valid actions were taken at such meetings."

On January 30, 2020, plaintiffs filed a cross-motion for summary disposition under MCR 2.116(C)(10), asking the Court of Claims to enter a judgment declaring that the decisions made by the Board during the June 21, 2019 meeting were without a quorum, and therefore null, void, and without effect. Plaintiffs argued that the Board is a public body authorized by Const. 1963, art. 8, § 5 to have eight members, determined by the electorate. The Board is further authorized to "elect a president of the institution" who shall be "the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board." Const. 1963, art. 8, § 5. However, the Michigan Constitution does not then count the total number of board members at nine, but maintains that the Board is made up of "eight members ... elected as provided by law." Thus, plaintiffs argued, the Michigan Constitution is clear that the president of the university is "not elected, and does not have any voting rights."

Plaintiffs went on to argue that § 1.3 of the WSU Bylaws requires that five members of the Board be present to establish a quorum for business, and although the quorum provision "does not differentiate between elected or ex-officio members of the Board, other areas of the Bylaws clearly differentiate between the President and the elected members of the Board." In support of their position, plaintiffs cited to § 2.2 of the WSU Bylaws, which provides that the Executive Committee of the Board is comprised of all Board members then in office and the President. Similarly, § 3.4 provides that membership of special committees is to be determined by the Board and the President. Plaintiffs argued that the WSU Bylaws would not make a distinction between the Board, its members, and the President "unless there was a meaningful distinction." Accordingly, President Wilson, an unelected, ex-officio member of the Board, should not be counted for the purposes of establishing a quorum. With only four voting members of the Board present at the June 21, 2019 meeting, the Board did not have a sufficient quorum to transact business and any decisions made at that meeting are rendered null and void, according to plaintiffs.

***5** The Court of Claims considered the cross-motions, and in an opinion and order dated March 25, 2020, granted

defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Looking to constitutional and statutory authority, as well as the WSU Bylaws, the Court of Claims found that President Wilson was a member of the board, in an ex-officio capacity, who is counted for the purposes of establishing a quorum. The Court of Claims reiterated that under MCL 390.645(2), "[a] majority of the members of the board shall form a quorum for the transaction of business." The Court of Claims went on to find that

> [a] plain reading of MCL 390.645(2) does not exclude [President Wilson] from being counted for purposes of establishing a quorum. Indeed, the phrase "members of the board" is not subject to additional qualification or explanation. To that end, the Court finds significant that the phrase "members of the board" is not expressly limited to voting members, nor is the phrase expressly limited to only the eight elected members of the board.

The Court of Claims further explained that because "the Legislature did not state that the phrase 'members of the board' was to be limited to only voting members or that it was to exclude ex officio members, this [c]ourt should be cautious about reading such a restriction into the statute[,]" particularly where the Legislature has enacted other limitations. Indeed, the Court of Claims explained, "the Legislature is aware of how to exclude ex officio members from being counted for purposes of establishing a quorum, but it did not take those steps to expressly exclude ex officio members in the instant statutory scheme."

Similarly, the WSU Bylaws mirror the language found in the statutory scheme by "declaring that the President of the University is 'an ex officio member of the Board without vote' who 'shall preside at the meetings of the Board.' " The Court of Claims noted that while the WSU Bylaws are silent as to who exactly makes up the five-member quorum, they also do not restrict the members who can be counted for purposes of establishing a quorum to only voting members. The WSU Bylaws, in § 4.1, expressly incorporate that in the "absence of specific provisions of the contrary," the procedure found in Robert's Rules of Order should be followed. The Court of Claims then relied on Robert's Rules of Order when finding that

> The only ex officio board members who should not ... be counted for purposes of establishing a quorum are those who have no obligation to participate in board matters. By contrast, and by implication, ex officio board members who are under authority and who have obligations are to be counted for purposes of establishing a quorum. In the instant case, President Wilson possesses two attributes of the class of ex-officio members who are deductively entitled to be counted in the quorum: (1) he is under the authority of the Board by virtue of being hired by the Board; and (2) he is obligated to preside at meetings.
>
> * * *
>
> Like the Legislature, the Board could have chosen to enact bylaws containing this exclusion, but it did not do so. Instead, the Board adopted bylaws that expressly incorporate authority which declares that President Wilson *is* to be counted for purposes of establishing a quorum. Giving effect to the plain meaning of the bylaws and to the authorities incorporated therein, it is apparent to the Court that President Wilson, by virtue of his ex officio membership, is to be included for purposes of establishing a quorum of the Board.

Thus, the Court of Claims affirmatively concluded that the President of the University can be counted for purposes of establishing a quorum, and therefore, plaintiffs' arguments for invalidating the Board's actions at the June 21, 2019 meeting are without merit, and defendants were entitled to summary disposition in their favor, as well as dismissal of plaintiffs' complaint. This appeal followed.

II. STANDARD OF REVIEW

***6** **[2]** "We review a trial court's decision concerning a preliminary injunction for an abuse of discretion. *Dep't of Environmental Quality v. Gomez*, 318 Mich. App. 1, 32, 896 N.W.2d 39 (2016). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* at 33-34, 896 N.W.2d 39." *Sandstone Creek Solar, LLC v. Township of Benton*, —— Mich. App. ——, ——, —— N.W.2d —— (2021) (Dkt. No. 352910); slip op. at 10, 2021 WL 400585.

[3] Summary disposition is appropriate under MCR 2.116(I)(1) "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact." "Under this rule, a trial court has the authority to grant summary disposition sua sponte, as long as one of the two conditions of the rule is satisfied." *Al-Maliki v. LaGrant*, 286 Mich. App. 483, 485, 781 N.W.2d 853 (2009). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ." *El-Khalil v. Oakwood*

Healthcare, Inc., 504 Mich. 152, 160, 934 N.W.2d 665 (2019) (quotation marks and citation omitted).

[4] **[5]** Similarly,

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v. Auto Club Ins. Ass'n*, 491 Mich. 200, 205-206, 815 N.W.2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v. Turkelson*, 322 Mich. App. 595, 605, 913 N.W.2d 369 (2018). "The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)." *Barnes v. 21st Century Premier Ins. Co.*, — Mich. App. ——, ——, — N.W.2d —— (2020) (Docket No. 347120); slip op. at 4, 2020 WL 6532953. Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Patrick*, 322 Mich. App. at 605, 913 N.W.2d 369.
>
> * * *
>
> "Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop., Inc. v. Savoy*, 284 Mich. App. 522, 525, 773 N.W.2d 57 (2009) (quotation marks and citation omitted). [*Ahmed v. Tokio Marine America Ins. Co.*, — Mich. App. ——, ——, — N.W.2d —— (2021) (Docket No. 352418); slip op. at 3, 2021 WL 1583184.]

This Court reviews de novo questions of statutory interpretation. *Id.*

III. ANALYSIS

A. AUGUST 1, 2019 OPINION AND ORDER

[6] **[7]** On appeal, plaintiffs first challenge the Court of Claims August 1, 2019 order denying their motion for a preliminary injunction and granting summary disposition under MCR 2.116(I)(1) in favor of defendants regarding plaintiffs' OMA claims. With respect to the August 1, 2019 opinion and order, plaintiffs argue that the June 21, 2019 meeting of the Board violated the OMA because that meeting was a "formal session" where decisions were made that required public scrutiny. Plaintiffs maintain that a preliminary injunction should have been granted in order to prevent the decisions made at that meeting from taking effect. We disagree.

[8] Under MCR 3.310(A)(4), the party requesting injunctive relief bears the burden of establishing that a preliminary injunction is warranted. This Court recently articulated:

> ***7** A preliminary injunction is generally considered a form of equitable relief intended to maintain the status quo pending a final hearing and determining the rights of the parties, and is considered an extraordinary remedy. When determining whether to grant the extraordinary remedy of a preliminary injunction, the trial court must consider:
>
> > (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction; (2) whether the applicant is likely to prevail on the merits; (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party; and (4) whether the public interest will be harmed if a preliminary injunction is issued.
>
> A preliminary injunction should not be issued if an adequate legal remedy is available. Economic injuries are generally not sufficient to demonstrate irreparable injury because such injuries typically can be remedied by damages at law. In addition, the mere apprehension of future injury or damage cannot be the basis for injunctive relief. [*Sandstone Creek Solar, LLC*, — Mich. App. at —— – ——, — N.W.2d ——, slip op. at 10-11 (citations omitted).]

Moreover, a preliminary injunction should only issue to preserve the status quo, not to change it. *Pharm. Research & Mfg. of America v. Dep't of Comm. Health*, 254 Mich. App. 397, 402, 657 N.W.2d 162 (2002). Only after the matter has been resolved on the merits is it appropriate to alter the status quo, being the "last actual, peaceable noncontested status which preceded the pending controversy." *Buck v. Thomas M. Cooley Law Sch.*, 272 Mich. App. 93, 98 n. 4, 725 N.W.2d 485 (2006) (citation and quotation marks omitted).

The Court of Claims found that with respect to plaintiffs' ability to prevail on the merits of their claims, there were two issues:

> (1) Whether Wilson should have been counted as a member of the Board of Governors for purposes of establishing a quorum, and if the answer to that question is "no," whether any resulting decision of the Board is void for the reason that no quorum was achieved? (2) Whether any decisions reached in the "closed session" of the June 21, 2019 meeting were reached in violation of the OMA?

The Court of Claims first concluded that plaintiffs did not have a likelihood of success on the merits of their OMA claim. In *Federated Publications, Inc. v. Board of Trustees of Michigan State University*, 460 Mich. 75, 83-84, 594 N.W.2d 491 (1999), our Supreme Court addressed "the question of the scope of the Legislature's power to regulate public universities." Our Supreme Court concluded that Const. 1963, art. 8, §§ 5 and 6 confer "a unique constitutional status on our public universities and their governing boards[,]" and that because the governing boards have the "constitutional authority to supervise the institution generally, application of the OMA to the governing boards of our public universities is ... beyond the realm of legislative authority." *Federated Publications*, 460 Mich. at 84, 89, 594 N.W.2d 491, citing Const. 1963, art. 8, § 5.

[9] Indeed, a public university's board is given "exclusive authority over the management and control of its institution[.]" *Wade v. Univ. of Michigan*, 320 Mich. App. 1, 16, 905 N.W.2d 439 (2017). Although Const. 1963, art. 8, § 4 provides "[f]ormal sessions of governing boards of such institutions shall be open to the public," what constitutes a "formal session" is not defined by the Michigan Constitution, and the "application of the OMA [cannot] rest on the absence of a definition of 'formal sessions' in the Constitution. Unlike other provisions of the constitution, the Legislature is not delegated the task of defining the phrase 'formal sessions' for purposes of Const. 1963, art. 8, § 4." *Federated Publications*, 460 Mich. at 90, 594 N.W.2d 491 (footnote omitted). See also *Detroit Free Press, Inc. v. Univ. of Michigan Regents*, 315 Mich. App. 294, 298-299, 889 N.W.2d 717 (2016), where this Court reiterated our Supreme Court's holding in *Federated Publications*, concluded that our Supreme Court's holding in *Federated Publications* broadly defined the scope of the Legislature's power to regulate public universities generally, and further concluded that public universities do not have "*completely* unfettered discretion" because a "governing boards' determination of what constitutes formal and informal is not *wholly* insulated from judicial review."

***8** In the Court of Claims, and again here on appeal, plaintiffs argue that the June 21, 2019 meeting should have been considered a "formal session" that was required to be publicly held because the decisions made during that meeting related to the transaction of university business. Therefore, plaintiffs argue, the fact that the June 21, 2019 meeting was not publicly held constituted a violation of the OMA. However, in light of our Supreme Court's holding in *Federated Publications*, and this Court's conclusions in *Detroit Free Press, Inc.*, we conclude that the Court of Claims did not abuse its discretion by finding that plaintiffs' OMA claim could not serve as the basis for injunctive relief, and further finding that defendants were entitled to summary disposition of the OMA claim because the OMA claim could not be asserted against the Board as a matter of law.

In the August 1, 2019 opinion and order, the Court of Claims also engaged in an extensive discussion regarding whether plaintiffs had any likelihood of success on the merits on the quorum issue, specifically whether President Wilson could be counted to establish a quorum. The Court of Claims found legal support for and against counting President Wilson to establish a quorum, and ultimately concluded that plaintiffs' "case on quorum as plead is neither frivolous nor lacking any support[,]" and that this issue should be decided on the merits, not preliminarily. Plaintiffs do not challenge this finding as it relates to the August 1, 2019 opinion and order, and therefore we do not address it. Rather, we address the quorum issue *infra* as it relates to the Court of Claims' March 25, 2020 opinion and order.

[10] **[11]** **[12]** Finally, the Court of Claims evaluated whether plaintiffs would suffer irreparable harm if a preliminary injunction did not issue. Michigan jurisprudence adheres to the

> longstanding principle that a particularized showing of irreparable harm ... is ... an indispensable requirement to obtain a preliminary injunction. The mere apprehension of further injury or damage cannot be the basis for injunctive relief. Equally important is that a preliminary injunction should not issue where an adequate legal remedy is available. [*Pontiac Fire Fighters Union Local 376 v. City of Pontiac*, 482 Mich. 1, 9, 753 N.W.2d 595 (2008) (quotation marks and footnotes omitted).]

The Court of Claims found plaintiffs' argument, that the "public will be harmed by the Board's decision to operate in secret, in violation of the OMA, lacked merit because the OMA does not apply." Therefore, plaintiffs could not establish any harm, "let alone irreparable harm." The Court of

Claims further found that plaintiffs had failed to demonstrate that a legal remedy was unavailable or inadequate.

Indeed, following our review of the record, we conclude that plaintiffs failed to meet their burden of a particularized showing of irreparable harm. Plaintiffs failed to address why, should they succeed on the merits of their quorum claim, cancelling the sublease or issuing a tuition refund would constitute inadequate legal remedies. Thus, we conclude that the Court of Claims did not abuse its discretion by denying plaintiffs the requested injunctive relief.

B. MARCH 25, 2020 OPINION AND ORDER

Next, plaintiffs challenge the Court of Claims' March 25, 2020 opinion and order granting summary disposition in favor of defendants under MCR 2.116(C)(10). Plaintiffs argue that the Court of Claims erred by finding President Wilson could be counted for purposes of establishing a quorum. Plaintiffs maintain that they are entitled to a declaration that the decisions made by the Board during the June 21, 2019 meeting were made without a quorum, and therefore are null, void, and without effect. While we are troubled by the behavior of all parties involved, particularly as it relates to their responsibilities to the electorate and institution that they have been elected to manage and protect as fiduciaries, we cannot agree that declaratory relief is appropriate in this case.

***9** **[13]** **[14]** The resolution of this issue involves the interpretation of various statutory and constitutional provisions. In examining the relevant constitutional provisions, this Court's objective is to "determine the text's original meaning to the ratifiers, the people, at the time of ratification. The primary rule is that of common understanding[,]" which requires this Court to examine the intent of the ratifiers. *Citizens Protecting Michigan's Constitution v. Secretary of State*, 503 Mich. 42, 61, 921 N.W.2d 247 (2018) (citations and quotation marks omitted). Moreover,

> [w]hen interpreting statutory language, we begin with the plan language of the statute. *Driver v. Naini*, 490 Mich. 239, 246-247, 802 N.W.2d 311 (2011). "We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Johnson v. Pastoriza*, 491 Mich. 417, 436, 818 N.W.2d 279 (2012). Additionally, when determining this intent we "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Hannay v. Dep't of Transp.*, 497 Mich. 45, 57, 860 N.W.2d 67 (2014) (quotation marks and citation omitted). [*Jesperson v. Auto Club Ins. Ass'n*, 499 Mich. 29, 34, 878 N.W.2d 799 (2016).]

[15] The Michigan constitution grants to the Board the power and responsibility of "general supervision of its institution and the control and direction of all expenditures of the institution's funds." Const. 1963, art. 8, § 5. Article. 8, § 5 goes on to provide, in relevant part:

> Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board. The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law.

Likewise, MCL 390.641 establishes WSU as a "state institution of higher education" that is to be "maintained by the state of Michigan[.]" Further, "[t]he conduct of its affairs and control of its property shall be vested in a board of governors, the members of which shall constitute a body corporate known as the 'board of governors of Wayne state university,' hereinafter referred to as 'the board[.]' " MCL 390.643 provides that the Board is to be comprised of "8 members who shall be nominated and elected in accordance with the election laws of this state. The president of the university shall be ex officio a member of the board without the right to vote and shall preside at meetings of the board."

[16] **[17]** **[18]** Neither the constitution, nor the applicable statutes, define the term "ex officio" as it relates to President Wilson's status as an ex officio member of the Board. This fact does not make the term "ex officio" ambiguous, simply because it is undefined. *Diallo v. LaRochelle*, 310 Mich. App. 411, 418, 871 N.W.2d 724 (2015). With the term "ex officio" being a legal term of art, it is therefore appropriate for us to construe the term "in accordance with its peculiar and appropriate legal meaning." *Brackett v. Focus Hope, Inc.*, 482 Mich. 269, 276, 753 N.W.2d 207 (2008). We refrain, however, from reading anything "into a statute that is not within the intent of the Legislature apparent from the language of the statute itself." *Detroit Pub. Schs. v. Conn*, 308 Mich. App. 234, 248, 863 N.W.2d 373 (2014). "In other words, we must not judicially legislate by adding into a statute provisions that the Legislature did not include." *Comerica, Inc. v. Dept. of Treasury*, 332 Mich. App. 155, 166, 955 N.W.2d 593, 600 (2020). *Black's Law Dictionary* (10th ed.) defines "ex officio"

as "[b]y virtue or because of an office" or "by virtue of the authority implied by office." See also Henry M. Robert, *Robert's Rules of Order Newly Revised*, § 49, art. 66 (10th ed. 2000), explaining that "[f]requently boards include ex-officio members–that is, persons who are members of the board by virtue of an office...." On the basis of the foregoing, we conclude that President Wilson, while not one of the eight elected board members, is a member of the Board by virtue of his office.

***10** **[19]** The next question becomes whether as an ex officio member of the Board, President Wilson can be counted for purposes of establishing a quorum to transact business. Looking to the plain language of MCL 390.645(2), we answer that question in the affirmative. Indeed, MCL 390.645(2) requires that "[a] majority of the members of the board shall form a quorum for the transaction of business." Likewise, § 1.3 of the WSU Bylaws requires a majority or "five members of the Board" to establish a quorum. President Wilson is a member of the Board, and MCL 390.645(2) and the WSU Bylaws do not limit a quorum to a majority of the *voting* or *elected* members of the Board. To be clear, that President Wilson is not a voting member of the Board is of no consequence under a plain reading of the applicable statute and the WSU Bylaws, and should WSU wish to limit which type of members qualify for purposes of establishing a quorum, they are free to amend their bylaws.

Like the Court of Claims, we find persuasive that § 4.1 of the WSU Bylaws incorporate "the procedure prescribed in Robert's Rules of Order" "in the absence of specific provisions to the contrary[.]" *Robert's Rules of Order* does discuss ex officio board members, and provides the following guidance:

> In the executive board of a society, if the ex-officio member of the board is under the authority of the society (that is, if he is a member, an employee, or an elected or appointed officer of the society), there is no distinction between him and the other board members. If the ex-officio member is not under the authority of the society, he has all the privileges of board membership, including the right to make motions and to vote, but none of the obligations.... The latter class of ex-officio board members, who has no obligation to participate, should not be counted in determining the number required for a quorum or whether a quorum is present at a meeting. [Henry M. Robert, *Robert's Rules of Order Newly Revised*, pp. 456-457 (11th ed.).]

The Court of Claims found, and we agree, that President Wilson falls into the first category of ex officio board members because he is under the authority of the Board by virtue of being hired by the Board, and he is constitutionally required to preside over Board meetings.

On the basis of the foregoing, we conclude that President Wilson is an ex officio member of the WSU Board of Governors who, despite being constitutionally divested of the right to vote, does count as a member of the board for purposes of establishing a quorum. Pertinent statutory authority, as well as the WSU Bylaws, provide further support for our conclusion. It follows that the June 21, 2019 meeting of the Board was conducted with a quorum present, and therefore the actions taken by the Board during that meeting are to have full effect. Therefore, the Court of Claims did not err by granting summary disposition in favor of defendants on this issue; plaintiffs are not entitled to declaratory relief.[2]

***11** Affirmed.

Ronayne Krause, J. (concurring).
I concur in result only.

All Citations

--- N.W.2d ----, 2021 WL 2171156

Footnotes

1 The Court of Claims, in a footnote, noted that

> Although not noted by the parties' briefing, MCL 390.645(2), which discusses the WSU Board of Governors and its meetings, expressly states that the "business which the board may perform *shall be conducted in compliance with Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws*," i.e., the OMA. This provision of the statute, which does not appear to have ever been the subject of challenge, is inconsistent with the constitutional authority of the Board discussed above. In addition, the statute appears to be in [ ] conflict with the holdings in *Federated Publications* and *Detroit Free Press*. Indeed, the universities at issue in those cases – Michigan State University and the University of Michigan – were subject to similar statutory authority purporting to subject Board meetings to the OMA. See MCL 390.20 (applying the OMA to the University of Michigan Board of

Regents meetings); MCL 300.104 (applying the OMA to Michigan State University Board of Trustee meetings). This apparent conflict between MCL 390.645(2) and the Constitution can be resolved by recognizing the preeminence of the Constitution over conflicting legislative enactments. See *Mays v. Snyder*, 323 Mich. App. 1, 33, 916 N.W.2d 227 (2018). Moreover, this Court is bound by the Supreme Court's interpretation of nearly the same issue and same authorities in *Federated Publications* and *Detroit Free Press*. Thus, the provision in MCL 390.645(2) purporting to subject WSU Board of Governors meetings to the OMA cannot be enforced and does not change the analysis of the instant issues.

We agree with the Court of Claims' analysis recognizing the preeminence of the Constitution over conflicting legislative enactments, and adopt it herein.

2 We again note, however, that the conduct of the Board and President Wilson leave much to be desired. Plaintiffs admit in their pleadings that they purposefully boycotted the June 21, 2019 meeting to avoid establishing a quorum so that the sublease and the tuition increase could not be voted on after those items were added to the meeting agenda at the last minute. Additionally, the Board approved a sublease of significant real estate behind closed doors. It is the nature of the beast, so-to-speak, that board members will disagree on university business. Disagreements, or differing viewpoints, regarding the management and control of the institution should not be an excuse to conduct business the way the parties have in this case. The Board, and President Wilson, as elected officials and fiduciaries of WSU, owe the institution, the students, the university alumni, and the electorate a greater duty to maintain decorum than has been displayed.

End of Document