STATE OF MICHIGAN

COURT OF APPEALS

In re FORFEITURE OF 2006 DODGE CHARGER.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

2006 DODGE CHARGER,

Defendant,

and

JOHN KNOELK,

Claimant-Appellant.

UNPUBLISHED
November 20, 2018

No. 343625
Wayne Circuit Court
LC No. 17-015863-CF

Before: M. J. KELLY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

In this public nuisance abatement and civil asset forfeiture action, claimant appeals by right the order of the trial court forfeiting his 2006 Dodge Charger to the Wayne County Sherriff's Office. Claimant contends on appeal that the judgment of nuisance abatement and forfeiture should be vacated because the trial court applied an incorrect burden of proof. We vacate and remand for application of the correct burden of proof.

We review a trial court's decision in a forfeiture proceeding for clear error. *In re Forfeiture of $180,975*, 478 Mich 444, 450; 734 NW2d 489 (2007). "A finding is clearly erroneous where, although there is evidence to support it, the reviewing court is firmly convinced that a mistake has been made." *Id*., citing *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). "Questions of statutory interpretation are questions of law that are reviewed de novo." *In re Forfeiture of Bail Bond*, 496 Mich 320, 325; 852 NW2d 747 (2014), citing *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004). " 'The applicable burden of proof presents a question of law that is reviewed de novo on appeal.' " *Griffin v Griffin*, 323 Mich

App 110, 118; 916 NW2d 292 (2018), quoting *Pierron v Pierron*, 282 Mich App 222, 243; 765 NW2d 345 (2009).

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493; 711 NW2d 795 (2006). " 'We read the statutory language in context and as a whole, considering the plain and ordinary meaning of every word.' " *O'Leary v O'Leary*, 321 Mich App 647, 648; 909 NW2d 518 (2017), quoting *Hamed v Wayne Co*, 490 Mich 1, 8; 803 NW2d 237 (2011). "If the statute's language is unambiguous, judicial construction is not permitted." *Sims v Verbrugge*, 322 Mich App 205, 210; 911 NW2d 233 (2017), citing *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004).

For the purposes of civil asset forfeiture, MCL 600.3801 governs what may be considered a nuisance to the public:

> Sec. 3801. (1) A building, vehicle, boat, aircraft, or place is a nuisance if 1 or more of the following apply:
>
> (a) It is used for the purpose of lewdness, assignation, prostitution, or gambling. [MCR 600.3801(1)(a).]

MCL 600.3805 authorizes abatement actions where nuisances exist:

> Sec. 3805. The attorney general, the prosecuting attorney or any resident of the county in which a nuisance described in section 3801 is located, or a city, village, or township attorney for the city, village, or township in which the nuisance is located may maintain an action for equitable relief in the name of the state of Michigan, on the relation of the attorney general, prosecuting attorney, resident, or city, village, or township attorney to abate the nuisance and to perpetually enjoin any person, or a servant, agent, or employee of the person, who owns, leases, conducts, or maintains the building, vehicle, boat, aircraft, or place from permitting or suffering the building, vehicle, boat, aircraft, or place owned, leased, conducted, or maintained by the person, or any other building, vehicle, boat, aircraft, or place conducted or maintained by the person to be used for any of the purposes or acts or by any of the persons described in section 3801. After an injunction is granted under this section it is binding on the defendant throughout this state.

Finally, MCL 600.3815 states the parameters for establishing that a nuisance exists and for entering the judgment that follows, in pertinent part:

> (4) In an action under this chapter, on finding that the plaintiff has satisfied the burden of proof and that the material allegations of the complaint are true, the court shall enter a judgment and order of abatement as provided in this chapter. However, if the plaintiff seeks abatement of a nuisance by forfeiture or sale of a vehicle, boat, aircraft, or other personal property, the plaintiff has the burden of proving by clear and convincing evidence that the vehicle, boat, aircraft, or

> property was used for or in furtherance of the activity or conduct that constituted the nuisance as described in section 3801. [MCL 600.3815(4).][1]

Based upon the plain and unambiguous language of the statute, there is no doubt that, in cases involving the forfeiture of a vehicle, MCL 600.3815(4) places the burden on prosecutors to show—*by clear and convincing evidence*—that the vehicle in question was used in furtherance of a nuisance. Despite the clear statutory language, however, the trial court applied a preponderance-of-the-evidence standard in determining that claimant's vehicle was forfeitable.[2]

The difference between the clear-and-convincing standard and the preponderance-of-the-evidence standard cannot be understated. The preponderance standard is a less exacting standard than clear and convincing evidence. *In re Martin*, 450 Mich 204, 229; 538 NW2d 399 (1995). Erroneous application of the preponderance standard over the clear and convincing evidence standard can "dramatically alter" the outcome of a case, and constitutes an error. *Griffin*, 323 Mich App at 123-124 n 8. Thus, the trial court's use of the preponderance standard was clearly erroneous, and claimant is entitled to vacation of the order and a remand to the trial court.

Vacated and remanded for application of the correct burden of proof. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Jane E. Markey

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[1] We note that the clear-and-convincing language of subsection (4) was added to the statute in 2015, becoming effective on January 18, 2016, well over a year before claimant allegedly engaged in the nuisance on July 24, 2017, or the prosecution filed its complaint on November 2, 2017. MCL 600.3815, as amended by 2015 PA 153.

[2] We note that neither the trial court nor the parties mentioned the applicable standard of review at the bench trial, and at the trial, the court simply found that "the People ha[d] met their burden as to the nuisance." In any event, it is well settled that "[a] court speaks through its written orders and judgments, not through its oral pronouncements." *Simcor Constr, Inc v Trupp*, 322 Mich App 508, 522; 912 NW2d 216 (2018) (quotation marks and citation omitted). And thus, there is no question in this case that the court applied the wrong burden of proof.