REAL PROPERTY

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There were no Michigan Supreme Court decisions regarding real property law during 2015, but the Michigan Court of Appeals did provide new guidance on a number of issues. To the extent a theme exists in these cases, the court continues to clarify the rights of creditors in an environment of increased mortgage and tax foreclosure and is also frequently asked to clarify ambiguity in statutory language.

I. OBLIGATION TO RELEASE COMMERCIAL REAL ESTATE BROKER'S LIEN

The Michigan Commercial Real Estate Broker's Lien Act[1] allows a broker to record a lien before the conveyance of property for a commission owed under a written commission agreement.[2] The broker must record a release of this lien if the "parties to the transaction" place an amount sufficient to satisfy the lien in escrow.[3] In *Anton, Sowerby &*

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1. MICH. COMP. LAWS ANN. §570 (West 2016).
2. *Id.* §570.584(1).
3. *Id.* §570.585(3).

Associates, Inc. v. Mr. C's Lake Orion, L.L.C.,[4] a broker argued that as a "party to the transaction" its agreement was required to establish the escrow, and it was not required to release its lien if it had not agreed to the terms of the escrow agreement.[5]

The court of appeals held that the broker's agreement to the escrow is not required by the statute and that the broker must release its lien once the amount listed in the recorded notice of lien has been placed into escrow.[6] According to the court, the broker's relationship to the transaction is *made clear* under the statute by the requirement that it must release its lien when the lien amount has been placed in escrow; a reading of the statute to further require the broker to agree to the escrow is incorrect.[7] When the seller and buyer escrow the amount listed in the recorded broker's lien, they have met their obligation under the statute, and the broker is then required to release the lien.[8]

II. EXCLUSIVE EASEMENTS

In *Penrose v. McCollough*,[9] the court held that the granting of an "exclusive" easement to a grantee precludes further transfer of the easement right to subsequent grantees.[10] As is so often the case with cases involving easements, the facts are unfortunately not easily simplified and the devil is in the detail. The McCulloughs transferred an "exclusive" easement across the burdened lot to "the title holder to Lots 9, 10, and 11."[11] The easement stated that the "Grantee may use the easement for the benefit of any or all of the Lots."[12] At the time of the grant, Gleason owned lots nine and ten and the McCulloughs owned lot eleven and the burdened lot.[13] The court held that there was no grant of an easement benefitting lot eleven across the burdened lot because the McCulloughs owned both lots at the time of transfer and one cannot grant an easement to themselves.[14] An easement was created according to

4. Anton, Sowerby & Associates, Inc. v. Mr. C's Lake Orion, L.L.C., 309 Mich. App. 535, 872 N.W.2d 699 (2015).
5. *Id.* at 543, 872 N.W.2d at 704.
6. *Id.* at 544–45, 872 N.W.2d at 704–05.
7. *Id.* at 543–45, 872 N.W.2d at 704–705.
8. *Id.* at 543, 872 N.W.2d at 704.
9. Penrose v. McCollough, 308 Mich. App. 145, 862 N.W. 2d 674 (2014).
10. *Id.* at 152, 862 N.W.2d at 679.
11. *Id.* at 148–49, 862 N.W.2d at 677.
12. *Id.* at 149, 862 N.W.2d at 678.
13. *Id.* at 148–49, 862 N.W.2d at 677.
14. *Id.* at 150, 862 N.W.2d at 678.

the court of appeals, however, benefitting lots nine and ten across the burdened lot at that time.[15]

Later the McCulloughs conveyed lot eleven to the Sanfords, including again an easement across the burdened lot.[16] While the prior transfer of an easement benefitting lot eleven may not have been effective, the transfer of this easement was effective because the McCulloughs were no longer attempting to transfer an easement to themselves. The result was an easement in favor of lots nine and ten, now owned by Penrose, from the first easement transfer and an easement in favor of lot eleven, now owned by the Sanfords.[17]

At this point the court found important the term "exclusive" used in the first easement transfer benefitting lots nine and ten.[18] This exclusive easement entitled use only to the owners of lots nine and ten.[19] The court found that the Sanfords took lot eleven having constructive notice of this exclusive easement because of the prior easement granted to Gleason, the predecessor in title to Penrose, and are excluded from use of the burdened parcel.[20]

Real property law modernizes at a glacial pace, often adhering to doctrine formulated in a bygone era designed to address policy concerns that have long since been mitigated. As state courts face real property issues, many would advocate dispensing with formulaic considerations and instead embrace rules primarily designed to capture the intent of the parties.[21] This case provides a good example. While exclusive easements should be enforceable, it seems that the intent of the parties as evidenced by the facts at the creation of this easement should factor into whether the easement is found to be exclusive. Here, the McCulloughs appear to have intended to include any potential owner of lot eleven in the benefit of the easement in their original transfer, but failed because of the formulaic principal of merger. The court then determined that the Sanfords had constructive notice of an exclusive easement in favor of lots nine and ten.[22] In fact, if the Sanfords would have searched the

15. *Id.*

16. *Id.*

17. *Id.* at 149-51, 862 N.W.2d at 678–79. As the court discusses at length, these easements are appurtenant, in that they benefit a particular parcel, in contrast with easements in gross, which would benefit a particular person. This was perhaps material to the pleadings of the parties and thus discussed by the court, but does not seem material to the courts holding and is omitted for simplification to the reader.

18. *Id.* at 151, 862 N.W.2d at 679.

19. *Id.* at 152, 862 N.W.2d at 679.

20. *Id.* at 153, 862 N.W.2d at 680.

21. RESTATEMENT (THIRD) OF PROP.: SERVITUDES INTRO. § 4.8 (AM. LAW. INST. 2000).

22. *Penrose*, 308 Mich. App. at 153, 862 N.W.2d at 680.

record of title they would have found an easement benefitting their lot eleven. It would only be if the Sanfords understood the doctrine of merger that they would have affirmatively disregarded the transfer and understood that an exclusive easement was granted only to lots nine and ten. While a court might adhere to formulaic principles of property law in denying the existence of an easement in favor of lot eleven, because the McCulloughs owned it at the time of transfer, it seems particularly harsh to provide so much import on the word "exclusive" in this partially ineffective transfer, so as to not allow an easement to ever benefit lot eleven going forward.

III. CONDO ASSOCIATION FEES

A. Condo Association Fee Liability to Foreclosing Governmental Units

In *Harbor Watch Condominium Ass'n v. Emmet County Treasurer*,[23] the court held that a county, in its role as a "foreclosing governmental unit," is not liable for condominium common expenses for the period following forfeiture and prior to foreclosure sale.[24] Emmet County had foreclosed certain properties in the Harbor Watch Condominium Association.[25] The Condominium Association asserted that Emmet County owed it nearly $98,000 in common expenses related to the foreclosed properties.[26] The court acknowledged that Michigan's Condominium Act[27] requires than any unit owner comply with the requirements of the condominium association's governing documents.[28] However, it cited the statutory obligation of Emmet County to foreclose tax forfeited properties[29] and held that the county is not liable for any common expenses that accrued during the period of its holding title.[30] The implication drawn by the court of appeals appears to be that a governmental unit that is statutorily required to take title to property is not required to meet the requirements of any real covenants burdening that property.

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23. Harbor Watch Condo. Ass'n v. Emmet Cty. Treasurer, 308 Mich. App. 380, 863 N.W. 2d 745 (2014), *appeal denied*, 498 Mich. 880, 868 N.W.2d 917 (2015).

24. *Id.* at 388, 863 N.W.2d at 750.

25. *Id.* at 381–82, 863 N.W.2d at 746.

26. *Id.* at 382, 863 N.W.2d at 747.

27. MICH. COMP. LAWS ANN. §§559.101–.276 (West 2016).

28. *Id.* §559.165.

29. *Harbor Watch*, 308 Mich. App. at 385, 863 N.W.2d at 748.

30. *Id.*

In determining that the tax foreclosure was mandatory, the court needed to reconcile certain language in the General Property Tax Act.[31] Michigan's constitution prohibits unfunded mandates on local governments.[32] The General Property Tax Act states that foreclosure of properties by the county is voluntary for "purposes of" this constitutional prohibition.[33] The court of appeals determined the use of the term "voluntary" in the General Property Tax Act does not mean that the county has the option to foreclose tax reverted properties, but rather that the term was placed in the statute to "insulate" the General Property Tax Act from a constitutional challenge.[34]

The court also noted that the General Property Tax Act required the county to pay any proceeds from the foreclosure sale first to pay any tax obligations for the property and the costs of the foreclosure.[35] The court did not directly address the Condominium Associations' argument that the condominium fee qualifies as a "maintenance cost" payable from the tax foreclosure proceeds as there would not have been enough proceeds from this sale to cover such a cost regardless.[36] The court rejected the Condominium Association's argument that such costs should have been included in the minimum bid for the property as clearly contrary to the statutory scheme.[37]

B. Condominium Association Fee Liability to Foreclosure Purchaser

The Condominium Act requires that a purchaser request a written accounting of a property's assessments or otherwise become liable for those assessments.[38] The Condominium Act also provides that a purchaser who acquires title by foreclosure is not liable for any assessments that became due before the purchaser acquires title.[39] Not explicitly clear under the Condominium Act was whether a purchaser by foreclosure was required to request a written accounting or otherwise

31. *See* MICH. COMP. LAWS ANN. §211 (West 2016).

32. MICH. CONST. art. 9, § 29 (West, Westlaw through Nov. 2014 general election).

33. MICH. COMP. LAWS ANN. §211.78(6) (West 2016).

34. *Harbor Watch*, 308 Mich. App. at 386, 863 N.W.2d at 749. While the court of appeals is likely correct that the legislature did not intend to make tax foreclosure optional for a county, it does leave one wondering how something can be voluntary for one purpose and not another. Is it that tax foreclosure would be voluntary to the extent that it may require the county to meet an unfunded mandate?

35. *Id.* at 387, 863 N.W.2d at 749.

36. *Id.* at 386–87, 863 N.W.2d at 749.

37. *Id.* at 387, 863 N.W.2d at 749.

38. MICH. COMP. LAWS ANN. §559.211(2) (West 2016).

39. *Id.* §559.158.

become liable for assessments accrued prior to the purchaser's acquisition of title.

In *Federal National Mortgage Ass'n v. Lagoons Forest Condominium Ass'n*,[40] the court of appeals held that the requirement to seek a written accounting does not apply when a purchaser acquires title by foreclosure.[41] Further, the failure to request such an accounting does not make the foreclosure purchaser liable for assessments that became due prior to the purchaser acquiring title.[42]

After foreclosure, a purchaser is clearly liable for condominium assessments that accrue after it acquires title.[43] The Condominium Act does not explicitly state though whether a purchaser by foreclosure "acquired title" for purposes of assessment at the time of the sale or at the expiration of the redemption period.[44] The court held that the purchaser by foreclosure acquires title at the time of the purchase, when it acquires equitable title, and is liable for any assessments that accrue after that date.[45]

IV. ADVERSE POSSESSION AND ACQUIESCENCE OF PUBLICLY HELD LAND

Michigan allows a party to acquire title through passage of the statutory period of limitations under the theories of adverse possession and acquiescence.[46] The Revised Judiciary Act of 1961[47] provides that "[a]ctions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations."[48] Therefore, adverse possession and acquiescence are not available as a private party's defense to a claim brought by a municipal corporation to recover public land.

The court had previously interpreted this provision to allow a party to claim title through acquiescence against a municipal corporation as

40. Fed. Nat'l Mortg. Ass'n v. Lagoons Forest Condo. Ass'n, 305 Mich. App. 258, 852 N.W. 2d 217 (2014).

41. *Id.* at 267, 852 N.W.2d at 222.

42. *Id.* at 267–68, 852 N.W.2d at 222.

43. MICH. COMP. LAWS ANN. §559.158 (West 2016).

44. *Lagoons*, 305 Mich. App. at 268, 852 N.W.2d at 222.

45. *Id.* at 268–69, 852 N.W.2d at 223; *see also* Wells Fargo Bank v. Country Place Condo. Ass'n, 304 Mich. App. 582, 593, 848 N.W.2d 425 (2014), *appeal denied*, 497 Mich. 889, 854 N.W.2d 896 (2014) (holding that the Condominium Act does not require absolute title and that equitable title is sufficient).

46. MICH. COMP. LAWS ANN. §600.5801 (West 2016).

47. *Id.* §600.201–.9948.

48. *Id.* §600.5821.

long as the suit was not *initiated* by the municipal corporation.[49] In *Waisanen v. Superior Township,*[50] the court also allowed a private party to make an adverse possession claim against a municipal corporation when the proceeding was not initiated by the municipal corporation.[51] While the municipal corporation argued that its counterclaim for possession should afford it the statutory protection against the adverse possession claim, the court rejected this argument, holding that the initiation of an action is the key trigger as to whether the municipal corporation receives the statutory protection.[52]

Citing a prior case on this issue, the court reiterates the "potential, perhaps unrecognized by the Legislature for inconsistent outcomes, depending on which party beats the other to the courthouse."[53] Nonetheless, the court here and in prior cases, believed the "plain language" of the statute compelled this outcome.[54] By reviewing Michigan court rules, the court found that an "action" encompasses both claims and counterclaims, and therefore the use of the term action in the statute must be interpreted to require the municipal corporation to have initiated the action in order to be protected from a private party's claim of acquiescence or adverse possession.[55]

Michigan contains another statutory protection for public bodies against acquiescence and adverse possession claims by encroachment into a "public highway."[56] Unlike the Judiciary Act, this provision does not limit the prohibition to "actions brought by" the public body.[57] The term public highway was not statutorily defined. In *Haynes v. Village of Beulah,*[58] using basic principles of statutory interpretation, the court determined that the term includes a platted village street.[59] The statutory protection, according to the court, also extends to portions of the right of way that have not yet been developed.[60] The court also held that this statutory prohibition applies equally to both adverse possession and acquiescence claims.[61] The court distinguished cases where it has

49. *See* Mason v. City of Menominee, 282 Mich. App. 525, 766 N.W.2d 888 (2009).
50. Waisanen v. Superior Twp., 305 Mich. App. 719, 854 N.W.2d 213 (2014).
51. *Id.* at 728–29, 854 N.W.2d at 218.
52. *Id.* at 729–30, 854 N.W.2d at 218–19.
53. *Id.* at 725, 854 N.W.2d at 216 (quoting *Mason*, 282 Mich. App. at 533, 766 N.W.2d at 893 (2009) (Beckering, J., concurring)).
54. *Id.* at 725-26, 854 N.W.2d at 216.
55. *Id.* at 730, 854 N.W.2d at 218-19.
56. MICH. COMP. LAWS ANN. §247.190 (West 2016).
57. *Id.*
58. Haynes v. Vill. of Beulah, 308 Mich. App. 465, 865 N.W. 2d 923 (2015).
59. *Id.* at 469, 865 N.W.2d at 926.
60. *Id.* at 470–71, 865 N.W.2d at 927.
61. *Id.* at 469–70, 865 N.W.2d at 926–27.

allowed an acquiescence claim, like *Mason* and, because it was defended under the Judiciary Act Provision, *Waisenen*.[62]

The ability of a private party to bring a claim of acquiescence or adverse possession against a municipal corporation is ready for clarification by the legislature. How can the court, faced with similar facts regarding encroachment into a public right of way, deliver different outcomes depending simply upon the statute the municipal corporation used to defend against the claims? And could it truly be the intent of the legislature that adverse possession and acquiescence are available against public lands, so long as the private party beats the municipal corporation to the courthouse?

V. VALIDITY OF LOCAL GOVERNMENT SALE TO LAND BANKS

In *Rental Property Owners Ass'n of Kent County v. Kent County Treasurer*,[63] "various individuals, companies, and associations involved in property ownership, rehabilitation, and development"[64] sought to invalidate tax deeds executed by the county treasurer to the city and county where the properties were afterward transferred to the land bank authority.[65] The challengers claimed that the city and county's actions in acquiring the properties violated the Land Bank Fast Track Act[66] because the city never intended to own the properties, many of the properties were not blighted, and the land bank paid a fraction of the value of the properties.[67] The challengers also claimed that they were denied due process because the city was merely a conduit and not a genuine purchaser of the properties, depriving the challengers of the opportunity guaranteed by the General Property Tax Act[68] and the Michigan Constitution[69] to participate in an open, reasonable, and fair bidding process on the properties.[70] Finally, the challengers asserted that by disposing of the properties at less than fair market value, the city breached its fiduciary duty to its residents and violated a Michigan

62. *Id.* at 470, 865 N.W.2d at 927.

63. Rental Prop. Owners Ass'n of Kent Cty. V. Kent Cty. Treasurer, 308 Mich. App. 498, 866 N.W. 2d 817 (2014), *appeal denied sub nom.* Rental Properties Owners Ass'n of Kent Cty., 3830 G, L.L.C. v. Kent Cty. Treasurer, 498 Mich. 853, 865 N.W.2d 19 (2015).

64. *Id.* at 502, 866 N.W. 2d at 821.

65. *Id.*

66. MICH. COMP. LAWS ANN. §124.755 (West 2016).

67. *Rental Prop. Owners Ass'n*, 308 Mich. App at 506, 866 N.W. 2d at 823.

68. MICH. COMP. LAWS ANN. §211.78m (West 2016).

69. MICH. CONST. art. 7 § 26 (Westlaw through Nov. 2014 general election).

70. *Rental Prop. Owners Ass'n*, 308 Mich. App at 506, 866 N.W. 2d at 823.

constitutional provision[71] prohibiting a city or village from lending its credit to another entity.[72]

The Land Bank Fast Track Act requires that a foreclosing governmental unit offer property to the state, county and city governments prior to public auction under the General Property Tax Act.[73] The challengers argued that the county and treasurer were both foreclosing governmental units for purposes of the General Property Tax Act and therefore the county, after acquiring title from the county treasurer, again had to make the properties available at public auction before transferring them to a land bank.[74]

The challengers also argued that the city, which purchased the properties with money placed in escrow and funded by the land bank, acted as a straw man in a ruse to avoid public auction of the properties.[75] The court highlighted that while the statute requires a city or county to purchase tax foreclosed properties for a public purpose, which here was to restore blighted properties and neighborhoods, the statute does not otherwise restrict how a city or county may convey the property afterward.[76]

While not properly raised for appellate review, the court of appeals also addressed the challengers' argument that the county exceeded its authority and violated a fiduciary duty to its taxpayers when it sold the tax-foreclosed properties to the land bank below their alleged fair market values.[77] In response, the court noted (i) various county policies and resolutions that authorized the purchase and resale of the property consistent with the county's strategic plan and the public purpose of economic revitalization, and (ii) various statutory authorizations for a county to acquire and sell real property.[78]

71. MICH. CONST. art. 7, § 26 (Westlaw through Nov. 2014 general election).
72. *Rental Prop. Owners Ass'n.*, 308 Mich. App. at 506, 866 N.W.2d at 823.
73. MICH. COMP. LAWS ANN. §124.755 (West 2016).
74. *Rental Prop. Owners Ass'n.*, 308 Mich. App. at 513, 866 N.W.2d at 826–27.
75. *Id.* at 515, 866 N.W.2d at 827.
76. *Id.* at 517, 866 N.W.2d at 828.
77. *Id.* at 523, 866 N.W.2d at 831.
78. *Id.* at 524, 866 N.W.2d at 832.

VI. INTERSECTIONS OF CIVIL PROCEDURE AND REAL PROPERTY LAW

A. Trial by Jury in an Action to Determine an Interest in Land

Historically, claims in equity were tried by the court and claims in law were tried by a jury.[79] "Although equity and law claims have been merged in modern practice, courts must continue to recognize the distinction between law and equity to preserve the 'constitutional rights to trial by jury in legal matters and trial by court in equity matters.'"[80] A party is guaranteed a right to trial by jury where such right existed before the distinction between courts of law and equity was removed.[81] This guarantee applies to new statutory claims that are similar to those that would have been tried by a jury prior to the merger.[82] The legislature also cannot extinguish the right to a trial by jury by reclassifying what was traditionally a legal claim as equitable.[83]

In Michigan, "any right in, title to, equitable title to, interest in, or right to possession of land" is determined by bringing an "Action to Determine Interest in Land."[84] Its enabling statute states that an Action to Determine Interest in Land is an equitable claim.[85] Before being consolidated into the Action to Determine Interest in Land by the legislature, a party could bring either an action for ejectment or an action to quiet title when there was a controversy over the ownership of land.[86] Ejectment, an action in law, was appropriate in the limited circumstance where a dispossessed party sought to regain possession as a result of his paramount legal title.[87] Quieting title, an action in equity, was usually intended to settle a dispute about the interest of a party not in possession.[88] Because the modern Action to Determine Interest in Land has roots in both equity and law, the court held in *New Products Corp.*

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79. New Products Corp. v. Harbor Shores BHBT Land Dev., L.L.C., 308 Mich. App. 638, 644–45, 866 N.W. 2d 850, 854 (2014), *appeal denied*, 871 N.W.2d 203 (Mich. 2015).

80. *Id.* at 645, 866 N.W.2d at 854 (citing Madugula v. Taub, 496 Mich. 685, 705, 853 N.W.2d 75 (2014)).

81. *Id.* (citing MICH. CONST. art. 1 § 14 (Westlaw through Nov. 2014 general election)).

82. *Id.* (citing Conservation Dep't v. Brown, 335 Mich. 343, 346, 55 N.W.2d 859 (1952)).

83. *Id.* (citing *Brown*, 335 Mich. at 346–347, 55 N.W.2d 859).

84. MICH. COMP. LAWS ANN. §600.2932 (West 2016).

85. *Id.*

86. *New Products*, 308 Mich. App. at 652, 866 N.W.2d at 858.

87. *Id.* at 649–50, 866 N.W.2d at 856.

88. *Id.* at 650–51, 866 N.W.2d at 857.

that the action may entitle a party to trial by jury even though the statute identifies the modern claim as equitable.[89] But a right to trial by jury should be granted only if the party's pleadings reflect the common law action for ejectment.[90] In *New Products Corp.*, there was a dispute over the ownership of a parcel that had been created in connection with a river relocation project.[91] New Products claimed an interest in the property which had been developed by another party.[92] New Products brought an action against other parties that might have an interest in the property alleging that it was the rightful owner of the parcel and that others had wrongfully developed and used the property.[93] New Products asked the trial court to (i) permanently enjoin others from trespassing on the disputed parcel, (ii) to quiet title to the parcel in dispute, and (iii) to declare that none of the others had any interest in the parcel.[94] "At the hearing, New Products maintained that its claims involving 'ownership of the land and whether New Products was entitled to possession' were claims that a jury traditionally decided. It stated that its quiet title and declaratory relief claims were—in effect—common-law actions for ejectment. . ."[95]

The court held that an Action to Determine an Interest in Land only entitles a party to trial by jury when the party's pleadings reflect a common law legal claim, such as an action for ejectment.[96] New Products was not entitled to trial by jury because (i) it is not in possession of the disputed property as would be required for the legal action of ejectment,[97] and (ii) the equitable relief New Products sought in its pleadings would not have been available under the legal action for ejectment.[98]

B. Attorneys' Fees in Arbitrated Construction Lien Claims

Under Michigan law, a court may award reasonable attorneys' fees to a construction lien claimant who is the prevailing party in an action to enforce a construction lien through foreclosure.[99] In *Ronnish*

89. *Id.* at 656–57, 866 N.W.2d at 860–61.
90. *Id.* at 658, 866 N.W.2d at 861.
91. *Id.* at 641–42, 866 N.W.2d at 852.
92. *Id.* at 642, 866 N.W.2d at 853.
93. *Id.*
94. *Id.*
95. *Id.* at 643, 866 N.W.2d at 853.
96. *Id.* at 658, 866 N.W.2d at 861.
97. *Id.* at 650, 866 N.W.2d at 856-57.
98. *Id.* at 658–59, 866 N.W.2d at 861.
99. MICH. COMP. LAWS ANN. §570.1118(2) (West 2016).

Construction Group, Inc. v. Lofts of the Nine, LLC,[100] the court held that this is true even when the underlying dispute is resolved in arbitration without foreclosure.[101] In such cases, reasonable attorneys' fees should be awarded to the "substantially prevailing party," even if both parties to the arbitration were awarded damages.[102] One can be the substantially prevailing party even if it was awarded less than its original claim.[103]

100. Ronnish Constr. Grp., Inc., v. Lofts of the Nine, LLC, 306 Mich. App 203, 854 N.W. 2d 744 (2014), *appeal granted*, 497 Mich. 1003, 861 N.W.2d 630 (2015).

101. *Id.* at 210–11, 854 N.W.2d at 747–48.

102. *Id.* at 211, 854 N.W.2d at 748.

103. *Id.*