STATE OF MICHIGAN

COURT OF APPEALS

NICHOLE RUGGIERO,

Plaintiff-Appellant,

v

UNNAMED GENESEE COUNTY PUBLIC BODY CONSISTING OF CIRCUIT COURT JUDGES TO APPOINT GENESEE COUNTY CLERK-REGISTER,

Defendant-Appellee.

FOR PUBLICATION
April 23, 2025
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No. 367378
Genesee Circuit Court
Ingham Circuit Court
LC Nos. 22-118299-CZ;
23-001423-VJ

ARCHIE H. BAILEY,

Plaintiff-Appellant,

v

UNNAMED GENESEE COUNTY PUBLIC BODY APPOINTING GENESEE COUNTY CLERK-REGISTER and COUNTY OF GENESEE,

Defendants-Appellees.

No. 367382
Genesee Circuit Court
Ingham Circuit Court
LC Nos. 23-118390-CZ;
23-006001-VJ

Before: GADOLA, C.J., and K. F. KELLY and REDFORD, JJ.

GADOLA, C.J.

In these consolidated cases,[1] plaintiffs, Nichole Ruggiero and Archie H. Bailey, appeal as of right the trial court's August 7, 2023 final order granting summary disposition under MCR 2.116(C)(10) in favor of defendants, Unnamed Genesee County Public Body Consisting of Circuit Court Judges to Appoint Genesee County Clerk-Register/Unnamed Genesee County Public Body Appointing Genesee County Clerk-Register (the Unnamed Body), and County of Genesee. Ruggiero also challenges the trial court's May 8, 2023 order partially granting the Unnamed Public Body's motion for summary disposition under MCR 2.116(C)(5) as it related to Counts I and II of her complaint.[2] We affirm in part and reverse in part.

I. FACTS

The facts of this case are undisputed. At issue is the filling of a vacancy for the office of "clerk-register" within Genesee County. Ordinarily, the offices of county clerk and register of deeds are held by two individuals, but the Michigan Constitution permits counties to combine the offices into a position held by a single individual, which Genesee County has done since 2012. The combining of the two positions is not challenged; rather, plaintiffs challenge the process that the Unnamed Body used to fill the clerk-register's vacancy in Genesee County. Since its inception, John Gleason held the combined-position within Genesee County. However, Gleason stepped down on November 2, 2022, resulting in a vacancy. Shortly after, the Unnamed Body, which was composed of judges from the Genesee Circuit Court, received applications to fill the vacancy and conducted interviews of the applicants. On December 6, 2022, the Unnamed Body announced that it had chosen Domonique D. Clemons to be Genesee County's next clerk-register. Defendants do not dispute that these proceedings took place in a nonpublic setting. The Unnamed Body did not hold any public meetings or keep meeting minutes, and there was no notice provided to the public regarding the interviews, deliberations, or appointment. On December 13, 2022, Bailey submitted a request for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., seeking all applications and letters of interest submitted in relation to the vacancy. Bailey sent this request to the FOIA coordinator for Genesee County. On December 20, 2022, Bailey's request was denied. The denial provided that the vacancy had been filled by the Genesee Circuit Court judges and that, under the FOIA, the judiciary was explicitly excluded from the definition of a "public body."

Both plaintiffs filed their respective complaints, which were largely identical for the first three counts. The crux of plaintiffs' positions in Count I was that the clerk-register was a combined position that created a new office. Plaintiffs alleged that the clerk-register was not the "office of county clerk or prosecuting attorney" described in MCL 168.209(1), of the Michigan Election Law, MCL 168.1 *et seq*.; instead, the clerk-register was one of the "other county office[s]" described in MCL 168.209(2). This meant that pursuant to Subsection (2) the clerk-register

[1] *People v Ruggiero*, unpublished order of the Court of Appeals, entered August 23, 2023 (Docket No. 367378); *People v Bailey*, unpublished order of the Court of Appeals, entered August 23, 2023 (Docket No. 367382).

[2] This prior order consolidated the two cases only for the purpose of deciding the two motions for summary disposition filed by defendants. However, the final order fully consolidated the two cases, decided the two motions collectively, and dismissed all remaining claims for both plaintiffs.

position needed to be filled by the presiding or senior judge of probate, the county clerk, and the prosecuting attorney, not the Genesee Circuit Court judges. In Count II, plaintiffs alleged that the Unnamed Body was a public body for purposes of the Open Meetings Act (OMA), MCL 15.261 *et seq.*, but that it had failed to follow the Act's requirements when selecting the clerk-register, such as holding meetings open to the public and providing notice to the public. Plaintiffs further alleged that the Unnamed Body's decision was invalidated by its failure to comply with the OMA. In Count III, plaintiffs reiterated the allegations in Count II and sought to compel compliance with the OMA. Finally, in Count IV of Bailey's complaint, he individually advanced a claim for the denial of his FOIA request, alleging that there was no justification for the denial.

In Ruggiero's case, the Unnamed Body moved for summary disposition pursuant to MCR 2.116(C)(5), (C)(8), and (C)(10); in Bailey's case, both defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The Unnamed Body argued that Ruggiero lacked standing because she was not a resident or taxpayer of Genesee County, did not have a personal stake in the outcome of the litigation, and did not suffer any injury. Accordingly, it argued that summary disposition was warranted under MCR 2.116(C)(5). Ruggiero did not dispute that she was not a resident, taxpayer, or registered voter within Genesee County. Instead, she countered that MCR 2.116(C)(5) was the wrong subrule because there was no evidence of any legal disability. Additionally, she argued that the OMA permitted any person to bring a cause of action, which made her status within Genesee County immaterial.

Regarding plaintiffs' Michigan Election Law claims, defendants argued that MCL 168.209(2) was inapplicable to filling the vacancy in the office of clerk-register because Const 1963, art 6, § 14, explicitly gives the judiciary the power to fill a vacancy in the office of county clerk. Given that the clerk-register position necessarily includes the office of county clerk, applying MCL 168.209(2) would violate Michigan's Separation of Powers Clause contained in Const 1963, art 3, § 2. Plaintiffs countered that the office of clerk-register was a new position created by the combination of the offices of county clerk and register of deeds. Accordingly, Genesee County no longer had a county clerk. Additionally, plaintiffs contended that there was no separation-of-powers issue because Const 1963, art 6, § 14—by utilizing the word "may" versus "shall"—merely enabled the Legislature to delegate the authority to judges to make appointments. According to plaintiffs, pursuant to MCL 168.209(1), the Legislature had done so *only* for the offices of county clerk and prosecuting attorney but no other offices.

Regarding plaintiffs' OMA claims, defendants argued that the OMA could not be applied to the Unnamed Body because doing so would violate the Separation of Powers Clause of the Michigan Constitution. Const 1963, art 3, § 2. Similar to its other arguments, defendants reasoned that because Const 1963, art 6, § 14, gives the judiciary the authority to fill vacancies in the office of county clerk, the OMA could not apply to the Unnamed Body because this would constitute legislative interference with the judiciary. Moreover, defendants contended that the Unnamed Body was not a public body for purposes of the OMA. Plaintiffs countered that the precedent defendants relied on in support of their separation of powers argument was both nonbinding and distinguishable. Additionally, plaintiffs argued that the Unnamed Body was a public body for purposes of the OMA.

Regarding Bailey's FOIA claim, defendants contended that the Unnamed Body was not a public body for purposes of the FOIA because the FOIA explicitly excluded the judiciary from the

definition of a public body. Although Bailey acknowledged that the judiciary, the office of county clerk in its capacity as clerk of the circuit court, and its employees working in their official capacities are exempt under the FOIA, Bailey countered that his FOIA request had been submitted to Genesee County, not to the judiciary, the county clerk as clerk of the court, or any of their employees. Bailey believed that Genesee County had the requested records in its possession regardless of whether the judges of the Genesee Circuit Court also had the records in their possession. Bailey argued that public records are not exempt merely because they may have been handled by the judiciary; if those same records were also available through Genesee County, the records were subject to the FOIA. Additionally, Bailey submitted an affidavit from his counsel proffering that defendants—specifically Genesee County officials and representatives—possessed the requested information, that defendants had unlawfully withheld this information, that summary disposition on this claim was premature, and that further discovery was required to demonstrate this to the trial court.

Before its final order granting summary disposition in its entirety and dismissing plaintiffs' claims, the trial court issued a decision on May 8, 2023, addressing only the Unnamed Body's standing argument against Ruggiero. The trial court determined that although the OMA gave Ruggiero a statutory right to sue, the Michigan Election Law did not. The court also determined that Ruggiero did not have an interest or right distinct from the public at large. Accordingly, the court granted summary disposition in part under MCR 2.116(C)(5) for Counts I and II of Ruggiero's complaint. In its August, 7, 2023 final order, the trial court granted defendants' motions for summary disposition under MCR 2.116(C)(10) and dismissed the remainder of plaintiffs' claims. Regarding the remaining Michigan Election Law claims, the trial court determined that the Michigan Constitution controlled over MCL 168.209(2). Analogizing prior Michigan Supreme Court precedent, the court determined that the clerk-register did not intermingle the two offices of county clerk and register of deeds; rather, each office remained separate with one person executing the duties of each office. Accordingly, the Unnamed Body had validly exercised its authority pursuant to Const 1963, art 6, § 14, and MCL 168.209(1) to fill the vacancy.

Regarding the remaining OMA claims, the court determined that because Const 1963, art 6, § 14, gave the judiciary the authority to fill vacancies in the office of county clerk, the OMA could not apply to the judicial body convened under that constitutional provision unless there was explicit constitutional authorization. Given that no such authorization existed, applying the OMA to the Unnamed Body would violate the Separation of Powers Clause. Finally, regarding Bailey's FOIA claim, the court determined that the FOIA explicitly excluded the judiciary. Additionally, for the same reasons as with the OMA, the court determined that applying the FOIA to the Unnamed Body convened under Const 1963, art 6, § 14, would violate the Separation of Powers Clause. The court also rejected Bailey's argument that summary disposition was premature, reasoning that Bailey could not merely assert that he might find evidence through a "fishing expedition." The court explained that plaintiff had failed to identify any office or person that may hold the requested information, any potential witness, or any specific item that could be obtained through discovery that would provide the evidence. The court determined that, at best, Bailey had alleged that the clerk-register had at one point possessed the requested information before convening the Unnamed Body. The court determined this to be insufficient to show a genuine issue of material fact because the clerk-register would have been working to assist the Genesee Circuit Court in convening the Unnamed Body. Plaintiffs now appeal.

II. DISCUSSION

A. STANDARDS OF REVIEW

We review de novo issues involving standing, *In re Knight*, 333 Mich App 681, 686; 963 NW2d 676 (2020), summary disposition, the construction and application of court rules, *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010), and the Michigan Constitution, *LeFever v Matthews*, 336 Mich App 651, 661; 971 NW2d 672 (2021). Furthermore, "[w]e review for clear error the trial court's factual findings underlying its application of the FOIA," *Mich Open Carry, Inc v Dep't of State Police*, 330 Mich App 614, 625; 950 NW2d 484 (2019), and clear error occurs "when the appellate court 'is left with the definite and firm conviction that a mistake has been made,' " *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471; 719 NW2d 19 (2006) (citation omitted).

A motion is properly granted pursuant to MCR 2.116(C)(5) when "[t]he party asserting the claim lacks the legal capacity to sue." When reviewing such a motion, "this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 493; 815 NW2d 132 (2012) (quotation marks and citation omitted). A motion is properly granted pursuant to MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Dextrom*, 287 Mich App at 415. This Court "must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Id*. at 415-416.

Regarding the interpretation of the Michigan Constitution, our Supreme Court recently explained:

> When interpreting our Constitution, this Court's " 'primary objective . . . is to realize the intent of the people by whom and for whom the constitution was ratified.' " Accordingly, we seek "to determine the text's original meaning to the ratifiers, the people, at the time of ratification." To do so, we must consider " 'the circumstances leading to the adoption of the provision and the purpose sought to be accomplished.' " "To help discover the common understanding, this Court has observed that constitutional convention debates and the address to the people, though not controlling, are relevant." [*Mothering Justice v Attorney General*, ___ Mich ___, ___; ___ NW3d ___ (2024) (Docket No. 165325); slip op at 11 (citations omitted).]

Furthermore, "[a] constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it." *Citizens Protecting Mich's Constitution v Secretary of State*, 503 Mich 42, 61; 921 NW2d 247 (2018) (citation omitted).

This case also requires us to examine statutory provisions. "All matters of statutory interpretation begin with an examination of the language of the statute." *McQueer v Perfect Fence*

Co, 502 Mich 276, 286; 917 NW2d 584 (2018). If a statute is unambiguous, it "must be applied as written." *Id*. (quotation marks and citation omitted). This Court may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id*. (quotation marks and citation omitted). Furthermore, statutory language "cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme." *Id*. (quotation marks and citation omitted). In other words, a statute must be read as a whole. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Courts "give undefined statutory terms their plain and ordinary meanings." *Id*. The same principles of statutory interpretation and application apply to court rules. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

B. STANDING

Ruggiero argues that the trial court erred by partially granting summary disposition under MCR 2.116(C)(5) regarding Counts I and II of her complaint because the OMA explicitly gives Ruggiero standing to sue. She also contends that Subrule (C)(5) was the incorrect rule under which to grant summary disposition. We agree with Ruggiero that the OMA gave her standing to sue, but we disagree regarding Subrule (C)(5).

"In general, standing requires a party to have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." *In re Knight*, 333 Mich App at 688 (citation omitted). "At the trial court level, a litigant has standing whenever there is a legal cause of action." *Id*. at 687-688 (quotation marks and citation omitted). However, standing can exist even without a legal cause of action "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id*. at 688 (quotation marks and citation omitted).

MCL 15.270(1) of the OMA provides that "[t]he attorney general, the prosecuting attorney of the county in which the public body serves, *or any person* may commence a civil action in the circuit court *to challenge the validity of a decision of a public body* made in violation of this act." (Emphasis added.) Accordingly, the OMA confers a statutory right upon "any person" to challenge the validity of a public body's decision in violation of the OMA. Given the OMA's plain language, it was immaterial that Ruggiero may not have had a special injury, interest, or right. In Count II of her complaint, Ruggiero sought to invalidate the Unnamed Body's decision on the basis of its failure to comply with the OMA, and this was explicitly permitted under the OMA.

However, although the OMA confers a statutory right upon "any person," Ruggiero points to no similar provision in the Michigan Election Law. Indeed, Ruggiero appears to have conceded that there was no explicit statutory right for her to sue under the Michigan Election Law, as there is under the OMA. As for the remaining ways an individual may establish standing, there was no dispute that Ruggiero was not a resident of Genesee County and did not own real property there, and Ruggiero has failed to show any special injury, right, or interest that would be detrimentally

affected in a manner different from the public at large. She therefore lacked standing to sue under the Michigan Election Law.

Regarding Subrule (C)(5), this Court has consistently affirmed the grant of summary disposition due to lack of standing under this subrule. See, e.g., *UAW*, 295 Mich App at 493, 496-497 (affirming the grant of summary disposition under MCR 2.116(C)(5) on the basis of a lack of standing); *Kuhn v Secretary of State*, 228 Mich App 319, 332-334; 579 NW2d 101 (1998) (same). Ruggiero points to *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 502; 776 NW2d 387 (2009), in which we "note[d] that standing to sue and capacity to sue are two distinct concepts, which have been conflated by both plaintiff and defendant in this case." However, apart from this language, nothing else about *Flint Cold Storage* or the other caselaw provided by Ruggiero explicitly states that MCR 2.116(C)(5) cannot be used as a basis to grant summary disposition when a party lacks standing.

Ruggiero also fails to articulate what the correct court rule would be or how using the improper court rule had any effect on the proceedings. "An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims." *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015) (quotation marks and citation omitted). When "a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Id*. (quotation marks and citation omitted). See also *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996) ("A party may not leave it to this Court to search for authority to sustain or reject its position."). Therefore, while the trial court correctly dismissed Count I of Ruggiero's complaint involving the Michigan Election Law, the court erred by dismissing Count II involving OMA claims because the latter statute confers standing to sue on "any person."

C. CLERK-REGISTER

Bailey argues that the trial court erred by granting summary disposition under MCR 2.116(C)(10) regarding the Unnamed Body's filling of the clerk-register vacancy because MCL 168.209(2) controlled the filling of the vacancy. We disagree.

"The legislature *may* provide by law the cases in which any office shall be vacant and the manner of filling vacancies *where no provision is made in this constitution*." Const 1963, art 4, § 38 (emphasis added). Const 1963, art 6, § 14, which is at the heart of these appeals, provides:

> The clerk of each county organized for judicial purposes or other officer performing the duties of such office as provided in a county charter shall be clerk of the circuit court for such county. *The judges of the circuit court may fill a vacancy in an elective office of county clerk or prosecuting attorney within their respective jurisdictions*. [Emphasis added.]

Accordingly, the Michigan Constitution empowers the Legislature to decide how vacancies are to be filled, but only when "no provision" for the filling of vacancies appears in the Constitution. Here, Const 1963, art 6, § 14, explicitly provides the manner in which vacancies in the offices of county clerk and prosecuting attorney shall be filled. Therefore, the Legislature cannot abridge this power or specify another way for filling these vacancies.

Const 1963, art 7, § 4, sets a four-year term for the offices of county clerk and register of deeds; moreover, it allows for the offices of county clerk and register of deeds to be combined into "one office." Within the Michigan Election Law there are several provisions that deal with how a county may choose to join these two offices into the office of clerk-register. See, e.g., MCL 168.200. However, such provisions do not answer how *vacancies* in the clerk-register position are to be filled once the board of commissioners chooses to combine the two offices. The parties have presented no caselaw directly addressing this question. The trial court relied primarily on *MacDonald v De Waele*, 263 Mich 233; 248 NW 605 (1933).

In *MacDonald*, the plaintiff was elected to the office of county clerk, and defendant was elected to the office of register of deeds. *Id*. at 234. However, after the election the board of supervisors, acting pursuant to what was then "Section 3 of article 8 of our state Constitution," decided to unite the two offices into a single office, i.e., the clerk-register. *Id*. This constitutional provision was similar to today's Const 1963, art 7, § 4: "The board of supervisors in any county may unite the officers of county clerk and register of deeds in one office or separate the same at pleasure." *MacDonald*, 263 Mich at 234 (quotation marks omitted). After the defendant refused to vacate his position and turn over county property, the county clerk filed suit. *Id*. The defendant's argument was that the two offices could not be combined while each incumbent was still serving, but must wait until the defendant had served his full term of office. *Id*. at 235. Our Supreme Court agreed. See *id*. at 237.

In reaching this conclusion, the Court first noted that the Legislature had imposed various duties on the offices of county clerk and register of deeds. *Id*. at 235. The Court further noted that "[i]f such offices be united, the duties and powers imposed by the statute upon each of them *shall thereafter be performed by one person, who shall thereafter fill the office of county clerk and register of deeds of the county*." *Id*. (emphasis added). The Court subsequently stated that:

> [t]he qualified voters of the county elected the plaintiff county clerk and the defendant register of deeds. Their term of office is fixed by the Constitution at two years. *Their duties are in no way intermingled. When united, the person elected shall become county clerk and register of deeds, and as such may perform any duty imposed by law upon either official*. [*Id*. at 236 (emphasis added).]

The Court held that although the two offices could be separated, this would not take effect until the next election, explaining that if "the offices have been united, one person would be elected to the office of county clerk and register of deeds and, in case of separation, one person would be elected to each of such offices." *Id*. at 237.

MacDonald demonstrates that when the offices of county clerk and register of deeds are combined, neither office is abolished, and the duties of each office are not intermingled. Rather, the two offices and their respective duties remain, and a single individual simultaneously holds both offices and performs their respective duties. This means that when Genesee County chose in 2012 to combine the two offices, neither office was abolished; rather, the duties of each office were performed by Gleason until he resigned. Therefore, when Gleason did resign, there was a vacancy in *both* the offices of county clerk and register of deeds. Contrary to Bailey's assertions, the clerk-register position was not a *new* office that abolished the other two offices.

With this constitutional framework in mind, we can now examine the pertinent provisions of the Michigan Election Law. MCL 168.209(1) provides that "[i]f the vacancy is in the *office of county clerk* or prosecuting attorney, it shall be filled by appointment by the judge or judges of that judicial circuit." (Emphasis added.) For all other county offices, MCL 168.209(2) provides that such vacancies shall be filled by "the presiding or senior judge of probate, the county clerk, and the prosecuting attorney . . . ." Accordingly, MCL 168.209 denotes two different processes that are to be used when filling vacancies. The first applies only to the offices of county clerk and prosecuting attorney, and it mandates that vacancies in these offices are to be filled by the circuit court judge(s). This comports with Const 1963, art 6, § 14, which explicitly gives constitutional authority to the circuit courts to fill vacancies in these two offices. For all other county offices, the second statutory process applies. Once Gleason resigned, there was a vacancy in *both* the offices of county clerk *and* register of deeds. Accordingly, because the office of county clerk was vacant, Const 1963, art 6, § 14, applied and empowered the judges of the Genesee Circuit Court, i.e., the Unnamed Body, to fill the vacancy.

The office of clerk-register was not "any other county office," MCL 168.209(2); rather, it was an office that included the county clerk and warranted application of MCL 168.209(1). Therefore, Subsection (1) applied, not Subsection (2). To apply Subsection (2) would infringe upon powers conferred by the Michigan Constitution because it would give the power to fill vacancies in the office of county clerk to a body different from that specified in Const 1963, art 6, § 14. See *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 95; 811 NW2d 4 (2011) ("Regardless of whether the union is accurately construing these statutes, to the extent that they infringe on the judicial branch's inherent constitutional powers, they also succumb to the primacy of the Michigan Constitution."). The infringement on judicial authority to name the county clerk (or in this case the clerk-register) that would be involved in applying Subsection (2) is readily apparent considering that under the constitution the county clerk serves as clerk of the circuit court and is custodian of the court's records, among other duties. Bailey provides no constitutional provision analogous to Const 1963, art 6, § 14, that addresses how to fill the office of register of deeds. The Michigan Constitution only addresses vacancies in the office of county clerk and prosecuting attorney, which we presume was intentional. Applying Subsection (2) in this instance would deprive the judiciary of constitutionally delegated power to fill the office of county clerk.[3]

Bailey's argument rests largely on the presence of the permissive word "may" within Const 1963, art 6, § 14, but this argument relies on principles of statutory, rather than constitutional, interpretation. Regardless, for purposes of the issue presented in these appeals, we do not believe the use of the word "may" is dispositive. Whether the words "must," "shall," or "may" were used, Const 1963, art 6, § 14, explicitly gives the circuit court judges of the county the authority to fill vacancies in the offices of county clerk and prosecuting attorney, which the judges exercised in this case. The fact the word "may" was used does not mean the Legislature can infringe on constitutionally granted authority, even if that authority is permissive. The Legislature is

[3] It would also involve an impracticality in that the three-person body created under Subsection (2) to fill vacancies in "any other county office" includes the clerk as one of its members. In the event of a vacancy in the office of clerk-register the three-person body designated to fill vacancies under Subsection (2) would be reduced to two members, creating the possibility of an impasse.

empowered to establish the process to fill vacancies in certain offices, but this power applies only to offices "where no provision is made in this constitution." Const 1963, art 4, § 38. Here, Const 1963, art 6, § 14, *does* address the filling of vacancies in the office of county clerk. Therefore, the trial court correctly determined that the Unnamed Body was the proper body to fill the clerk-register vacancy. The court did not err by dismissing Bailey's Election Law claim.

D. OPEN MEETINGS ACT

Plaintiffs argue that the trial court erred by granting summary disposition under MCR 2.116(C)(10) regarding their OMA claims. Plaintiffs contend that the Unnamed Body was a public body for purposes of the OMA and that applying the OMA would not violate the Separation of Powers Clause because the judges were not performing a judicial function. We disagree with plaintiffs.

The Michigan Separation of Powers Clause provides: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. This "does not require so strict a separation as to provide no overlap of responsibilities and powers among the branches." *Carter v DTN Mgt Co*, ___ Mich ___, ___; ___ NW3d ___ (2024) (Docket No. 165425); slip op at 9 (quotation marks and citations omitted). Rather, branches may constitutionally share power "so long as the authority exercised by one branch of government is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other[.]" *Id*. (quotation marks and citations omitted; alteration in original). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Oakland Co v Michigan*, 325 Mich App 247, 260; 926 NW2d 11 (2018) (quotation marks and citation omitted).

Subject to limitations that do not apply in this case, the Michigan Constitution grants all judicial power to "one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house." Const 1963, art 6, § 1. As our Supreme Court stated long ago, "The primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto." *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959) (quotation marks and citation omitted). Similarly, "[t]he judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them." *Id*. (quotation marks and citation omitted). Furthermore, as our Supreme Court recently discussed:

> The 'judicial power' has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional

> issues; and the emphasis upon proscriptive as opposed to prescriptive decision making. [*Carter*, ___ Mich at ___; slip op at 10 (citation omitted).]

Moreover, "[t]hat the management of the employees of the judicial branch falls within the constitutional authority and responsibility of the judicial branch is well established," and this includes trial courts. *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 297, 299; 586 NW2d 894 (1998).

Under the OMA, "[a]ll meetings of a public body must be open to the public and must be held in a place available to the general public." MCL 15.263(1). A "public body" is defined in pertinent part to be "any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function . . . ." MCL 15.262(a). The parties have presented no caselaw directly addressing whether the OMA may be applied to the body of circuit court judges who fill a vacancy in the office of clerk or clerk-register pursuant to Const 1963, art 6, § 14. The trial court relied primarily on *In re 1976 PA 267*, 400 Mich 660; 255 NW2d 635 (1977).

In that case, our Supreme Court opined that 1976 PA 267 was "an impermissible intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers." *Id*. at 663. That public act sought to extend the OMA "to a court while exercising rule-making authority and while deliberating or deciding upon the issuance of administrative orders." *Id*. at 662 (quotation marks and citation omitted). The Court opined that this violated the Separation of Powers Clause. See *id*. at 662-663. Generally, "[t]his Court is bound to follow the precedent of the Supreme Court." *Maier v Maier*, 311 Mich App 218, 222-223; 874 NW2d 725 (2015). However, *In re 1976 PA 267* was not a binding decision. There was no case in controversy nor were there parties before the Court; the Court issued a letter addressed to various political figures, including the Governor of Michigan and the Speaker of the House of Representatives, which was signed by all seven justices. See *In re 1976 PA 267*, 400 Mich at 660-661, 664. The letter concluded: "It is our opinion that 1976 PA 267 is an impermissible intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers." *Id*. at 663.

In addition to issuing binding opinions, our Supreme Court is empowered to issue advisory opinions on statutes: "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law *but before its effective date*." Const 1963, art 3, § 8 (emphasis added). "As suggested by the 'important questions of law' requirement, the request for an advisory opinion must 'particularize any claims of unconstitutionality.' " *Request for Advisory Opinion on Constitutionality of 1975 PA 227*, 395 Mich 148, 149; 235 NW2d 321 (1975). Advisory opinions are not binding but only hold potential persuasive value. *AFT Mich v Michigan*, 303 Mich App 651, 668; 846 NW2d 583 (2014), aff'd 497 Mich 197 (2015).

In re 1976 PA 267 was not an advisory opinion. The letter was issued on July 18, 1977, after 1976 PA 267 became effective on March 31, 1977. Furthermore, the letter was issued *sua sponte*, not at the request of the Governor or either house of the legislature. Therefore, because

the letter was issued after the effective date of the statute, and not at the request of the political branches, it could not have been an advisory opinion under Const 1963, art 3, § 8.

Plaintiffs have continued to rely on *Menominee Co Taxpayers Alliance, Inc v Menominee Co Clerk*, 139 Mich App 814; 362 NW2d 871 (1984), overruled in part on other grounds by *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014).[4] In that case, this Court held "that the county prosecutor, county clerk, and senior probate judge constitute a 'public body' for purposes of the Open Meetings Act when those individuals come together pursuant to MCL 168.209(2) . . . for the purpose of filling a vacancy in a county office." *Id*. at 819. This Court rejected the defendants' argument that this was merely "an *ad hoc, pro tem* group" and not "a 'legislative or governing body' " under the OMA. *Id*. at 818. This Court reasoned:

> We agree that defendants in their collective capacity are not a "legislative body". However, we disagree that they are not "a governing body". Under the statute creating them they are empowered, and in fact required, to perform a governmental function. What could be more obviously governmental than the appointment of a treasurer? [*Id*. at 818.]

Menominee Co did not involve MCL 168.209(1), it involved Subsection (2), which involves a different body fulfilling a different function. It involves the county prosecutor, county clerk, and "presiding or senior judge of probate" coming together to fill a vacancy in "any other county office," which would be any office other than prosecutor or clerk. *Menominee Co* is therefore distinguishable from this case, which necessarily involves filling the office of county clerk, and we are not bound to apply it here. Notably, the body created under MCL 168.209(2) is purely statutory. In contrast, the Constitution gives the circuit judge or judges the authority to fill a vacancy in the office of clerk. In addition, the probate judge is the sole judicial officer on a 3-person body assigned the authority to fill vacancies in a county office other than clerk or prosecutor. The mere presence of a probate judge on that body does not make it a judicial body, and the authority to fill vacancies in "other" county offices is not constitutionally or statutorily assigned to the judicial branch. These factors support our holding in *Menominee Co* that the body prescribed by MCL 168.209(2) is a "governing body" (not a purely judicial body) subject to the OMA.

The authority to fill a vacancy in the office of county clerk is, by contrast, a constitutionally derived power assigned to the circuit court judge or judges. That the drafters of our Constitution assigned this authority to the judge(s) of the circuit court is understandable in light of the fact that the county clerk is the clerk of the circuit court and the custodian of the court's records. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146 (2003). Indeed, the same section of the

[4] Published decisions of the Court of Appeals issued on or after November 1, 1990, are precedentially binding. MCR 7.215(J)(1). Although this Court is "not strictly required to follow uncontradicted opinions from this Court decided before November 1, 1990, . . . they are nevertheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018).

constitution that makes the county clerk the clerk of the circuit court gives the circuit judge(s) the authority to fill a vacancy in that office. Const 1963, art 6, § 14.

We therefore conclude that the naming of a new county clerk in the event of a vacancy in that office is a core judicial power. As our Supreme Court said in *In re 1976 PA 267*, "The judicial powers derived from the Constitution include rulemaking, supervisory and other administrative powers as well as traditional adjudicative ones. They have been exclusively entrusted to the judiciary by the Constitution and may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization." The naming of a new county clerk is an administrative power derived from the Constitution that has been exclusively entrusted to the judiciary. It may not, therefore, "be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization." Subjecting this process to the OMA would necessarily involve "encroachment . . . of one branch at the expense of another." *Carter*. We therefore hold that the Unnamed Body was not subject to the OMA.[5]

E. FREEDOM OF INFORMATION ACT

Bailey argues that the trial court erred by granting summary disposition under MCR 2.116(C)(10) regarding his FOIA claim. Bailey contends that he filed his FOIA request with Genesee County, not the Unnamed Body or the judiciary, which meant the exception for the judiciary did not apply. Bailey also maintains that he satisfied the requirements for alleging a FOIA violation. We agree.

Except when expressly exempted, "a person has a right to inspect, copy, or receive copies of [a] requested public record of [a] public body." MCL 15.233(1). Our "Legislature codified the FOIA to facilitate disclosure to the public of public records held by public bodies," and, "[t]o that end, the FOIA must be broadly interpreted to allow public access to the records held by public bodies." *Mich Open Carry, Inc*, 330 Mich App at 625 (quotation marks and citation omitted). A public body is defined in pertinent part to be a county, MCL 15.232(h)(*iii*), as well as

> [a]ny other body that is created by state or local authority or is primarily funded by or through state or local authority, *except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body*. [MCL 15.232(h)(*iv*) (emphasis added).]

[5] It is worth noting that of the 57 judicial circuits in our state, 24 have a single circuit court judge. In addition to the jurisprudential reasons why the OMA should not be applied to the Unnamed Body in this case, there would be serious practical difficulties associated with attempting to subject a lone Circuit judge to the requirements of the OMA. The judge's decisional process presumably occurs within the judge's own mind in that instance, which would make it impractical at the very least to apply the OMA in a substantial number of circuit courts when performing this function.

MCL 15.232(i) defines a "public record" to be "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created."

Here, we need not address whether the Unnamed Body was a public body for purposes of the FOIA or whether applying the FOIA to the Unnamed Body violates the Separation of Powers Clause. Bailey filed his FOIA request with Genesee County. It was addressed to the FOIA coordinator for Genesee County, and the FOIA defines a "FOIA coordinator" to be "[a]n individual designated by a public body in accordance with [MCL 15.236] to accept and process requests for public records under this act." MCL 15.232(f)(*ii*). Furthermore, the language within the request asked for "the letters of application/interest of ALL individuals who submitted same requesting consideration for appointment to the vacancy created by the retirement of the former Genesee County Clerk/[Register]." This language did not refer to the Genesee Circuit Court or any members of the judiciary. Additionally, in his complaint, Bailey alleged that "[o]ne or both Defendant(s)" had improperly withheld the requested information, which necessarily implicated Genesee County. The FOIA explicitly includes a county as a public body, MCL 15.232(h)(*iii*), which meant that Genesee County was subject to the FOIA. The exception of the judiciary was immaterial.

Defendants argue that because the Genesee Circuit Court handled the requested records, this exempted those records from disclosure. However, defendants show no language within the FOIA suggesting that if a public body *and* nonpublic body *both* possess requested records, the public body is able to withhold those records. Because defendants fail to cite any authority in support of this proposition, we consider this argument to be abandoned. See *Bill & Dena Brown Trust*, 312 Mich App at 695; *Magee*, 218 Mich App at 161. In contrast, MCL 15.232(i) shows that something becomes a public record from the moment it is created. There is no language suggesting that if another nonpublic body may have handled or possessed the same public record, that record does not need to be disclosed. Accordingly, it was immaterial whether the Unnamed Body or members of the Genesee Circuit Court handled or possessed the requested information; what mattered was whether Genesee County possessed the requested information. No separation-of-powers concerns were ever raised regarding Genesee County.

Furthermore, we agree with Bailey that the trial court erred by determining that he had not provided an adequate factual allegation that Genesee County was in actual possession or control of the requested information. "[T]he Legislature did not impose detailed or technical requirements as a precondition for granting the public access to information" but merely "required that any request be sufficiently descriptive to allow the public body to find public records containing the information sought." *Herald Co v Bay City*, 463 Mich 111, 121; 614 NW2d 873 (2000). There is no requirement for a party to "describe the specific public records to be disclosed." *Id*. So long as the FOIA request is sufficient to allow the public body to locate the requested information, the request is valid. *Id*. Furthermore, our Supreme Court long ago recognized the unequal playing field regarding FOIA requests. See *Evening News Ass'n v City of Troy*, 417 Mich 481, 514; 339 NW2d 431 (1983).

Additionally, if the trial court "determines a public record is not exempt from disclosure," the court "shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record." MCL 15.240(4). The

trial court's review is de novo, and the public body bears the burden of sustaining its denial. *Id*. See also *Woodman v Dep't of Corrections*, 511 Mich 427, 442; 999 NW2d 463 (2023), citing MCL 15.240(4) ("When a public body denies a FOIA request and the requesting party seeks to compel disclosure of a public record in a circuit court action under MCL 15.240(1)(b), *the public body bears the burden* of proving that its decision to withhold the records was justified under FOIA.") (emphasis added). Accordingly, once a party initiates a lawsuit in the circuit court against the public body based on a denial of a FOIA request, the burden is on the public body to show that the denial was proper. This is in keeping with the FOIA's purpose, which "is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Woodman*, 511 Mich at 441 (quotation marks and citation omitted). Disclosure is the default unless a statutorily designated reason provides otherwise. See *id*. at 441-442.

Here, Bailey submitted a valid FOIA request, which was denied, and Bailey sought relief in the trial court. Defendants never disputed Bailey's claims that he had requested information through the FOIA and that this request was denied. Accordingly, there was no other requirement for Bailey to satisfy. By alleging that the information was wrongfully withheld, Bailey necessarily alleged that defendants had possession of the requested information. Regardless, any doubt was alleviated by the affidavit of Bailey's counsel, who proffered that Genesee County officials and representatives "*have the originals and/or copies* of the letters of application/interest of the individuals who submitted same requesting consideration for appointment to be the Clerk-Register." By requiring further factual information, the trial court improperly shifted the burden from defendants to Bailey. Once Bailey showed that his FOIA request was denied, the burden shifted to defendants to show that the denial was proper. Therefore, the trial court erred by granting summary disposition on Bailey's FOIA claim.

III. CONCLUSION

In sum, while Ruggiero had standing under the OMA to pursue her claims against the Unnamed Body regarding compliance with that Act, she failed to show standing regarding her claims involving the Michigan Election Law. The Unnamed Body was the proper body to fill the vacancy in the office of clerk-register, thereby dispensing with Bailey's claims on this front. Furthermore, the Unnamed Body was not a public body for purposes of the OMA, and applying that Act to the Unnamed Body would violate the Separation of Powers Clause. Finally, Bailey's FOIA request was brought against Genesee County, which meant the exception of the judiciary from the FOIA was inapplicable. His complaint satisfied the requirements for bringing a FOIA action against Genesee County, thereby shifting the burden to Genesee County to show a valid reason for the denial.

We affirm the dismissal of Counts I, II, and III of both plaintiffs' complaints. We reverse the dismissal of Count IV of Bailey's complaint, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Kirsten Frank Kelly
/s/ James Robert Redford