Michigan . Supreme Court .

MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

April 8, 1994 to July 27, 1994

WILLIAM F. HAGGERTY
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
MICHAEL F. CAVANAGH, East Lansing	1999
Associate Justices	
CHARLES L. LEVIN, Detroit	1997
JAMES H. BRICKLEY, Traverse City	1997
PATRICIA J. BOYLE, Detroit	1999
DOROTHY COMSTOCK RILEY, Grosse Pointe Farms	2001
ROBERT P. GRIFFIN, Traverse City	1995
CONRAD L. MALLETT, Jr., Detroit	1995

Commissioners

ALOYSIUS J. LYNCH, Chief Commissioner

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HARRY ZELIFF	LYNN K. RICHARDSON[2]
MARY C. SMITH	

State Court Administrator: MARILYN K. HALL, Lansing

Clerk: CORBIN R. DAVIS, Lansing
Crier: DAVID G. PALAZZOLO, Williamston
Reporter of Decisions: WILLIAM F. HAGGERTY, East Lansing

[1] From April 25, 1994.

[2] From June 1, 1994.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
MARTIN M. DOCTOROFF, Birmingham,	1999
Chief Judge Pro Tem	
WILLIAM B. MURPHY, East Grand Rapids,	1995
Judges	
DONALD E. HOLBROOK, Jr., Lansing,	1997
MICHAEL J. KELLY, Bloomfield Hills,	1995
BARBARA B. MacKENZIE, Petoskey,	1997
MYRON H. WAHLS, Detroit,	1999
HAROLD HOOD, Detroit,	1997
ROMAN S. GRIBBS, Detroit,	1995
JOHN H. SHEPHERD, Southfield,	1997
DAVID H. SAWYER, East Grand Rapids,	1999
ELIZABETH A. WEAVER, Glen Arbor,	1999
GARY R. McDONALD, Saginaw,	1995
THOMAS J. BRENNAN, Dearborn,	1995
MARK J. CAVANAGH, Rochester Hills,	1997
RICHARD ALLEN GRIFFIN, Traverse City,	1997
MARILYN J. KELLY, Bloomfield Hills,	1995
JANET T. NEFF, East Grand Rapids,	1995
MAUREEN PULTE REILLY, Grosse Pointe Park,	1997
KATHLEEN JANSEN, Mt. Clemens,	1995
E. THOMAS FITZGERALD, Owosso,	1997
MICHAEL J. CONNOR, Grosse Pointe Farms,	1997
CLIFFORD W. TAYLOR, East Lansing,	1999
MAURA D. CORRIGAN, Grosse Pointe Park,	1995
HELENE NITA WHITE, Detroit,	1999

Commissioners:

JOHN H. STENGER, Lansing
ALLAN S. FALK, Lansing
NELSON S. LEAVITT, East Lansing
GLEN M. BIS, Ann Arbor
CRYSTAL L. MILLER, Lansing
WILLIAM W. SIDWELL, Lansing
NEAL C. VILLHAUER, Lansing

Chief Clerk: ELLA WILLIAMS, Lansing

CIRCUIT JUDGES

	Term Expires January 1 of
1. HARVEY W. MOES, Hillsdale,	1997
2. ZOE S. BURKHOLZ, Benton Harbor,	1995
CASPER OTHELLO GRATHWOHL, Niles,	1999
JOHN T. HAMMOND, St. Joseph,	1999
RONALD J. TAYLOR, Benton Harbor,	1997
3. MARIANNE O. BATTANI, Grosse Pointe Woods,	1999
SUSAN D. BORMAN, Detroit,	1997
WILLIAM LEO CAHALAN, Grosse Ile,	1995
MICHAEL J. CALLAHAN, Belleville,	1997
JAMES R. CHYLINSKI, Grosse Pointe Woods,	1999
ROBERT J. COLOMBO, Jr., Grosse Pointe,	1995
ANDREA J. FERRARA, Grosse Pointe,	1995
SHARON TEVIS FINCH, Detroit,	1995
JOHN H. GILLIS, Jr., Grosse Pointe,	1997
WILLIAM J. GIOVAN, Grosse Pointe Park,	1997
PAMELA R. HARWOOD, Detroit,	1997
DIANE MARIE HATHAWAY, Grosse Pointe Park,	1999
RICHARD P. HATHAWAY, Grosse Pointe Park,	1997
JOHN H. HAUSNER, Grosse Pointe Park,	1995
DENISE PAGE HOOD, Detroit,	1999
J. PHILLIP JOURDAN, Plymouth,	1997
RICHARD C. KAUFMAN, Plymouth,	1999
JOHN R. KIRWAN, Northville,	1999
ARTHUR J. LOMBARD, Grosse Pointe Farms,	1995
KATHLEEN I. MACDONALD, Grosse Pointe Woods,	1999
CLAUDIA HOUSE MORCOM, Detroit,	1999
JOHN A. MURPHY, Detroit,	1999
SUSAN BIEKE NEILSON, Grosse Pointe Woods,	1997
ROLAND L. OLZARK, Grosse Pointe,	1997
JAMES J. RASHID, Northville,	1999
LOUIS F. SIMMONS, Jr., Detroit,	1999
MICHAEL L. STACEY, Detroit,	1995
JEANNE STEMPIEN, Northville,	1999
MARVIN R. STEMPIEN, Plymouth,	1997
CYNTHIA DIANE STEPHENS, Detroit,	1995
MICHAEL J. TALBOT, Grosse Pointe Farms,	1995
PAUL S. TERANES, Grosse Pointe,	1995
KAYE TERTZAG, Allen Park,	1995
EDWARD M. THOMAS, Detroit,	1997
SAMUEL A. TURNER, Detroit,	1997
4. EDWARD J. GRANT, Jackson,	1995

	Term Expires January 1 of
CHARLES A. NELSON, Jackson,	1995
ALEXANDER CHARLES PERLOS, Jackson,	1997
CHAD C. SCHMUCKER, Jackson,	1999
5. RICHARD M. SHUSTER, Hastings,	1997
6. ROBERT C. ANDERSON, Waterford,	1999
STEVEN N. ANDREWS, Bloomfield Hills,	1997
DAVID F. BRECK, Birmingham,	1995
JESSICA R. COOPER, Birmingham,	1999
HILDA R. GAGE, Bloomfield Hills,	1999
BARRY L. HOWARD, West Bloomfield,	1997
RICHARD D. KUHN, Waterford,	1999
DENISE LANGFORD-MORRIS, West Bloomfield,	1995
JOHN JAMES McDONALD, Farmington Hills,	1995
FRED M. MESTER, Bloomfield Hills,	1997
RUDY J. NICHOLS, Waterford,	1997
FRANCIS X. O'BRIEN, Royal Oak,	1995
GENE SCHNELZ, Walled Lake,	1997
EDWARD SOSNICK, Bloomfield Hills,	1995
ROBERT LEWIS TEMPLIN, Jr., Bloomfield Hills,	1997
DEBORAH G. TYNER, Franklin,	2001
7. DUNCAN M. BEAGLE, Flint,	1999
EARL E. BORRADAILE, Davison,	1995
DONALD R. FREEMAN, Flint,	1997
JUDITH A. FULLERTON, Flint,	1995
ROBERT M. RANSOM, Flushing,	1997
VALDEMAR LUTHER WASHINGTON, Flint,	1995
THOMAS C. YEOTIS, Flint,	1999
8. JAMES K. NICHOLS, Ionia,	1997
CHARLES W. SIMON, Jr., Edmore,	1999
9. JOHN F. FOLEY, Schoolcraft,	1999
J. RICHARDSON JOHNSON, Kalamazoo,	1995
RICHARD RYAN LAMB, Mattawan,	1995
PHILIP D. SCHAEFER, Kalamazoo,	1999
WILLIAM G. SCHMA, Kalamazoo,	1997
10. LEOPOLD P. BORRELLO, Saginaw,	1995
WILLIAM A. CRANE, Saginaw,	1999
LYNDA L. HEATHSCOTT, Saginaw,	1995
ROBERT L. KACZMAREK, Saginaw,	1997
PATRICK M. METER, Saginaw,	1999
11. CHARLES H. STARK, Munising,	1997
12. GARFIELD W. HOOD, Pelkie,	1997
13. THOMAS G. POWER, Traverse City,	1999
PHILIP E. RODGERS, Jr., Traverse City,	1997
14. R. MAX DANIELS, Muskegon,	1999
JAMES M. GRAVES, Jr., Muskegon,	1995
MICHAEL EUGENE KOBZA, Norton Shores,	1999
RONALD H. PANNUCCI, North Muskegon,	1997
15. MICHAEL H. CHERRY, Coldwater,	1997
16. JOHN B. BRUFF, Mt. Clemens,	1995
LIDO V. BUCCI, Utica,	1999
RAYMOND R. CASHEN, Roseville,	1999
MARY A. CHRZANOWSKI, Sterling Heights,	1999

	Term Expires January 1 of
PETER J. MACERONI, Washington,	1997
GEORGE E. MONTGOMERY, Warren,	1997
MICHAEL D. SCHWARTZ, Clinton Twp.,	1995
DEBORAH A. SERVITTO, Warren,	1997
GEORGE C. STEEH, III, Mt. Clemens,	1995
17. ROBERT A. BENSON, Grand Rapids,	1997
GEORGE S. BUTH, Grand Rapids,	1999
DONALD A. JOHNSTON, III, Grand Rapids,	1995
DENNIS C. KOLENDA, Rockford,	1995
DENNIS B. LEIBER, Grand Rapids,	1995
MICHAEL R. SMOLENSKI, Grand Rapids,	1997
H. DAVID SOET, Grand Rapids,	1999
18. LAWRENCE M. BIELAWSKI, Linwood,	1997
WILLIAM J. CAPRATHE, Bay City,	1999
EUGENE C. PENZIEN, Bay City,	1995
19. JAMES M. BATZER, Manistee,	1997
20. CALVIN L. BOSMAN, Grand Haven,	1999
WESLEY J. NYKAMP, Holland,	1997
EDWARD R. POST, Grand Haven,	1999
21. PAUL H. CHAMBERLAIN, Mt. Pleasant,	1999
22. WILLIAM F. AGER, Jr., Ann Arbor,	1995
PATRICK J. CONLIN, Ann Arbor,	1997
MELINDA MORRIS, Ann Arbor,	1995
DONALD E. SHELTON, Saline,	1997
KURTIS T. WILDER, Ann Arbor,	1999
23. J. RICHARD ERNST, Tawas City,	1997
24. DONALD A. TEEPLE, Sandusky,	1997
25. RAYMOND J. JASON, Marquette,	1997
EDWARD A. QUINNELL, Marquette,	1999
26. JOHN F. KOWALSKI, Alpena,	1997
JOSEPH P. SWALLOW, Alpena,	1999
27. ANTHONY A. MONTON, Pentwater,	1995
TERRENCE R. THOMAS, Newaygo,	1997
28. CHARLES D. CORWIN, Cadillac,	1997
29. JEFFREY L. MARTLEW, DeWitt,	1999
RANDY L. TAHVONEN, Elsie,	1997
30. THOMAS LEO BROWN, Lansing,	1999
WILLIAM E. COLLETTE, Lansing,	1997
JAMES R. GIDDINGS, Lansing,	1999
LAWRENCE M. GLAZER, Okemos,	1997
MICHAEL G. HARRISON, East Lansing,	1995
PETER D. HOUK, East Lansing,	1997
CAROLYN STELL, East Lansing,	1995
31. JAMES T. CORDEN, Port Huron,	1995
PETER E. DEEGAN, Port Huron,	1999
ERNEST F. OPPLIGER, Port Huron,	1997
32. ROY D. GOTHAM, Ironwood,	1997
33. RICHARD M. PAJTAS, Charlevoix,	1997
34. CARL L. HORN, Standish,	1997
MICHAEL J. MATUZAK, Roscommon,	1999
35. GERALD D. LOSTRACCO, Owosso,	1997
36. WILLIAM C. BUHL, Paw Paw,	1995

		Term Expires January 1 of
	MEYER WARSHAWSKY, South Haven,	1997
37.	ALLEN L. GARBRECHT, Battle Creek,	1999
	JAMES C. KINGSLEY, Albion,	1997
	STEPHEN B. MILLER, Battle Creek,	1999
	CONRAD J. SINDT, Homer,	1995
38.	MICHAEL W. LaBEAU, Monroe,	1995
	WILLIAM F. LaVOY, Monroe,	1999
	DANIEL L. SULLIVAN, Lambertville,	1997
39.	KENNETH B. GLASER, Jr., Adrian,	1995
	HARVEY A. KOSELKA, Adrian,	1997
40.	MARTIN E. CLEMENTS, Lapeer,	1997
	NICK O. HOLOWKA, Imlay City,	1999
41.	FRANCIS D. BROUILLETTE, Iron Mountain,	1999
	JOHN D. PAYANT, Kingsford,	1997
42.	THOMAS A. BEALE, Midland,	1995
	PAUL J. CLULO, Midland,	1997
43.	MICHAEL E. DODGE, Niles,	1999
44.	DANIEL A. BURRESS, Brighton,	1999
	STANLEY J. LATREILLE, Howell,	1995
45.	JAMES P. NOECKER, Sturgis,	1995
46.	ALTON T. DAVIS, Jr., Grayling,	1999
	WILLIAM A. PORTER, Gaylord,	1997
47.	STEPHEN T. DAVIS, Escanaba,	1995
48.	HARRY A. BEACH, Otsego,	1997
	GEORGE R. CORSIGLIA, Allegan,	1999
49.	LAWRENCE C. ROOT, Big Rapids,	1995
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	1995
51.	RICHARD I. COOPER, Ludington,	1997
52.	M. RICHARD KNOBLOCK, Port Austin,	1997
53.	ROBERT C. LIVO, Cheboygan,	1999
54.	PATRICK REED JOSLYN, Caro,	1995
55.	KURT N. HANSEN, Gladwin,	1997
56.	THOMAS S. EVELAND, Dimondale,	1995
	G. MICHAEL HOCKING, Charlotte,	1997

RECORDER'S COURT OF DETROIT

	Term Expires January 1 of
WENDY M. BAXTER,	1995
TERRANCE K. BOYLE,	1999
MARGIE R. BRAXTON,	1999
HELEN E. BROWN,	1997
JEFFREY G. COLLINS,	1997[1]
GEORGE W. CROCKETT, III,	1995
DAPHNE MEANS CURTIS,	1997
GERSHWIN ALLEN DRAIN,	1999
MAGGIE DRAKE,	1999
PRENTIS EDWARDS,	1995
ROBERT L. EVANS,	1999
GERALDINE BLEDSOE FORD,	1999
CYNTHIA GRAY HATHAWAY,	1995[2]
KAREN FORT HOOD,	1995
THOMAS EDWARD JACKSON,	1995
BEVERLEY ANNE JASPER,	1995
CLARICE JOBES,	1997[3]
VERA MASSEY JONES,	1997
DAVID P. KERWIN,	1999[4]
WILLIAM LUCAS,	1995
WARFIELD MOORE, Jr.,	1997
BRUCE U. MORROW,	1999
JOHN PATRICK O'BRIEN,	1995
DALTON A. ROBERSON,	1995
MICHAEL F. SAPALA,	1995
M. JOHN SHAMO,	1997
CRAIG S. STRONG,	1997
HARVEY F. TENNEN,	1997
ISIDORE B. TORRES,	1999
LEONARD TOWNSEND,	1999
ROBERT L. ZIOLKOWSKI,	1997

[1] From June 3, 1994.

[2] From May 2, 1994.

[3] Retired June 1, 1994.

[4] To May 2, 1994.

DISTRICT JUDGES

		Term Expires January 1 of
1.	PAUL E. BRAUNLICH, Monroe,	1997
	TERRENCE P. BRONSON, Monroe,	1995
	MARY PATRICIA COSTELLO, Monroe,	1999
2-1.	NATALIA M. KOSELKA, Adrian,	1999
	JAMES E. SHERIDAN, Adrian,	1997
2-2.	DONALD L. SANDERSON, Hillsdale,	1997
3A.	DAVID T. COYLE, Coldwater,	1997
3B.	WILLIAM L. McMANUS, Colon,	1997
	WILLIAM D. WELTY, Three Rivers,	1995
4.	PAUL E. DEATS, Edwardsburg,	1997
5.	HUGH W. BLACK, St. Joseph,	1997
	DANIEL R. DEJA, Baroda,	1999
	JOHN N. FIELDS, Niles,	1999
	DAVID M. PETERSON, St. Joseph,	1997
	LYNDA ALENE TOLEN, Stevensville,	1995
7.	DAVID C. GRIER, South Haven,	1999
	WARD S. HAMLIN, Jr., South Haven,	1997
8.	KENNETH E. LONG, Kalamazoo,	1997
	VINCENT C. WESTRA, Kalamazoo,	1999
9-1.	QUINN E. BENSON, Kalamazoo,	1997
	JAMES P. COYLE, Kalamazoo,	1995
	ANN L. HANNON, Kalamazoo,	1999
	DONALD E. JAMES, Kalamazoo,	1999[1]
9-2.	ROBERT C. KROPF, Portage,	1997
10.	SAMUEL I. DURHAM, Jr., Battle Creek,	1999
	JOHN ROBERT HOLMES, Battle Creek,	1995
	FRANKLIN K. LINE, Jr., Marshall,	1997
	MARVIN RATNER, Battle Creek,	1997
12.	CHARLES J. FALAHEE, Jr., Jackson,	1997
	LYSLE G. HALL, Jackson,	1999
	JAMES M. JUSTIN, Jackson,	1995
	CARLENE G. WALZ, Clarklake,	1997
14A.	KENNETH BRONSON, Ann Arbor,	1999
	KARL VOORHIES FINK, Dexter,	1997
	BETTY R. WIDGEON, Ypsilanti,	1995
14B.	JOHN B. COLLINS, Ypsilanti,	1997
15.	TIMOTHY P. CONNERS, Ann Arbor,	1995
	ANN E. MATTSON, Ann Arbor,	1995
	ELIZABETH O. POLLARD, Ann Arbor,	1999
16.	ROBERT B. BRZEZINSKI, Livonia,	1997
	JAMES R. McCANN, Livonia,	1995

[1] Retired July 1, 1994.

		Term Expires January 1 of
17.	KAREN KHALIL, Redford,	1999
	RICHARD EDMUND MANNING, Redford Twp.,	1997[2]
18.	C. CHARLES BOKOS, Westland,	1997
	GAIL McKNIGHT, Westland,	1995
19.	WILLIAM C. HULTGREN, Dearborn,	1999
	WILLIAM J. RUNCO, Dearborn,	1997
	VIRGINIA A. SOBOTKA, Dearborn,	1995
20.	GREGORY D. BILL, Dearborn Heights,	1995
	LEO K. FORAN, Dearborn Heights,	1995
21.	RICHARD L. HAMMER, Jr., Garden City,	1997
22.	SYLVIA A. JAMES, Inkster,	1995
23.	ANTHONY NICITA, Taylor,	1995
	WILLIAM J. SUTHERLAND, Taylor,	1997
24.	MICHAEL T. RUSSELL, Allen Park,	1997
	GERARD TRUDEL, Allen Park,	1999
25.	DAVID A. BAJOREK, Lincoln Park,	1997
	JOSEPH H. DeLAURENTIIS, Lincoln Park,	1999
26-1.	RAYMOND A. CHARRON, River Rouge,	1997
26-2.	MICHAEL F. CIUNGAN, Ecorse,	1997
27-1.	LAWRENCE L. EMMERT, Wyandotte,	1995
27-2.	GLENN C. VALASCO, Riverview,	1997
28.	JAMES A. KANDREVAS, Southgate,	1997
29.	CAROLYN A. ARCHBOLD, Wayne,	1995
30.	WILLIAM F. BLEDSOE, Highland Park,	1997
	L. KIM HOAGLAND, Highland Park,	1999
31.	PATRICK T. CAHILL, Hamtramck,	1995
	PAUL J. PARUK, Hamtramck,	1997
32A.	ROGER J. La ROSE, Harper Woods,	1997
33.	KURT G. KERSTEN, Trenton,	1997
	DONALD L. SWANK, Trenton,	1999
34.	FELIX F. ROGALLE, Belleville,	1995
	WILLIAM JOHN SZLINIS, Belleville,	1997
	HENRY ZABOROWSKI, Belleville,	1999
35.	JAMES N. GARBER, Plymouth,	1995
	JOHN E. MacDONALD, Northville,	1997
36.	ALEX J. ALLEN, Jr., Detroit,	1999
	MARYLIN E. ATKINS, Detroit,	1995
	TRUDY DunCOMBE ARCHER, Detroit,	1995
	JOSEPH N. BALTIMORE, Detroit,	1997
	NANCY McCAUGHAN BLOUNT, Detroit,	1997
	DAVID MARTIN BRADFIELD, Detroit,	1997
	GERALD BROCK, Detroit,	1999[3]
	DONALD COLEMAN, Detroit,	1995
	WENDY COOLEY, Detroit,	1997
	JOHN COZART, Jr., Detroit,	1995
	THERESA DOSS, Detroit,	1999
	NORMA Y. DOTSON, Detroit,	1997
	NANCY A. FARMER, Detroit,	1995
	CLAUDIA LAUCHIÉ GARTIN, Detroit,	1995
	JIMMYLEE GRAY, Detroit,	1997
	RUFUS GRIFFIN, Jr., Detroit,	1999

[2] Died May 29, 1994.

[3] Retired May 27, 1994.

		Term Expires January 1 of
	RICHARD B. HALLORAN, Jr., Detroit,	1997[4]
	WILLIAM J. HATHAWAY, Detroit,	1995
	PAULA G. HUMPHRIES, Detroit,	1999
	VANESA F. JONES-BRADLEY, Detroit,	1995
	NICK P. KRUST, Detroit,	1997
	DEBORAH L. LANGSTON, Detroit,	1995
	WILLIE G. LIPSCOMB, Jr., Detroit,	1997
	LEONIA LLOYD, Detroit,	1999
	MARION A. MOORE, Detroit,	1999
	ELBERT E. NANCE, Jr., Detroit,	1999
	JEANETTE O'BANNER-OWENS, Detroit,	1997
	JOHN R. PERRY, Detroit,	1999
	C. LORENE ROYSTER, Detroit,	1995
	CHRIS E. STITH, Detroit,	1995
	VESTA SVENSON, Detroit,	1997
	MARY MANDANA WATERSTONE, Detroit,	1999
37.	SHERMAN P. FAUNCE, II, Warren,	1997
	DAWNN M. GRUENBURG, Warren,	1999
	WALTER A. JAKUBOWSKI, Jr., Warren,	1995
	THOMAS EDWARD KENNEDY, Warren,	1995
39.	MARY E. McDEVITT, Roseville,	1997
	MARK S. SWITALSKI, Roseville,	1999
	WILLIAM B. WARD, Roseville,	1995
40.	WILLIAM A. CROUCHMAN, St. Clair Shores,	1995
	CRAIGEN J. OSTER, St. Clair Shores,	1997
41A.	HERMAN C. CAMPBELL, Shelby Twp.,	1995
	ANDREW R. DRANCHAK, Shelby Twp.,	1997
	KENNETH J. KOSNIC, Sterling Heights,	1995
	THOMAS W. McDONELL, Macomb Twp.,	1999
41B.	WILLIAM H. CANNON, Clinton Twp.,	1995
	JOHN C. FOSTER, Mt. Clemens,	1999
	JAMES A. SCANDIRITO, Mt. Clemens,	1997
42-1.	RICHARD D. McLEAN, Romeo,	1997
42-2.	RICHARD E. CYRUL, New Baltimore,	1995
43.	JOSEPH S. AGNELLO, Madison Heights,	1995
	ROBERT J. TURNER, Ferndale,	1997
	DOUGLAS J. M. VOSS, Madison Heights,	1999
44.	TERRENCE H. BRENNAN, Royal Oak,	1997
	DANIEL SAWICKI, Royal Oak,	1995
45A.	WILLIAM R. SAUER, Berkley,	1997
45B.	MARVIN F. FRANKEL, Huntington Woods,	1997
	BENJAMIN J. FRIEDMAN, Huntington Woods,	1997
46.	STEPHEN C. COOPER, Southfield,	1999
	BRYAN HOWARD LEVY, Birmingham,	1997
	SUSAN M. MOISEEV, Southfield,	1995
47.	FREDERICK L. HARRIS, Farmington Hills,	1997
	MARLA E. PARKER, Farmington Hills,	1999
48.	EDWARD AVADENKA, West Bloomfield,	1999
	THOMAS W. BROOKOVER, Bloomfield Hills,	1997
	GUS CIFELLI, Bloomfield Hills,	1995

[4] From May 28, 1994.

		Term Expires January 1 of
50.	LEO BOWMAN, Pontiac,	1995
	CHRISTOPHER C. BROWN, Pontiac,	1997
	LOUIS E. FAIRBROTHER, Pontiac,	1999
	WILLIAM WATERMAN, Pontiac,	1997
51.	ROBERT W. CARR, Waterford,	1995
	KENNETH H. HEMPSTEAD, Waterford,	1997
52-1.	MICHAEL BATCHIK, White Lake,	1999
	HAROLD M. BULGARELLI, Walled Lake,	1995
	BRIAN W. MacKENZIE, Novi,	1997
52-2.	GERALD E. McNALLY, Clarkston,	1997
52-3.	RALPH H. NELSON, Rochester Hills,	1995
	JAMES P. SHEEHY, Rochester Hills,	1999
	ROBERT L. SHIPPER, Oxford,	1997
52-4.	WILLIAM E. BOLLE, Troy,	1997
	DENNIS C. DRURY, Troy,	1995
	MICHAEL A. MARTONE, Troy,	1999
53.	FRANK R. DEL VERO, Howell,	1999
	MICHAEL KAYE HEGARTY, Hartland,	1997
	A. JOHN PIKKARAINEN, Fowlerville,	1995
54A.	PATRICK F. CHERRY, Lansing,	1997
	JOHN W. DAVIS, Lansing,	1995
	CHARLES F. FILICE, Lansing,	1997
	PAULA J. MANDERFIELD, Lansing,	1999
	BEVERLEY NETTLES-NICKERSON, Lansing,	1999
	JAMES J. WOOD, Lansing,	1995
54B.	RICHARD D. BALL, East Lansing,	1999
	DAVID L. JORDON, East Lansing,	1995
55.	THOMAS E. BRENNAN, Jr., East Lansing,	1999
	PAMELA J. McCABE, East Lansing,	1997
56-1.	GARY R. HOLMAN, Hastings,	1995
56-2.	PAUL F. BERGER, Charlotte,	1997
	KENNETH A. HANSEN, Charlotte,	1999
57.	STEPHEN E. SHERIDAN, Saugatuck,	1995
	GARY A. STEWART, Plainwell,	1997
58.	SUSAN ALT JONAS, Spring Lake,	1995
	RICHARD J. KLOOTE, Jenison,	1995
	HANNES MEYERS, Jr., Holland,	1997
	KENNETH D. POST, Zeeland,	1999
59.	SHERWIN J. VENEMA, Grandville,	1999
60.	WILLIAM J. COLE, North Muskegon,	1999
	FREDRIC A. GRIMM, Jr., North Muskegon,	1997
	WILLIAM C. MARIETTI, North Muskegon,	1995
	RICHARD J. PASARELA, Muskegon,	1997
61.	PATRICK C. BOWLER, Grand Rapids,	1997
	J. MICHAEL CHRISTENSEN, Grand Rapids,	1999
	JOEL P. HOEKSTRA, Grand Rapids,	1997
	BEN H. LOGAN, II, Grand Rapids,	1995
	JANE E. MARKEY, Grand Rapids,	1999
	PAUL J. SULLIVAN, Grand Rapids,	1995
62A.	JACK R. JELSEMA, Wyoming,	1997
	RICHARD H. TIMMERS, Grandville,	1995
62B.	WILLIAM G. KELLY, Kentwood,	1997

		Term Expires January 1 of
63-1.	STEVEN R. SERVAAS, Rockford,	1997
63-2.	SARA J. SMOLENSKI, East Grand Rapids,	1997
64A.	DAVID A. HOORT, Portland,	1997
64B.	JOEL S. GEHRKE, Carson City,	1997
65-1.	JAMES B. MACKIE, Alma,	1997
65-2.	RICHARD D. WELLS, St. Johns,	1995
66.	GEORGE L. BeGOLE, Morrice,	1997
	BRUCE A. FOX, Corunna,	1995
67-1.	ARTHALU LANCASTER, Flint,	1997
67-2.	JOHN L. CONOVER, Davison,	1997
	GERALD D. SNODGRASS, Burton,	1999
67-3.	WILLIAM R. EVANS, Mt. Morris,	1997
67-4.	HARLAND R. CASWELL, Grand Blanc,	1995
	MARK C. McCABE, Fenton,	1995
68.	PETER ANASTOR, Flint,	1999
	MICHAEL D. McARA, Flint,	1997
	GEOFFREY L. NEITHERCUT, Flint,	1995
	NATHANIEL C. PERRY, III, Flint,	1997
	RAMONA M. ROBERTS, Flint,	1999
	KENNETH M. SIEGEL, Flint,	1995
70-1.	TERRY L. CLARK, Saginaw,	1995
	JOSEPH G. DeFRANCESCO, Saginaw,	1999
	HARRY M. TITUS, Saginaw,	1997
70-2.	CHRISTOPHER S. BOYD, Saginaw,	1999
	BRUCE J. SCORSONE, Saginaw,	1997
	KYLE HIGGS TARRANT, Saginaw,	1995
71A.	LAURA CHEGER BARNARD, Metamora,	1997
	JOHN T. CONNOLLY, Lapeer,	1995
71B.	KIM DAVID GLASPIE, Cass City,	1997
72.	RICHARD A. COOLEY, Jr., Port Huron,	1999
	JOHN G. CUMMINGS, St. Clair,	1997
	DANIEL J. KELLY, Fort Gratiot,	1995
73-1.	KARL E. KRAUS, Pigeon,	1997
73-2.	JAMES A. MARCUS, Applegate,	1997
74.	CRAIG D. ALSTON, Bay City,	1997
	JOHN C. LEAMING, Essexville,	1995
	SCOTT J. NEWCOMBE, Bay City,	1999
75.	ROBERT G. FRASER, Midland,	1997
	JAMES E. WILSON, Midland,	1999
76.	PETER D. O'CONNELL, Mt. Pleasant,	1997
77.	GEORGE VAN KULA, Big Rapids,	1997
78.	RICHARD J. FARABAUGH, Fremont,	1997
79.	JOHN R. CARNEY, Jr., Ludington,	1997
80.	GARY J. ALLEN, Gladwin,	1997
81.	EDWARD M. KELLER, Oscoda,	1997
82.	PAUL T. DWYER, Jr., Greenbush,	1997
83.	FRANCIS L. WALSH, Prudenville,	1997
84.	DAVID A. HOGG, Harrietta,	1997
85.	BRENT V. DANIELSON, Manistee,	1997
86.	RICHARD L. BENEDICT, Traverse City,	1997
	JAMES R. McCORMICK, Traverse City,	1995

		Term Expires January 1 of
87.	NORMAN R. HAYES, Gaylord,	1995
	PATRICIA A. MORSE, Gaylord,	1997
88.	THEODORE O. JOHNSON, Ossineke,	1997
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	1997
90.	HARVEY C. VARNUM, Boyne City,	1997
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	1997
92.	STEVEN E. FORD, Newberry,	1997
93.	BRUCE E. PLACKOWSKI, Manistique,	1997
94.	ROBERT J. DeGRAND, Gladstone,	1997
95A.	JEFFREY G. BARSTOW, Menominee,	1997
95B.	MICHAEL J. KUSZ, Iron Mountain,	1997
96.	JAMES M. COLLINS, Neguanee,	1997
	PATRICIA L. MICKLOW, Marquette,	1999
97.	PHILLIP L. KUKKONEN, Lake Linden,	1997
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	1997

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	Term Expires January 1 of
KIRSTEN FRANK, Grosse Pointe Park,	1998
STAN C. KAZUL, Grosse Pointe,	1996
LYNNE A. PIERCE, Grosse Pointe Woods,	1996
MATTHEW R. RUMORA, Grosse Pointe Farms,	1998
BENEDICT SEGESTA, Eastpointe,	1996
MARTIN J. SMITH, Eastpointe,	1996

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	JAMES H. COOK	1995
Alger	WILLIAM A. WERNER	1995
Allegan	GEORGE A. GREIG	1995
Alpena	DOUGLAS A. PUGH	1995
Antrim	JOHN W. UNGER	1995
Arenac	RONALD M. BERGERON	1995
Baraga	TIMOTHY S. BRENNAN	1995
Barry	RICHARD H. SHAW	1995
Bay	PAUL N. DONER	1995
Benzie	JOHN F. HUFT	1995
Berrien	STUART F. MEEK, Jr.	1997
Berrien	WILBUR SCHILLINGER	1995
Branch	FREDERICK L. WOOD	1995
Calhoun	JOHN M. BRUNDAGE	1995[1]
Calhoun	PHILLIP E. HARTER	1999
Cass	HERBERT E. PHILLIPSON, Jr.	1995
Cheboygan	JOANNA NEALE	1995
Chippewa	LOWELL R. ULRICH	1995
Clare/Gladwin	THOMAS P. McLAUGHLIN	1995
Clinton	MARVIN E. ROBERTSON	1995
Crawford	JOHN G. HUNTER	1995
Delta	ROBERT E. GOEBEL, Jr.	1995
Dickinson	ROBERT G. FOSTER	1995
Eaton	JAMES L. THEOPHELIS	1995
Emmet	FREDERICK R. MULHAUSER	1995
Genesee	THOMAS L. GADOLA	1999
Genesee	ALLEN J. NELSON	1997
Genesee	BRUCE A. NEWMAN	1995
Gogebic	JOEL L. MASSIE	1995
Grand Traverse	JOHN D. FORESMAN	1995
Gratiot	JACK T. ARNOLD	1995
Hillsdale	ALBERT J. NEUKOM	1995
Houghton	JOHN A. MIKKOLA	1995
Huron	DAVID L. CLABUESCH	1995
Ingham	R. GEORGE ECONOMY	1995
Ingham	DONALD S. OWENS	1997
Ionia	GERALD J. SUPINA	1995
Iosco	WILLIAM H. McCREADY	1995
Iron	C. JOSEPH SCHWEDLER	1995

[1] Retired June 30, 1994.

County		Term Expires January 1 of
Isabella	WILLIAM T. ERVIN	1995
Jackson	FREDERICK O. SILL	1999
Jackson	SUSAN E. VANDERCOOK	1995
Kalamazoo	JAMES S. CASEY	1997
Kalamazoo	DONALD R. HALSTEAD	1999
Kalamazoo	CAROLYN H. WILLIAMS	1995
Kalkaska	ODELL B. CARLISLE	1995
Kent	NANARUTH H. CARPENTER	1999
Kent	DONALD J. DeYOUNG	1995
Kent	JANET A. HAYNES	1997
Kent	JOHN P. STEKETEE	1995
Keweenaw	JAMES G. JAASKELAINEN	1995
Lake	MARK S. WICKENS	1995
Lapeer	CLAYTON E. PREISEL	1995
Leelanau	JOSEPH E. DEEGAN	1995
Lenawee	CHARLES WILLIAM JAMESON	1995
Livingston	SUSAN L. RECK	1995
Luce/Mackinac	THOMAS B. NORTH	1995
Macomb	THOMAS L. BULLER	1995
Macomb	JAMES F. NOWICKI	1997
Macomb	ANTONIO P. VIVIANO	1999
Manistee	JOHN R. DeVRIES	1995
Marquette	MICHAEL J. ANDEREGG	1995
Mason	FRANCIS K. BOURISSEAU	1995
Mecosta/Osceola	LaVAIL E. HULL	1995
Menominee	WILLIAM A. HUPY	1995
Midland	DONNA T. MORRIS	1995
Missaukee	FREDERICK S. KRUPP	1995
Monroe	JOSEPH ANTHONY COSTELLO, Jr.	1995
Monroe	PAMELA A. MOSKWA	1995
Montcalm	EDWARD L. SKINNER	1995
Montmorency	ROBERT P. M. NORDSTROM	1995
Muskegon	TOM H. LINCK	1995
Muskegon	NEIL G. MULLALLY	1999
Newaygo	THOMAS J. EGGLESTON	1995
Oakland	BARRY M. GRANT	1997
Oakland	EUGENE ARTHUR MOORE	1999
Oakland	SANDRA G. SILVER	1999
Oakland	JOAN E. YOUNG	1995
Oceana	WALTER A. URICK	1995
Ogemaw	EUGENE I. TURKELSON	1995
Ontonagon	JOSEPH D. ZELEZNIK	1995
Oscoda	KATHRYN JOAN ROOT	1995
Otsego	RICHARD J. LIEDEL	1995
Ottawa	MARK A. FEYEN	1995
Presque Isle	KENNETH A. RADZIBON	1995
Roscommon	MICHAEL J. BAUMGARTNER	1995
Saginaw	FAYE M. HARRISON	1997
Saginaw	EDMUND M. TROESTER	1995
St. Clair	JOHN R. MONAGHAN	1995
St. Clair	ROBERT R. SPILLARD	1997
St. Joseph	THOMAS E. SHUMAKER	1995

County		Term Expires January 1 of
Sanilac	GEORGE E. BENKO	1995
Shiawassee	JAMES R. CLATTERBAUGH	1995
Tuscola	W. WALLACE KENT, Jr.	1995
Van Buren	FRANK D. WILLIS	1995
Washtenaw	NANCY C. FRANCIS	1997
Washtenaw	JOHN N. KIRKENDALL	1995
Wayne	JUNE E. BLACKWELL-HATCHER	1995
Wayne	FREDDIE G. BURTON, Jr.	1995
Wayne	PATRICIA B. CAMPBELL	1999
Wayne	JAMES E. LACEY	1995
Wayne	MILTON L. MACK, Jr.	1999
Wayne	CATHIE B. MAHER	1999
Wayne	MARTIN T. MAHER	1997
Wayne	FRANCES PITTS	1997
Wayne	DAVID J. SZYMANSKI	1997
Wexford	WALTER F. RANSOM	1995[2]
Wexford	KENNETH L. TACOMA	1995[3]

[2] Died April 15, 1994.

[3] From May 23, 1994.

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Arenac	Standish	34
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	50
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	54
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Washtenaw	Ann Arbor	22
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ADMINISTRATIVE ORDER
No. 1994-4

RESOLUTION OF CONFLICTS IN COURT OF APPEALS DECISIONS

Entered April 27, 1994, effective May 1, 1994—REPORTER.

A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990. The prior published decision remains controlling authority unless reversed or modified by the Supreme Court or a special panel of the Court of Appeals as provided in this order. A panel which follows a prior published decision only because it is required to do so shall so indicate in the text of its opinion, citing this administrative order and providing a statement of wherein and why it disagrees with the prior published opinion.

When a panel of the Court of Appeals indicates in its opinion that it is following a prior published decision only because it is required to do so, the opinion in the case at bar shall be published in the official report of opinions of the Court of Appeals, and the Chief Judge of the Court of Appeals shall within 14 days after release of the opinion complete a poll of the judges of the Court of Appeals to ascertain whether a special panel of that Court, as described *infra,* should be convened to rehear the case for the purpose of resolving the conflict

which would have been created but for the provisions of this order. This procedure is to be invoked for outcome-determinative questions only. An order reflecting the result of the poll shall enter immediately thereafter and the order shall be published in the official report of opinions of the Court of Appeals.

If a majority of the judges of the Court of Appeals vote in favor of convening a special panel, an order to that effect shall be entered. If a majority of the judges of the Court of Appeals does not vote in favor of convening a special panel, an order to that effect shall be entered. The time limits for moving for rehearing or for filing an application for leave to appeal to the Supreme Court shall be calculated from the date of entry of the order declining to convene a special panel or, if a panel is convened, from the date of the release of the opinion of the special panel.

An order directing the convening of a special panel shall vacate the prior opinion in the case at bar. The parties shall be permitted to file supplemental briefs and shall be entitled to oral argument before the special panel.

A special panel convened pursuant to this administrative order shall consist of 7 judges of the Court of Appeals selected by lot, except that judges who participated in either the controlling decision or the decision in the case at bar may not be selected. The decision of the special panel shall be published and is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court.

When a poll of the judges of the Court of Appeals is taken pursuant to this order, the Chief

Clerk of the Court of Appeals shall notify the Clerk of the Supreme Court of the poll and shall provide a copy of the order reflecting the result of the poll.

This administrative order shall take effect on May 1, 1994, and shall remain in effect until April 30, 1996, or until the further order of this Court.

Administrative Order No. 1990-6 is rescinded, effective May 1, 1994.

ADMINISTRATIVE ORDER
No. 1994-5

PROBATE COURT FEE SCHEDULE

Entered June 6, 1994, effective July 1, 1994—REPORTER.

On order of the Court, the following fee schedule is adopted June 2, 1994, for use in probate court, to be effective July 1, 1994.

PROBATE COURT FEES

How to use this schedule: This schedule is divided into four sections:

(1) Proceedings by subject matter,
(2) Generally applicable procedures,
(3) Fees for copies, and
(4) Waiving fees.

Be familiar with the contents of the generally applicable procedures and waiving fees sections, as these may apply in any type of proceeding. In general, there is a $60.00 fee for filing papers (documents) which open a file and a $15.00 fee for filing additional papers. The fees for starting certain proceedings are increased on an annual time table set out at the end of this schedule. These fees are marked with an asterisk. Some parties do not have to pay filing fees. See *Waiving Fees* section.

PROCEEDINGS BY SUBJECT MATTER

DECEDENT ESTATES

Small Estate—generally $20,000 or less, MCL 700.101; MSA 27.5101	$60.00*
Small Estate—$5,000 or less, MCL 700.102; MSA 27.5102 (plus inventory fee)	$25.00

Petition to Determine Heirs (in pending case, even if in petition to commence proceedings)	$15.00
Petition for Commencement of Proceedings	$60.00*
—If the petition requests appointment of a temporary personal representative in addition to a personal representative or independent personal representative	$15.00
—Each other request at any time	$15.00
Petition to Reopen a Closed File	$60.00*
Claims (statement and proof)	$15.00
Disallowance of Claim	No Fee
Civil Action (summons and complaint)	$60.00*
Motions in Civil Actions, per document	$15.00
Inventory	
—No fee for filing	No Fee
—An inventory fee, set by MCL 600.871; MSA 27A.871 is due with the final account or within one year of commencement, whichever occurs first.	See RJA 871
Account (any type: annual, amended, final, interim, supplemental, including account with zero receipts and disbursements)	$15.00
Account with Assets less than $15.00 (If the fiduciary is or will be assembling assets, the fee should be suspended, rather than waived.)	No Fee or Suspended
Petition for Allowance of Account (if separate)	$15.00
Each Additional Petition, Motion, Objection or other Paper, no matter how titled, which requests relief or requires a hearing or ruling of the court, for instance:	$15.00
—Petition for Partial Distribution of Assets	

—Report of Sale of Real Estate, Petition for Confirmation
—Petition for Authority to Settle Wrongful Death Claim
—Petition for Supervision
—Report, Petition and Order for Continuing Pendency
—Petition for Removal of Personal Representative and Appointment of Successor
—Petition for Reinstatement of Personal Representative after Suspension

PROCEEDINGS INVOLVING TESTAMENTARY OR INTER VIVOS TRUSTS

Initiating a Proceeding Involving a Testamentary Trust (unless the trust proceeding is processed as part of a decedent estate)	$60.00*
Initiating a Proceeding Involving a Testamentary Trust (if processed as part of a decedent estate)	$15.00
Petition to Commence a Proceeding Relating to an Inter Vivos Trust	$60.00*
Registration of Trust	$25.00
Each Additional Petition, Motion, Objection or other Paper, no matter how titled, which requests relief or requires a hearing or ruling of the court, for instance:	$15.00

—Petition to Remove a Trustee and Appoint a Successor
—Petition to Review the Fees of a Trustee
—Petition to Require, Hear, and Settle Interim or Final Accounts
—Petition to Ascertain Beneficiaries
—Petition for Construction
—Petition for Instructions

CONSERVATORSHIP/GUARDIANSHIP OF ESTATE

Petition for Conservator/Protective Order (There are two fees if a conservator [$60.00*] and guardian [$50.00] are requested for the same person.)	$60.00*
Petition to Add Conservator or Protective Order (filed after Proceeding Opened)	$15.00
Petition for Preliminary Protective Order (special conservatorship—petition for conservator/protective order must be pending)	$15.00
Account (any type: annual, amended, final, interim, supplemental, including account with zero receipts and disbursements)	$15.00
Account with Assets less than $15.00 (If the fiduciary is or will be assembling assets, the fee should be suspended, rather than waived.)	No Fee or Suspended
Petition for Allowance of Account (if separate from account)	$15.00
Claims (statement and proof)	$15.00
Disallowance of Claim	No Fee
Civil Action (summons and complaint)	$60.00*
Motions in Civil Actions (per document)	$15.00
Motion to Release Restricted Funds of a Minor	No Fee
Any Petition if the subject of the proceeding (the Ward) is the Petitioner	No Fee
Each Additional Petition, Motion, Objection or other Paper, no matter how titled, which requests relief or requires a hearing or ruling of the court, for instance: —Petition for Successor or Special Conservator —Petition for Removal of Conservator —Proof of Sale of Real Estate, Petition to Confirm	$15.00

GUARDIANSHIPS (LEGALLY INCAPACITATED PERSONS AND MINORS)[1]

Petition for Full or Limited Guardianship (There are two fees if a conservator and guardian are requested for the same person.)	$50.00
Petition for Temporary Guardianship (whether filed with or after initial petition, petition for full appointment must be pending)	$15.00
Annual Report on Condition of Ward	No Fee
Any Subsequent Motion, Petition, Account or Claim where the Ward is the Petitioner	No Fee
Petitions by Court Appointed Attorney in Response to Guardianship Review	No Fee
Each Additional Petition, Motion, Objection or other Paper, no matter how titled, which requests relief or requires a hearing or ruling of the court, for instance: —Petition for Authority —Petition for Authority to Adopt (minor guardianship) —Petition for Modification or Termination	$15.00

ADOPTION PROCEEDINGS

Petition for Adoption	$60.00*
Motion for Immediate Confirmation	No Fee
Petition for Hearing to Identify Father	$15.00
Supplemental Petition to Terminate Rights of Non-Custodial Parent	$15.00

[1] MCL 600.880(3); MSA 27A.880(3), as amended by 1993 PA 189 states, in part, "[A] fee shall not be charged for commencing a proceeding in probate court pursuant to any provision of the mental health code . . . ." The statute is silent as to fees for matters other than commencement of proceedings. Until the statute is clarified, no fee should be charged after commencement except for matters affecting an estate which is derived from other than public sources, for example an inheritance or personal injury recovery.

Release of Information Concerning Adoption, see MCL 710.68(18); MSA 27.3178(555.68)(18)	cost up to $ 60.00
Declaration of Inability to Locate or Identify Father	No Fee
Petition of Adult to Rescind Adoption by Step-parent	$15.00
Petition to Determine if Consent is Being Arbitrarily or Capriciously Withheld	$15.00
Each Subsequent Petition, Motion, Objection, or Other Paper, no matter how titled, which requests relief or requires a hearing or ruling of the court	$15.00
PROCEEDINGS UNDER THE UNIFORM GIFT TO MINORS ACT	
Initial Petition for any Relief Under Uniform Gift to Minors Act	$60.00*
Each Additional Petition, Motion, Objection or other Paper, no matter how titled, which requests relief or requires a hearing or ruling of the court, for instance: —Petition to Remove Custodian and/or Appoint Successor Custodian —Petition for an Accounting	$15.00
OTHER SPECIFIC PROCEEDINGS[2]	
Entry of Order Changing Name (does not include a certified copy, $10.00)	$10.00
Petition for Emancipation	$60.00*
Petition to Open Safe Deposit Box	$10.00
Wills Filed for Safekeeping	$25.00
Civil Action, Summons and Complaint	$60.00*
Civil Action, Motion	$15.00
Performing a Marriage	$10.00
Secret Marriage License	$ 3.00

[2] There may be many different petitions, motions, objections or similar papers filed in any of the listed proceedings. There will be a fee of $15.00 per paper (document) filed.

Issuance of a Commission to Take Testimony	$ 7.00
Petition to Change Name (adult or minor)	$60.00*
Proceedings on Waiving Parental Consent (any filing)	No Fee
Proceedings on Infectious Disease (any filing)	No Fee
Proceedings on Substance Abuse (any filing)	No Fee
Petition for Settlement of Personal Injury Claim	$15.00
Petition to Establish Death of Victim of Accident or Disaster	$60.00*
Petition to Determine Heirs (in separate proceeding)	$60.00*
Acknowledgment of Paternity	No Fee
Petition for Leave to File Acknowledgment of Paternity	$60.00*

GENERALLY APPLICABLE PROCEDURES

Demand for Jury Trial (except Juvenile Division and mental health proceedings for which there is no fee)	$30.00
Motion to Change Venue	$15.00
Objection (for example to inventory, account, will, appointments)	$15.00
Answer, Brief, Response (distinguish from objections)	No Fee
Motion to Show Cause	$15.00
Motion to Recuse	$15.00
Amended Petition (any kind)	$15.00
Writ of Garnishment or Execution	$15.00
Petition for Temporary Restraining Order (main petition must be filed with or before this petition)	$15.00
Petition to Withdraw a Petition, if hearing required (no fee if no hearing)	$15.00
Motion for Rehearing (distinguish from a petition to reopen)	$15.00
Petition for Fees by Fiduciary (if separate from account)	$15.00

If More Than One Account is Filed at the Same Time	$15.00 per account
Petition for Attorney Fees (if separate from account)	$15.00
Petition for Instruction (after the case has been opened)	$15.00
Petition to Surcharge Fiduciary	$15.00
Petition for Removal of Fiduciary and Appointment of Successor	$15.00
Petition and Order for Reinstatement of Fiduciary after Suspension	$15.00
Petition for Appointment for Guardian ad Litem	$15.00
Single Account Filed by Temporary Personal Representative/Personal Representative for Same Accounting Period	$15.00
Petition to Allow Account (if separate from account)	$15.00
Appeals from Probate Court to Circuit Court or Court of Appeals	$25.00
Petition to Withdraw as Attorney (if hearing required)	$15.00
Petition to Allow Fees of Guardian ad Litem	$15.00
Petition and Order for Authority	$15.00
Annual Report on Condition of Ward	No Fee

CERTIFICATION OR EXEMPLIFICATION OF DOCUMENTS

Letter of Authority to Fiduciary or Fiduciary's Attorney (first copy only)	No Fee
Each Subsequent Letter of Authority, first page	$10.00
—Each additional page	$ 1.00
Order Changing Name	$10.00
Order of Adoption	$10.00
Order for Small Estate Assignment	$11.00
Acknowledgment of Paternity	$10.00

Order for Use of Funds, adult ward	$10.00
—if for minor	No Fee
Certified copies of Papers in Connection With Commitment Proceedings	No Fee
Certified copies of Papers in Proceedings for Determining Inheritance Tax	No Fee
Taking, Certifying, Sealing, and Forwarding Depositions	$ 5.00 plus $ 0.10 per folio
Each copy of deposition furnished	$ 0.03 per folio
Certified Copies of any Other Paper	
—First Page	$10.00
—Each Additional Page	$ 1.00

WAIVING FEES

No fees are charged in the following situations:

—There is no fee for proceedings for admission and commitment of persons under the mental health code, except for matters affecting an estate from other than public sources. See note 1.

—After filing of the initial petition, there are no $15.00 fees where the ward is the petitioner or moving party (guardianship and conservatorship).

—There are no fees where the petitioner or moving party is indigent or has an inability to pay. Procedures for determining indigency are appropriate for local administrative rule. See also form MC 20.

—Where the petitioner is the Attorney General, Department of Treasury, Department of Social Services, State Public Administrator, Administrator of Veterans Affairs, or a county governmental agency.

—Where the value of a small estate, not exceeding $5,000.00 is less than $500.00, the Court might consider waiving the $11.00 order fee.

—There may be other instances where the Court might exercise discretion to waive fees, for instance where the estate is small and has no income producing assets.

COMMENCEMENT FEE SCHEDULE

Present through 9/30/94	$60.00
10/1/94 through 9/30/95	$70.00
10/1/95 through 9/30/96	$80.00
10/1/96 through 9/30/97	$90.00
10/1/97 and after	$100.00

Administrative Order No. 1994-1 is rescinded effective July 1, 1994.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted June 7, 1994, effective September 1,1994—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 2.302. GENERAL RULES GOVERNING DISCOVERY.

(A) [Unchanged.]

(B) Scope of Discovery.

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2)-(4) [Unchanged.]

(C)-(H) [Unchanged.]

RULE 2.306. DEPOSITIONS ON ORAL EXAMINATION.

(A)-(C) [Unchanged.]

(D) Motion to Terminate or Limit Examination.

(1)-(3) [Unchanged.]

(4) A party who has a privilege regarding part or all of the testimony of a deponent must either assert the privilege at the deposition or lose the privilege as to that testimony for purposes of the action. A party who claims a privilege at a deposition may not at the trial offer the testimony of the deponent pertaining to the evidence objected to at the deposition. A party who asserts a privilege regarding medical information is subject to the provisions of MCR 2.314(B).

(E)-(G) [Unchanged.]

RULE 2.314. DISCOVERY OF MEDICAL INFORMATION CONCERNING PARTY.

(A) Scope of Rule.

(1) When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under these rules to the extent that

(a) the information is otherwise discoverable under MCR 2.302(B), and

(b) the party does not assert that the information is subject to a valid privilege.

(2) Medical information subject to discovery includes, but is not limited to, medical records in the possession or control of a physician, hospital, or other custodian, and medical knowledge discoverable by deposition or interrogatories.

(3) For purposes of this rule, medical information about a mental or physical condition of a party is within the control of the party, even if the

information is not in the party's immediate physical possession.

(B) Privilege; Assertion; Waiver; Effects.

(1) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(E) [Formerly (F), redesignated, but otherwise unchanged.]

Staff Comment: The June 7, 1994 amendments make several changes in the provisions of the discovery rules dealing with assertion of privileges.

The language of former MCR 2.302(B)(1)(b) is moved to the deposition rule as new MCR 2.306(D)(4), and a cross reference to MCR 2.314 is added.

Several changes are made in MCR 2.314, the rule regarding discovery of medical information. As amended, the rule would apply the preclusive effect of subrule (B)(1) to a party who asserts a privilege as to medical information in connection with depositions and interrogatories as well as to requests for production of documents. See *Gibson v Bronson Methodist Hosp,* 445 Mich 331 (1994).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Adopted May 2, 1994, effective October 1, 1994—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 4.003. REMOVAL OF ACTIONS FROM CIRCUIT COURT TO DISTRICT COURT.

(A) Removal to District Court.

(1) The circuit court may order an action removed to the district court pursuant to MCL 600.641; MSA 27A.641 on its own initiative or on motion of a party only if

(a) it appears that the damages sustained, without regard to questions of liability, ~~may~~ will be less than the jurisdictional limitation as to the amount in controversy applicable to the district court, and

(b) removal will expedite the trial and disposition of the action.

The court's findings under this subrule must be stated on the record or included in the order removing the action. No action will be removed after mediation unless the mediation panel has complied with MCR 2.403(K)(4).

(2) Regardless of the amount in controversy, the following claims may not be removed from the circuit court:

(a) claims for medical malpractice and other professional malpractice;

(b) claims for products liability;

(c) domestic relations actions that are governed by subchapter 3.200 of these rules;

(d) claims filed pursuant to the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.;* and

(e) federal civil rights claims.

(3) An action may be removed only to a district in which venue would have been proper. If venue would have been proper in more than one district within the circuit, the removal order shall designate the district to which the action is removed.

(B)-(D) Unchanged.

(E) Transfer to Circuit Court After Removal Prohibited. Except as provided in subrule (F), an ~~An~~ action removed to the district court under this rule may not be transferred to the circuit court on the ground that it appears the damages will ~~may~~ exceed the jurisdictional limitation of the district court.

(F) Resolution of Disputes Between Courts.

(1) If the chief district judge believes that a circuit judge has removed a case improperly, and the chief circuit judge agrees, the case shall be transferred to the circuit court from which it was improperly removed.

(2) If the chief district judge believes that a circuit judge has removed a case improperly, and is unable to resolve the issue with the chief circuit judge within 35 days, the chief district judge shall refer the matter to the state court administrator. Upon referral, the state court administrator shall assign a current or retired judge of the Court of Appeals to review the matter and determine whether the case has been properly removed. If it is determined that the case should not have been removed, the case shall be transferred to the circuit court from which it was improperly removed.

(3) The district court and the circuit court shall share equally the costs associated with resolution of any dispute that is referred to the state court administrator.

(4) There is no appeal from a decision reached pursuant to this subrule.

Staff Comment: The May 2, 1994, amendments, effective October 1, 1994, made several changes in the rule governing the removal of cases from circuit court to district court. An addition to subrule (A)(1) makes clear that an action may not be removed after mediation unless the mediation panel has complied with MCR 2.403(K)(4). Subrule (A)(2) is a new provision that lists numerous kinds of actions that may not be removed, regardless of the amount in controversy. Another new provision, subrule (F), establishes a procedure for resolving disputes that arise concerning the removal of a case.

Adopted May 2, 1994, effective July 1, 1994—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(E) [Unchanged.]

(F) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) [Unchanged.]

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,

(i) the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause,

(ii) the sentencing transcript, and

(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System.

(3) [Unchanged.]

Staff Comment: The May 2, 1994, amendment of subrule (F)(2)(a)(i), effective July 1, 1994, was based on a proposal from the Michigan

Judges Association. The amendment specifies that the court reporter shall not be directed to transcribe the jury voir dire unless certain conditions are met.

RULE 6.433. DOCUMENTS FOR POSTCONVICTION PROCEEDINGS; INDIGENT DEFENDANT.

(A)-(C) [Unchanged.]

(D) Transcript of Jury Voir Dire. The court shall not order the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause.

Staff Comment: The May 2, 1994, amendment, which added subrule (D), effective July 1, 1994, was based on a proposal from the Michigan Judges Association. The amendment specifies that the court shall not order the transcript of the jury voir dire unless certain conditions are met.

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 6.425(F)(2) or MCR 6.433, or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(J) [Unchanged.]

CAVANAGH, C.J., and LEVIN and MALLETT, JJ., dissent from the order adopting the rule changes.

Staff Comment: The May 2, 1994 amendment of subrule (B)(1)(a), effective July 1, 1994, was based on a proposal from the Michigan Judges Association. The amendment recognizes a change in Rule 6.433 regarding the transcribing of the jury voir dire.

AMENDMENTS OF MICHIGAN RULES OF EVIDENCE

Adopted June 24, 1994, effective immediately—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

(a) [Unchanged.]

(b) Other crimes, wrongs, or acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. If necessary to a determination of the admissibility

of the evidence under this rule, the defendant shall be required to state his theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Staff Comment: The June 24, 1994 amendment codifies *People v VanderVliet,* 444 Mich 52, 89 (1993).

A proposal to amend the rule further, and a somewhat related proposal in Administrative File 94-28 for a new MCR 6.201 governing discovery in criminal cases, *post,* pp 1229-1232 are being published for comment today.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

STATE OF THE JUDICIARY MESSAGE

THURSDAY, MAY 5, 1994
THE CAPITOL, LANSING, MICHIGAN
CHIEF JUSTICE MICHAEL F. CAVANAGH

It is a great honor to come here today to report to you on the state of Michigan's judicial branch. I first must thank you and your leadership for recognizing the importance of communication between the branches of government, and thus for summoning today's special session. I would like to extend my special appreciation to the Co-Clerks of the House, Mel DeStigter and David Evans, and to the Secretary of the Senate Willis Snow for their efforts with my staff in making this event possible.

In addition to the many legislators who are with us this morning, I also wish to acknowledge the representatives of the executive branch. Also present in the gallery are many of Michigan's trial judges, of whose hard work we are so proud, and officers of their associations. I am especially pleased to see some former Justices of the Supreme Court, including Chief Justice Thomas E. Brennan, Chief Justice John W. Fitzgerald, and Justice Theodore Souris. I also welcome former Chief Judge Robert J. Danhof of the Court of Appeals with whom I had the privilege of serving on that Court.

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* Reporter's Note: The annual State of the Judiciary address to the Legislature is prepared and delivered by the chief justice after consultation with the justices of the Supreme Court. The views expressed in the address, however, do not necessarily represent those of all the justices.

There is another person whom we should recognize today. At the end of 1994, our bench will lose one of Michigan's great public servants. For nearly forty years you have served Michigan as a Member of Congress, a United States Senator, and a Justice of the Michigan Supreme Court . . . you are the pride of Traverse City and Central Michigan University . . . Bob Griffin, your place is assured in the history of this state. My colleagues and I feel proud and privileged to have served with you.

Finally, as a point of personal privilege, I want to take this opportunity to recognize some people whose love and support I have enjoyed and who have in that way contributed to the judicial system in which I have been privileged to serve.

Last Saturday, April 30, marked the opening day of trout season. It also happened to be my twenty-eighth wedding anniversary. I wish to introduce the woman who has tolerated me—and the trout for all those years—my wife Patricia. As living evidence of the havoc we have wrought during our twenty-eight years of marriage, I would introduce our children: Jane Elizabeth, Michael, and Megan Kathleen. My big brother, Paul Cavanagh, retired after many years of service with the Department of Public Health Crippled Children's Division, is here with me, as he always has been. His wife Shirley and several of my nephews and nieces are here as well. Thanks to all of you for attending.

Twenty-five years ago, on May 1, 1969, Chief Justice Brennan came here to present the first State of the Judiciary address. As I read his address in the House Journal, I was struck by the changes we have seen in a quarter of a century.

In 1969, Chief Justice Brennan spoke enthusiastically of new developments which today are part

of the accepted *status quo.* He praised the Legislature for overcoming "many obstacles" in establishing the district court; he described a requirement of annual reports from judges regarding the status of cases; he spoke of new court rules to manage the discipline process for lawyers; he discussed the newly created Judicial Tenure Commission. Together, we have come a great distance.

We have far to go, however. Years from now, one of your children will stand in my place, directing a multimedia, interactive presentation on the State of the Judiciary, with holograms and sound effects. I wonder: How much will have changed by then? How much will be the same?

So let me tell you where we are today and where, with your assistance, we are headed.

My friends, those of us who serve as judges know that a court is a special place. Francis Bacon said that "The place of justice is a hallowed place." We wear robes as a sign of an authority that traces its roots to the Old Testament. But we also wear robes to remind us that the source of our authority is not within ourselves. It comes from the people, who briefly entrust it to our care.

And it is the people who breathe life into the courts. They do so through their belief that the courts can and do provide justice. Though we live in a skeptical age, the words "Equal Justice Under Law" are no idle phrase. Justice Thurgood Marshall had supporters and he had opponents, but when he died last year, no cynic was bold enough to doubt the sincerity of that judge's lifelong quest for justice for all Americans.

The people also invigorate the courts every day through the jury system. Juries are the clearest day-to-day illustration of the central defining principle of this great nation—the people *are* the government. Citizens don't just observe the courts;

as jurors they *are* the courts. They appear day after day, year after year, for minimal compensation, to provide extraordinary civic service. Jurors bring humanity, life itself, to the law.

Despite all of that, the Judiciary is often referred to as the third branch of government. Most of our work goes unnoticed by the media, since our primary focus is on the resolution of disputes between individual litigants, few of whom are among the rich and famous. But today, I'd like to tell you why, as we approach the year 2000, no branch can be the first branch of government, or the second, or the third.

One reason that the courts have been seen as the third branch is that our work takes place third in time. You make the laws; you establish the public institutions; you give definition and order to society. Only then do we implement and enforce the laws you have written.

Yet this task is certainly not third in importance. Though each of the three branches of government employs different procedures and is directly responsive to different interests, there exists a common goal.

You are legislators. Great controversies stir the public soul and you address them. You legislate. And so you have made decisions regarding school financing, regarding adoption, regarding malpractice law, regarding no-fault insurance, regarding the allocation of this state's financial resources. In the weeks and months to come, you will consider matters such as assisted suicide, reforms in the punishment and release of criminal offenders, and the manner in which custody and support problems are addressed by our Friend of the Court offices.

Yet during the same time, we in the Judiciary also have faced these challenges. The judges of this

state have made wrenching decisions concerning children and families, have addressed issues such as assisted suicide, have processed new malpractice cases and considered issues related to no-fault legislation, and have shepherded their own scarce financial resources. In the months ahead, we will face in different forms all the same great questions that you have seen.

Everyone here knows Tip O'Neill's aphorism, "All politics is local." I can tell you today that "all justice is individual."

The greatest controversies to reach our Supreme Court, even the most famous cases at the United States Supreme Court, are still, in the main, just disputes between individual human beings. You've seen Henry Fonda and José Ferrer in *Gideon's Trumpet.* Well, the question for the United States Supreme Court in *Gideon v Wainwright* was simply whether one poor man named Clarence Earl Gideon could be imprisoned by the State of Florida for five years without the opportunity to have a lawyer. In *Brown v Board of Education,* the United States Supreme Court was asked whether a little girl named Linda Brown had the right to enroll in an ordinary public school in Topeka, Kansas.

Here in Michigan, our courts do the same thing. We solve problems the old-fashioned way—one person at a time. A district judge searching for guilt or innocence, a probate judge wrestling with an adoption case, a circuit judge hearing a volatile domestic-relations matter—each is listening to an individual, and each will offer a real answer to a real problem.

At the Supreme Court, we do the same, whether in the context of a tax case like *Caterpillar,* or a school financing case like *Schmidt,* or even your

apportionment litigation. Each of these matters directly affects individual citizens.

As legislators, you hold hearings and gather information from all who wish to address you. You then enact legislation governing the whole citizenry, not individuals. Our problem-solving technique is the reverse. We decide individual cases, one by one. Our decisions are based on the record in the particular case before us, and only indirectly do our rulings apply to others.

Thus, while the Legislature and the Judiciary employ very different means, our functions are not opposed. Rather our roles are complementary, as we seek the same objective—justice.

When we recognize our fundamental sameness as servants of the people, we can perform our separate roles with purpose, and without acrimony. We can honor our differences, remembering why we are separate, and respecting—not resenting—our distinct authority.

We who have no power to appropriate do not and must not expect you to fund us without giving you a coherent explanation of our needs. And you, who have the exclusive power to enact laws, must understand that when the Judiciary construes a statute it is not seeking to infringe on your domain. When two parties propose different meanings for the language you have enacted, we cannot avoid the question, or send the litigants back to you for an answer. You completed your work when you passed the legislation. Our work is to locate your intended meaning in the context of a particular factual setting.

So when, inevitably, we sometimes disagree about the fiscal needs of the Judiciary, or when you find fault with the manner in which we have construed a statute, let our disagreements be phrased in language that respects both the neces-

sity of our separate roles and our sameness as servants of the people of Michigan. The rhetoric of the campaign trail—the battle of credit and blame—should have no place in the discourse between the branches of government.

My purpose in coming before you today is to emphasize that the branches of Michigan government must take specific steps to understand each other better, and to work more closely together. The Court understands, though, that we first must do all that we can, on our own, to make the courts a friendly and efficient environment for the resolution of disputes.

Last summer, the Court revised the court rules and ethical standards to assure that men and women of all races and social classes will be treated fairly, with courtesy and respect.

Earlier in 1993, the Court completed a sweeping revision of its domestic relations rules, so that divorces and child-custody matters can be handled swiftly and with as little pain as the difficult nature of these cases will allow.

Together with a Senate committee, we are reviewing how best to provide court interpreter services to persons who are not native speakers of English, as well as to the hearing impaired. This effort involves both persons who function as interpreters, and new technologies such as real-time computerized transcription.

We are also working with local courts to maximize compliance with the Americans with Disabilities Act, within the tight budgetary constraints found in so many localities.

Our Telecourt system provides quick and convenient answers for citizens who have questions about our legal system. These answers are delivered in Plain English—a new dialect we are trying to master—and they have helped lift the shroud of

mystery and confusion that too often surrounds the legal system.

Our State Court Administrator's Office remains active on countless fronts, working directly with our judges, and with a host of other private and public agencies, searching for ways to better serve the people of this state.

In all the nation, no organization is better than our Michigan Judicial Institute at providing continuing education for judges and court staff. We expect all court personnel to be helpful and well-informed, and the Judicial Institute is central to that objective.

We have begun an exciting and important dialogue with Michigan's tribal courts. Through the efforts of the State Court/Tribal Court Forum and in subsequent conversations, we and tribal officials are exploring further opportunities for cooperation with Michigan tribes.

The Attorney Discipline Board, Attorney Grievance Commission, and Board of Law Examiners each plays a critical role in helping Michigan lawyers maintain the highest ethical standards. With your help and with the help of the State Bar, we have doubled the commitment of funds used to protect the public from the small minority of lawyers who fail to honor their obligations to clients and the public.

We are also proud of the energy with which the whole judicial system monitors its own compliance with the high ethical standards that you and other Michigan citizens properly expect of us. In different ways, the State Court Administrator's Office and the Judicial Tenure Commission both oversee the performance of Michigan courts and judges, to assure prompt and fair treatment of litigants, witnesses, jurors, and everyone else who enters our courts.

Much of what the Court has been able to accomplish is due to the outstanding leadership and vision of the State Bar of Michigan. I want to extend a personal note of thanks to State Bar President Jon Muth, and to his predecessors with whom I have dealt in an atmosphere of cooperation and mutual respect. The State Bar of Michigan enjoys a national reputation that is second to none. This is directly attributable to the outstanding commitment and effort of its able Director, Mike Franck. Mike has announced his plan to retire as Executive Director, and we wish him all the best.

As our courts race toward the twenty-first century, we remain committed to a pattern of action, not reaction. You recall that the Legislature commissioned a report on the courts in the twenty-first century in 1990. Since that time, a number of our courts have been participating in pilot programs to share personnel and resources. We will continue to explore with you the structure of the court system and the division of work among the trial courts. And we will continue to use our authority to assign judges where they are needed, in order to facilitate the prompt delivery of justice.

Throughout this year and the next, the State Court Administrator's Office will be engaged in strategic planning. We are undertaking a thorough review of our own mission, and that of all Michigan courts. Without wavering in our commitment to a justice system that is fair, accessible, and effective, we will remain flexible and open to new *methods* of fulfilling that commitment.

We have done much on our own. However, there are a great many areas in which improvements can only come from joint efforts with you. Think about one example—Michigan's Friend of the Court system.

The successes are undeniable. Our child support guidelines have brought order and fairness to the process of determining support obligations.

Likewise, we have achieved remarkable success in the collection of child support payments from noncustodial parents. Indeed, during nearly every year that such statistics have been kept, Michigan has ranked first in the nation—both in total dollars collected and in collecting the highest percentage of the dollars that judges have ordered to be paid. Michigan Friend of the Court offices accomplish this feat while performing a host of other duties concerning visitation and custody enforcement—tasks required by statute here in Michigan.

Yet we have been listening at the same hearings as you. We have heard the complaints and the voices raised, urging new approaches—to aid both custodial and noncustodial parents, and most importantly, to protect the welfare of the children.

In the months to come, we must work together to locate better ways of responding to the needs of these citizens. We have an excellent system in Michigan, but we've been reminded that excellence remains at that level only through constant advancements. Together, let us institute those improvements.

We also need to work together on fair financing for all of Michigan's courts. We applaud you and we thank you for last year's efforts to commit court-generated revenue for court purposes. You have set a 31.5 percent floor for state support of local courts, and you have directed that needed funds be made available for the Court of Appeals, for the State Court Administrative Office, and to provide legal aid in civil matters for the poor. Your recent debates on this subject evidence your continued interest, and your desire to effect a more equitable funding structure.

Working closely with you on this issue, we continue to assess the proper balance for the sharing of costs between local and state funding sources. Decisions by local officials affect the caseload of a court, and so it may be sensible to maintain a link between local policies and the costs incurred locally. At the same time, all of Michigan's citizens have the right to receive *equal* justice. Adequate resources must be available to the courts of this state without regard to the community or county in which they sit.

This address is not an occasion for telling you how to finance Michigan courts. Rather, I wish to say that we have accomplished much together, and that we need to maintain the cooperative spirit that has allowed this progress.

As you think about court financing, remember your other experiences with difficult funding issues. This is not the first time that you have been asked to take a system of mixed state and local financing, balance the objective of statewide equality of opportunity against the sound desire for local control, and effect substantial reforms.

Think of your other recent accomplishments. It is said that there is nothing new under the sun. But you have created something entirely new in this House of Representatives—a joint leadership agreement. If Democratic and Republican legislators, formal opponents by definition, can share responsibility and authority, surely the legislative and judicial branches can tackle our common problems with grace and cooperation.

Let us remember these lessons as we continue our combined efforts on court financing.

A staple of speeches on the American court system is a passage in which the speaker recounts the shocking rise in court filings. You already

know the staggering numbers. You know that in 1990, our courts received 4.2 million cases generated by Michigan's 9.3 million citizens and 22,000 police personnel. You can do the arithmetic. It shows that Michigan courts disposed of over 2,000 cases every hour.

You also know that the tide continues to rise, and that every single case entering our system is of overwhelming importance to the individual citizens involved. Yet our resources have not—and, in truth, probably cannot—fully keep pace.

Each of you has heard also that our Court of Appeals judges have the heaviest appellate workload of any state court in the nation—that each judge of the Michigan Court of Appeals has a caseload that is more than double the average caseload of a judge at a comparable court.

In dealing with these realities, there are, again, measures that we can take alone. Working with the Court of Appeals, and aided by the State Bar's Task Force on the Appellate Courts, we have taken a number of steps to help that Court reduce its backlog. Additional panels have been created for the Court of Appeals, using both appellate and trial court judges, and they are hearing cases in several Michigan cities, even as we gather this morning.

But your help remains essential. In particular, your continued support will be needed for the Court of Appeals. At the Supreme Court, our most pressing need is to bring together in one place all our personnel and resources, presently scattered around Lansing in half a dozen state buildings and rented offices. To manage our system well into the twenty-first century, we need a single functional building. The State Bar has expressed its support and its commitment to this building effort, but legislative backing will also be crucial.

Understand what I am saying. I am not talking about the Legislature and the Judiciary working together just so that you can write more and bigger checks for us. The cooperation must precede and extend beyond the appropriation process.

What you do affects us every day. You decide what is a crime in this state, and what the penalty should be. You enact the statutes that form our civil law. These decisions are yours to make. But your actions send a ripple throughout state government.

We have all watched the budget for the Department of Corrections pass $1 billion per year, and keep right on going, with no sign of slowing down. Where do those prisoners come from? They come from the courts. Several times in recent years you have provided large percentage increases to the Department of Corrections while furnishing the courts with little or no additional resources. We are all part of one justice system—you cannot expect *more* police to arrest *more* criminals and fill *more* prison beds while passing through the same courts with the same amount of staff. It cannot happen.

Countless other legislative actions have added to the workload of the courts. Our trial courts must report more offenses to the Secretary of State, including some drug offenses that are unconnected to driving. When licensed professionals are convicted of certain crimes, we must transmit conviction records to the Department of Commerce. We must adjudicate drunk driving cases within a specified time frame. We must collect, process, and transmit secondary road patrol traffic ticket surcharges, crime victim assessments and restitution, Department of Public Health fees for acknowledgment of paternity, and forensic lab fees. We must transmit funds to the state for inclusion in certain

retirement funds. We must facilitate the entry of probation conditions on the police computer network, and the correction of these records when the conditions are removed. Our Friends of the Court are now required to be much more involved in the mechanics of collecting child support, even when the noncustodial parent is already meeting his or her obligations. And many new offenses and new causes of action are being litigated in our courts.

I am not here today to tell you that you have acted unwisely in *any* of these matters. However, I am here to remind you that the three branches form one government. If the courts of this state are to keep pace, then we must be provided with resources and personnel for the increased tasks. Our only alternative is to make the difficult determination of which present court services to discontinue.

As a further illustration, remember Governor Engler's State of the State address. He reported that six new prisons and two new camps have opened, and that 28,000 outstanding felony warrants will be served. He also pledged that 270 new troopers will be patrolling the state, and that more criminals will spend more time in prison through abolition of parole and of disciplinary credits for certain offenders.

These are policy decisions for you and the Governor. Some of these recommendations have already come before you, and some remain for your consideration. As you decide whether to embrace these measures, remember that the full cost is not reflected in the budget lines for the agencies directly affected. Each of these changes will affect the court system. We will continue to cooperate with the Legislature and the Governor in their efforts to reduce crime and make Michigan safer. And we will continue to advise you of the cost of

this effort to the judicial branch, so that you can support *our* part of the effort, as well.

Last summer, Michigan had the opportunity to participate in the National Conference on the Crisis in America's System of Justice. The conference had several themes, but I was particularly struck by three things. First, this was not just about a "crisis in the *courts.*" The crisis extends to agencies throughout government, including those of the legislative and executive branches.

Second, the problems do not lie exclusively in the realm of criminal law. As we have seen in our own state, many of the most pressing concerns of the people lie in areas of civil law, such as domestic relations and family law, and business litigation.

Third, it is essential that *teams* be formed, from all branches of government, to pursue workable solutions. I was proud that our Michigan delegation included representatives from the Governor's office, the Legislature, the courts, the practicing bar, and the business community. We also had local involvement as we were joined by then-County Commissioner Lynne Martinez, who only last week was sworn in as a member of this House of Representatives.

Joint efforts mark the road down which we must travel. Through cooperative effort, we can assure that the courts are able to move *swiftly.* And, more importantly, we can assure that the courts are able to *slow down* and attend properly to each individual's case. Our efforts to add timeliness cannot ignore fundamental due process.

People expect the courts to provide our most basic offering—a *hear*ing. People want to be heard. And while many have the ability to speak quickly, it takes time to listen. Belief in our system of justice is central to the maintenance of our society.

To preserve that confidence, we must have the resources, as well as the energy and creativity, to give each person a real hearing.

Effective sharing of scarce resources so that every case can be heard timely and properly—that was the goal of those participating in the conference on the crisis in the justice system. It is also the task we must address with you.

If we are to work more effectively with each other, we each need to have better information. For our part, we have begun preparing and supplying judicial impact statements, to enable you to gauge the effect that new laws will have on the courts. We understand that you need our comments *before* legislation is passed, and the Court is committed to providing you with information you need to do your work.

However, a continuing obstacle to that effort is the often limited information we have concerning the workload and resources of local jurisdictions. We have made great strides in this regard, and last year's court-financing legislation was possible, in part, because we were able to provide you with more accurate figures than ever before. But this is an area in which your continued support is necessary.

I have spoken to you today about the relationship between legislative and judicial efforts. Yet, as we all know, the connecting web extends much farther. Just as your work and ours are connected, so do the decisions made in each branch affect citizens throughout the state.

Remember that it is individuals who come to our courts. They are the ones who will bear the burden if we fail to work effectively together. The child who may wait and wait for the Solomonic decision regarding which adult will have custody, the police officer who may see the arrested person

dance away from an overcrowded prison or jail, the battered spouse for whom judicial aid may come one day too late, the businessperson whose assets may remain too long in jeopardy pending the outcome of a civil case—they are the ones who will tell us if we fail our shared responsibilities.

We have so much to do in the years to come. We must explore alternative dispute resolution, so citizens have choices other than litigation. We need to continue our efforts to be responsive to diverse constituencies—not only those defined by race and gender, but also groups such as the handicapped and persons who speak languages other than English. And there are other persons whose needs we must remember—the business community, the victims of crime, and the poor. Juvenile law will continue to present great challenges. So will all forms of family law. As we move into the next century, an aging population may shift the focus of our caseload or require other innovative responses. The whole area of criminal law, including police practices, sentencing, corrections, and release practices will continue to challenge all of us. And each of us needs to be ready for a wild ride through the coming world of information and communication technology.

So let's plan together, and let's get to know each other better. Our 611 judges and 8,000 court employees extend a warm welcome to each of you. Please come visit our courts whenever you can. Talk with our judges, and see how the courts handle the colossal workloads placed on them by modern society.

In closing, I am reminded of a speech that United States Supreme Court Chief Justice Charles Evans Hughes delivered to the Congress on the occasion of its 150th anniversary. That was fifty-five years ago, but its theme parallels what I

have attempted to suggest to you today. Chief Justice Hughes said to the Congress:

> In thus providing the judicial establishment, and in equipping and sustaining it, you have made possible the effective functioning of the department of government which is designed to safeguard with judicial impartiality and independence the interests of liberty. But in the great enterprise of making democracy workable we are all partners. One member of our body politic cannot say to another: "I have no need of thee." We work in successful cooperation by being true, each department to its own functions, and all to the spirit which pervades our institutions, exalting the processes of reason, seeking through the very limitations of power the promotion of the wise use of power, and finding the ultimate security of life, liberty, and the pursuit of happiness, and the promise of continued stability and rational progress in the good sense of the American people.

Ladies and Gentlemen, what is the state of Michigan courts? Excellent—the best in all the land. Yet we face many challenges, both today and tomorrow. We look forward to working with you in the exciting years ahead.

LAWRENCE v WILL DARRAH & ASSOCIATES, INC

Docket No. 94885. Argued November 2, 1993 (Calendar No. 4). Decided April 19, 1994. Rehearing denied *post,* 1205.

Benjamin P. Lawrence brought an action in the Macomb Circuit Court against Will Darrah & Associates, Inc., and Lucy J. Barker, commercial insurers of his over-the-road tractor-trailer, seeking monies under his policy as a result of its theft, and consequential damages in the form of lost profits caused by the defendants' failure to timely pay his claim. The court, Robert J. Chrzanowski, J., entered judgment on a jury verdict for the plaintiff. The Court of Appeals, DOCTOROFF, C.J., and MICHAEL J. KELLY and BRENNAN, JJ., reversed in part, holding that the trial court erred in denying a directed verdict for the defendants because there was insufficient evidence to create a factual issue regarding whether lost profits were foreseeable when the policy was issued (Docket No. 123790). The plaintiff appeals.

In an opinion by Justice BOYLE, joined by Chief Justice CAVANAGH, and Justices BRICKLEY, RILEY, and MALLETT, the Supreme Court *held:*

The plaintiff presented sufficient evidence that the parties knew or had reason to know that lost profits would occur if the defendants breached the contract.

1. Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made, i.e., damages the parties knew or had reason to know about. Michigan law embodies a flexible approach to determining the foreseeability of contract damages. Thus, lost profits are recoverable for breach of an insurance contract if they were in the contemplation of the parties at the time the contract was formed.

2. In this case, the plaintiff submitted enough evidence of the element of foreseeability to make out a prima facie case for lost profits. When combined with the nature of the underlying transaction, the evidence was sufficient to allow a jury to infer that at the time the parties entered into the contract, the

defendants reasonably knew or should have known that in the event of breach the plaintiff would lose profits.

Reversed and remanded.

Justice LEVIN, joined by Justice GRIFFIN, dissenting, stated that MCL 500.2006(3), (4); MSA 24.12006(3), (4) provides that an insurance claim is deemed to be paid timely if paid within sixty days of the receipt by the insurer of proof of loss. In this case, it appears that the insurer offered to pay the value of the insured's tractor-trailer within the sixty-day period, and that the insured declined the offer, seeking in addition compensation for lost wages, mental anguish, and other expenses. It cannot properly be said that the insurer acted unreasonably in declining to pay the value of the tractor-trailer unless the insured waived his other claims. The claim for mental anguish clearly was barred by case law and neither the statute nor case law provided for consequential damages for a delay in payment to an insured by an insurer.

Whatever may be the correct resolution of the conflicting views regarding the recovery of lost profits for delay in payment of an insurance claim, the judgment entered by the circuit court for lost profits over a five and one-half-year period is problematic under the circumstances that payment by the insurer would have been timely as late as the latter part of October, 1982, and Lawrence delayed three years in commencing this action, and another three and one-half years in filing a motion for partial summary disposition.

The facts of this case underscore that the Supreme Court should adhere to the tendency of its earlier decisions, the decision of the Court of Appeals in the instant case, and the result in another Court of Appeals case denying recovery for consequential damages for delay by an insurer in payment to an insured of an insurance claim. This is not the case to let the camel get his nose under the tent.

194 Mich App 635; 487 NW2d 820 (1992) reversed.

Hay & O'Rourke, P.C. (by *Timothy A. O'Rourke*), for the plaintiff.

Plunkett & Cooney, P.C. (by *Ernest R. Bazzana*), for the defendants.

BOYLE, J. The present action involves a suit by plaintiff, Benjamin P. Lawrence, filed against defendants, Will Darrah & Associates, Inc., and Lucy

Jane Barker, to collect monies recoverable under an insurance policy and for consequential damages in the form of lost profits caused by defendants' failure to timely pay plaintiff's claim. The plaintiff obtained a $70,800 judgment in the trial court and the defendants appealed. The Court of Appeals reversed in part,[1] holding that the trial court erred in denying the defendants' motion for a directed verdict because there was insufficient evidence "to create a factual issue regarding whether lost profits were foreseeable when the policy was issued." 194 Mich App 635; 487 NW2d 820 (1992). The plaintiff appealed. We granted leave to decide "whether the Court of Appeals erred in reversing the jury award for lost profits." 442 Mich 938 (1993). Under the circumstances of this case the trial court did not err in denying the defendants' motion for a directed verdict. We reverse the decision of the Court of Appeals and remand the case to the circuit court for a recalculation of the interest due.

I

In November, 1981, the plaintiff purchased an over-the-road tractor-trailer. At the time of purchase, he obtained an insurance policy covering theft through Fawcett & Associates, Inc., with Will Darrah & Associates, Inc., the managing general agent for Lloyd's of London, as the insurers. The policy notes on its front page that the vehicle will be used for commercial purposes and that the plaintiff's occupation is hauling dry freight. The policy covered only one truck, and the plaintiff personally was named as the insured. The plaintiff used the tractor to haul freight from November,

[1] The propriety of the Court of Appeals decision on the trial court's interest calculation is not before this Court.

1981, until January, 1982, when it was stolen. The plaintiff reported the theft to the police and called Fawcett & Associates, Inc., who promptly reported the theft to the defendants.

For reasons that remain largely unknown, the defendants delayed in settling under the policy.[2] When the defendants' adjuster finally offered the plaintiff a settlement, it was only under the condi-

[2] The defendant waived any arguments relating to the proof of loss and its timeliness by not pleading this defense, "specifically and with particularity" as required by MCR 2.112(D)(2)(b), previously GCR 1963, 112.3. See *O'Neill v Northern Assurance Co of London, England,* 155 Mich 564, 566; 119 NW 911 (1909) (proof of loss defenses were not open to the defendant because it gave no notice of them in its pleadings); *Hare v Workingmen's Mutual Protective Ass'n,* 151 Mich 225, 227; 114 NW 1009 (1908) (the defendant's failure to specially plead a proof of loss defense foreclosed its use). Moreover, the defendant failed to appeal the trial court's ruling on this issue to the Court of Appeals, waiving it before this Court, *Butcher v Treasury Dep't,* 425 Mich 262, 276; 389 NW2d 412 (1986). Finally, the defendant's failure to brief this issue before this Court (defendant noted it only in a footnote and then stated that it is irrelevant), may also be construed as a waiver; "[f]ailure to brief a question on appeal is tantamount to abandoning it." *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). The defendant waived the proof of loss claim in the trial court, the Court of Appeals, and this Court. The dissent's six pages on the subject do not change this fact.

Even if the defendant had preserved a proof of loss claim, the statutory underpinnings of its timeliness arguments are questionable. The dissent notes correctly that MCL 500.2006(3); MSA 24.12006(3) provides that an insurance payment made within sixty days of submission of a proof of loss is timely. However, the sixty-day requirement, found in the second and third sentences of § 3, is preceded by a thirty-day time requirement found in the first sentence of § 3. The requirement provides that the "insurer shall specify in writing the materials which constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days." There is no evidence that the defendant ever met the thirty-day requirement. Although exact dates are not clear, the defendant's trial brief states that "[t]hree months after the truck was stolen, the plaintiff's attorney, Mr. Zelenoch, wrote a letter to defendants requesting a Proof of Loss for purposes of concluding the claim. The Proof of Loss was forwarded to the plaintiff's attorney on May 1, 1982." Even if the defendants had made the dissent's statutory argument, and they did not, the failure of the insurer to meet the thirty-day requirement found in § 3 would most likely have precluded a ruling in its favor.

tion that the plaintiff waive all future claims.[3] Consequently, the plaintiff did not receive recompense until a settlement was reached on the eve of trial.[4] Defense counsel conceded during oral argument that defendants do not here challenge the jury's determination that the contract was breached or the amount of lost profits that the plaintiff claimed. Thus, the narrow issue before the Court is whether the trial court erred when it denied defendants' request for a directed verdict.

II

The defendants' argument in essence, is that the commercial nature of this transaction was not in itself sufficient to put the parties on notice that the plaintiff would suffer lost profits. Defendants contend that the measure of damages for breach of a contract to pay money is the contract price plus interest, absent evidence that the parties contemplated other damages at the time they entered into the contract. From this premise, defendants conclude that plaintiff's failure to introduce testimony that he was unable to replace the vehicle when the defendants breached the contract defeats his prima facie case. It is with this final assertion that we disagree.

[3] The dissent's assertion that "[i]t could not properly be said that the insurer acted unreasonably in declining to pay the $19,250 unless Lawrence waived his claim for 'down time' . . . ," is troublesome because it seems to approve of business tactics which are at best, heavy handed. *Post* at 17. Additionally, the "reasonableness" of the defendant's failure to pay the $19,250 is not before this Court. At trial, the defendant agreed to a jury instruction which stated that "[i]nsurance companies are required to promptly pay any amounts which are known to be due under the policy even if the insured intends to bring an action against the insurance company for other claims . . . ." Moreover, at oral argument, the defendant admitted that it does not challenge the determination that it breached the contract.

[4] The money for the truck did not change hands until after the trial.

A

The controlling case in this area is *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401; 295 NW2d 50 (1980). *Kewin* involved a breach of contract suit. The plaintiff sought damages arising out of the nonpayment of benefits under a disability income protection policy. The alleged damages included mental anguish and exemplary (punitive) damages. After reviewing Michigan law on the matter, we held that neither the mental distress[5] nor exemplary damages[6] were recoverable under the circumstances presented.

We acknowledged the rule of *Hadley v Baxendale,* 9 Exch 341; 156 Eng Rep 145 (1854), and its usual application to the commercial contract setting:

> [T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in contemplation of the parties at the time the contract was made. 5 Corbin, Contracts, § 1007. Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it. [409 Mich 414-415.]

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[5] [W]e hold that a disability income protection insurance policy contract is a commercial contract, the mere breach of which does not give rise to a right to recover damages for mental distress. The damages recoverable are those damages that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made. Absent proof of such contemplation, the damages recoverable do not include compensation for mental anguish. [*Id.* at 419.]

[6] [A]bsent allegation and proof of tortious conduct existing independent of the breach, exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract. [*Id.* at 420-421. Citation omitted.]

However, we also noted that the general rule limiting damages for breach of a commercial contract had been held inapplicable where there was evidence that the parties contemplated the damages.[7]

Miholevich v Mid-West Mutual Auto Ins Co, 261 Mich 495; 246 NW 202 (1933), was such a case. This Court began by reaffirming the general rule stated in *Clark v Craig,* 29 Mich 397, 402 (1874), that "[f]or any mere delay in payment, interest is in law regarded as a sufficient compensation." The Court noted, however, that this rule is not absolute:

> The damages claimed by plaintiff are for a breach of defendant's contract to pay the judgment. In *Frederick v Hillebrand,* 199 Mich 333, 341 [165 NW 810 (1917)], in which damages were claimed for a breach of contract, it was said:
>
> "The damage which a party ought to receive in respect to such breach of contract may be said to be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it."
>
> The rule thus stated is in accord with that laid down in the English case of *Hadley v Baxendale,* 9 Exch 341 (156 Eng Repr 145; 23 LJ Exch 179; 18 Jur 358; 5 Eng Rul Cas 502) [1854], and has been followed quite generally by all the courts in this country. (See citations in footnote in 8 RCL [Damages, § 25], p 455 *et seq.*) Let us apply it to the facts in this case. The plaintiff was a man without

[7] Our refusal in *Kewin* to recognize a broad right to recover mental distress and exemplary damages for breach of a commercial contract was not meant to "take away any traditional contract remedies in an insurance contract case." *Royal College Shop, Inc v Northern Ins Co of NY,* 895 F2d 670, 678 (CA 10, 1990).

means. He owned an automobile, and was aware of the fact that a judgment might at some time be recovered against him for his negligence in driving it. It must be presumed that he knew that, if he did not pay such judgment, a body execution might issue against him. To protect himself from this liability he sought and secured the policy in question. The defendant must also be presumed to have known that, in case of plaintiff's default in payment, his arrest might follow. Must it not then be reasonably supposed that the liability to arrest to which plaintiff was exposed was in the contemplation of these parties at the time the contract was entered into? While there are many cases in which this rule of law has been so applied, we find none involving the question here presented.

The wilful neglect of the defendant to pay the judgment was not due to an oversight on its part. It resulted in the imprisonment of plaintiff, with the shame and mortification as well as loss of time incident thereto. A reasonable interpretation of the contract and the application of the law thereto justified the award of damages by the trial court. [261 Mich 498-499.]

The *Miholevich* analysis illustrates how in a given case an application of *Hadley* can allow for more than interest damages.[8]

[8] While in *Kewin* we distinguished *Miholevich* on the basis that it involved an insurer's failure to pay a third party under a liability contract, we do not read *Kewin* to preclude lost profit damages for breach of an indemnity contract. Rather, the *Kewin* Court was seemingly acknowledging that the liability nature of the contract in *Miholevich* made the damages suffered by the plaintiff more foreseeable under the *Hadley* test. A similar distinction has been drawn with regard to lost profits stemming from "collateral" transactions in which some courts have employed more rigorous formulations of lack of foreseeability and absence of proximate cause as reasons to deny recovery. In *Mohr v Dix Mutual Co Fire Ins Co,* 143 Ill App 3d 989, 997; 493 NE2d 638 (1986), the Illinois Court of Appeals noted:

> When profits which are sought arise out of the breached contract, profits are considered an element of the contract and are presumed to have been within the contemplation of the

Alderton v Williams, 139 Mich 296, 300; 102 NW 753 (1905), a case relied upon by the defendants and referred to in *Miholevich,* also found the general limitation on damages recoverable for a failure to pay inappropriate under the facts of a given case. In that case, the defendant argued

> [t]hat the measure of damages where one fails to advance money as agreed is the excess in interest which the borrower is compelled to pay to procure the money elsewhere. . . . In such cases the law presumes that the borrower can obtain money elsewhere, and the increased rate of interest therefore furnishes full compensation for his damages. [*Alderton, supra* at 300.]

The *Alderton* Court noted that this general limitation on damages only applies "where the defaulting party failed to advance money which he had

parties. However, as in the instant case, where the profits sought arise out of a collateral transaction, the plaintiff must establish the damages with reasonable certainty and also show lost profits were within the contemplation of the parties at the time they entered the agreement.

Defendants have not specifically urged the collateral transaction formulation or asked us to adopt a rule of subjective foreseeability. We note, however, that one commentator has observed that lost profit damages should be awarded on proof of actual or constructive knowledge.

> The collateral transaction rule has vitality, but more as a principle of proximate cause than as an aspect of *Hadley v Baxendale.* The courts properly see that liability for the consequences of a breach of contract must be cut off somewhere. A strict test of actual knowledge of the collateral transaction . . . goes too far, however. . . . A reasonable test would require plaintiff to show only that defendant knew or should have known, from the nature of the transaction, that plaintiff would enter collateral transactions based upon it of the type actually entered. If this was foreseeable, then it is reasonable to hold defendant liable for plaintiff's losses. [Dunn, Recovery of Damage for Lost Profits (3d ed), § 1.17, pp 48-49. See also *Royal College Shop v Northern Ins Co of NY,* n 7 *supra* at 678, 679.]

promised to *loan.*" *Id.* at 300 (emphasis in original). The *Alderton* Court went on to hold:

> Those cases [limiting interest to damages] and the principle underlying them have no application to the case at bar. Here plaintiff defaulted, not in making an agreed loan, but in contributing to a joint adventure. Even if defendants had the right to do so, it cannot be presumed that they could have obtained such a contribution from some other source. [*Id.* at 300-301.]

Alderton is valuable not because it limits commercial contract damages to cases involving "loans." *Kewin* does not so limit its holding. Rather, *Alderton* indicates that the rule limiting damages to interest in cases involving commercial contracts is not an inflexible bar to consequential damages. Instead, the rule is to be sensibly applied where the justifications for application, namely, that the parties did not contemplate the additional damages, are present. The federal courts, interpreting Michigan law, have recognized this approach.

In *Salamey v Aetna Casualty & Surety Co,* 741 F2d 874 (CA 6, 1984), a diversity action, the United States Court of Appeals[9] recognized that under the circumstances of a given case, lost profits are recoverable under Michigan law for breach of an insurance contract:

> [The defendant] argues that the trial court erred in allowing the jury to award as damages compensation for lost profits beyond the two and a half months required for rebuilding. [The defendant] urges that the business interruption clause should be enforced according to its terms, which limit the

[9] A per curiam opinion joined by Judges Kennedy, Celebrezze, and Neese.

> recovery to income lost during the period theoretically required for rebuilding the premises. [*Id.* at 876-877.]

That court rejected the defendant's assertions. It began by noting:

> This claim for lost profits is separate from the claims to enforce the insurance contract. "The policy limits restrict the amount the insurer may have to pay in the performance of the contract, not the damages that are recoverable for its breach." . . . Salamey here is seeking to collect damages for losses occasioned by Aetna's breach of contract in failing to pay Salamey's claim under the policy. The business interruption clause is thus irrelevant to the measure of damages for breach of contract. [*Id.* at 877.]

Regarding the defendants' second claim, the court recognized Michigan follows *Hadley v Baxendale* and held that a review of Michigan law demonstrated that consequential damages could be recovered if they were in the contemplation of the parties at the time the contract is formed.[10] Applying this standard to the circumstances of the case before it, the court allowed consequential damages:

> [T]he instant case involves only one enterprise, the convenience store in Bay City. Since Aetna did not argue that Salamey failed to mitigate his damages, the jury was entitled to conclude that his inability to rebuild and reopen the store resulted naturally and directly from Aetna's refusal to pay benefits for the fire loss. Accordingly, Salamey may recover lost profits from the store as conse-

[10] The *Salamey* court relying on *Parmet Homes, Inc v Republic Ins Co,* 111 Mich App 140; 314 NW2d 453 (1981), as well as other Michigan precedent, concluded that this Court would allow "compensation for lost profits that were the natural and usual consequence of a breach of an insurance contract." *Salamey, supra* at 878, n 1.

quential damages for the breach of this insurance contract. [*Salamey* at 877.]

B

While this brief survey of Michigan law is not exhaustive,[11] it reveals a flexible approach when determining the foreseeability of contract damages.[12] Defendants' assertion that Michigan applies the objective standard of foreseeability is consistent with this flexible approach.[13] It is with the

[11] The dissent's reliance on *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433; 491 NW2d 545 (1992), is misplaced. The primary question in *Kassab* was the applicability of the Michigan Civil Rights Act to insurance claims processing. The Court held that the operative section of the act applied only to insurance access, not to the processing of a claim. The only common-law claim argued in *Kassab* was fraud, a claim the Court allowed to proceed.

[12] Commentators agree that courts should be flexible when ruling on what damages are available for breach of contract. Professor Corbin notes:

> The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case. [5 Corbin, Contracts, § 1002, p 33.]

Likewise, professors Calamari and Perillo observe:

> It should be noted that the rule is not applied blindly and mechanically. Courts must be aware of the transactional context in which the transactions occur. [Calamari & Perillo, Contracts (3d ed), § 14-7, p 599.]

[13] The objective standard has been approved by a number of commentators, Corbin, n 12 *supra*, § 1009-1012, pp 77-89, Calamari & Perillo, n 12 *supra*, § 14-5, p 595, Dunn, Recovery of Lost Profits, n 8 *supra*, § 1.6, p 17, the Uniform Commercial Code, MCL 440.2715(2)(a); MSA 19.2715(2)(a) (specifically rejecting the "tacit agreement" test in comment 2), and the Restatement Contracts, 2d, § 351 (specifically identifying the test as an objective one in comment a, p 135). While Michigan precedent is not entirely clear on the subject, e.g., *Huler v*

defendants' application of the objective standard that this Court disagrees.

Specifically, the defendants maintain that

> [i]n order for a plaintiff to establish a prima facie entitlement to lost profits damages for the breach of a commercial contract, he must present evidence to overcome the presumption of the availability of funds in the marketplace and show that, at the time the contract was made, the insurer knew that, if the contract were breached, it would be impossible for the insured to procure money in the marketplace.

The *Hadley* rule, as stated in *Kewin,* demands no such showing, requiring only that "[t]he damages recoverable are those damages that arise naturally from the breach,[14] or which can *reasonably* be said to have been in contemplation of the parties at the time the contract was made." *Id.* at 419 (emphasis added). Applying this objective standard, restated by Calamari and Perillo as damages "the promisor knows or has reason to know" about, the plaintiff submitted enough evidence regarding the element of foreseeability to make out a prima facie case for lost profits. Calamari & Perillo, Contracts (3d ed), § 14-5, p 595.

The plaintiff introduced the insurance policy, which noted on its face that the truck would be used for commercial purposes, namely, to haul dry freight. The policy named the plaintiff, individually, as the insured and covered only the one truck. The plaintiff introduced the testimony of

Nasser, 322 Mich 1; 33 NW2d 637 (1948), we agree with the defendants that in this context a thorough review of Michigan's law on foreseeability indicates approval of the objective test. See *Kewin* at 431 (WILLIAMS, J., dissenting).

[14] Although consequential damages might also be available in a commercial setting when they arise naturally from a breach of contract, analysis of this possibility is not necessary because the plaintiff presented sufficient evidence of foreseeability under *Hadley.*

two employees of Will Darrah & Associates,[15] the vice president and the adjuster handling the plaintiff's file. The vice president testified that he understood that the insured's vehicle was used for commercial purposes and that the loss of that vehicle would result in lost profits unless it was replaced. The adjuster also testified that he was aware that the truck was used for making profits. The adjuster further testified that Will Darrah & Associates' primary source of business was insuring trucking concerns. Finally, the plaintiff introduced the testimony of Ronald Fawcett, president of Fawcett & Associates and the retail agent responsible for the plaintiff being insured with Will Darrah & Associates. Mr. Fawcett testified[16] that the insurer was aware that many of the clientele procured by Mr. Fawcett were one-truck owners, and that these owners would suffer if deprived of the use of their trucks, their sole sources of income.

The evidence in this case, when combined with the nature of the underlying transaction,[17] was

[15] At the time of trial, Will Darrah & Associates had changed its name to Quantex Corporation.

[16] The defendants argue before this Court that Mr. Fawcett's testimony could not have been used by the judge or the jury to demonstrate that lost profits damages were foreseeable. Defense counsel failed to object to plaintiff's use of this testimony during Mr. Fawcett's deposition or at any time thereafter. The failure at trial to object to or challenge in some way Mr. Fawcett's testimony prevented the plaintiff from having the opportunity to address it below. Furthermore, even had the defendants not waived this objection, under the objective standard of foreseeability, Mr. Fawcett's testimony is admissible to prove what the parties reasonably could have or should have known at the time the contract was entered into.

[17] We disagree that the nature of the transaction alone can never be enough. The defendants' assertions about the availability of money in the marketplace do not necessarily ring true in the insurance contract setting:

> Legal rates of interest, however, fall far short of commercial rates and the credit worthiness of an insured following a loss

sufficient to allow a jury to infer that at the time the parties entered into the contract, the defendants reasonably knew or should have known that in the event of breach this plaintiff would lose profits. Under Michigan law, the plaintiff presented a prima facie case.

The defendants' assertion that the plaintiff must prove he could not obtain money in the marketplace to establish a prima facie case confuses the contemplation requirements of *Hadley* with mitigation. At common law, while a plaintiff has a duty to mitigate his loss, it is the defendant who bears the burden of proving a failure to mitigate, *Edgecomb v Traverse City School Dist,* 341 Mich 106, 115; 67 NW2d 87 (1954).[18] In the instant case, the defendants did not plead mitigation,[19] nor did they attempt to support it with proofs at trial.[20]

CONCLUSION

The plaintiff presented sufficient evidence that

may be doubtful. In fact, the insured's purpose in obtaining insurance is often intended to avoid the financial losses the insured would otherwise be unable to bear. [Freemon, *Reasonable and foreseeable damages for breach of an insurance contract,* 21 Tort & Ins L J 108, 111 (1985).]

[18] Similarly, the Uniform Commercial Code imposes a duty on a plaintiff to mitigate damages, while placing the burden of proving a failure to mitigate on the defendant, MCL 440.2715; MSA 19.2715. See *Lorenz Supply Co v American Standard, Inc,* 100 Mich App 600, 610; 300 NW2d 335 (1980), aff'd 419 Mich 610; 358 NW2d 845 (1984).

[19] The dissent's argument regarding the timeliness of the institution of plaintiff's action is arguably a claim that plaintiff should have mitigated, a claim that defendants did not make below.

[20] The dissent's "slippery slope" arguments are unconvincing. Apart from the requirements of *Hadley* itself, in the vast majority of cases, plaintiffs will be barred from recovering consequential damages because the defendant complied with the requirements of MCL 500.2006(3); MSA 24.12006(3), by paying the insured's claim in a timely fashion. Further, in those cases in which consequential damages are recoverable, most defendants will argue mitigation in the trial court. Finally, nothing in this opinion prevents insurers from limiting possible contract damages in the policy itself.

the parties knew or had reason to know that lost profits would occur if the defendants breached the contract. We reverse the decision of the Court of Appeals, and remand the case to the trial court for recalculation of interest.

CAVANAGH, C.J., and BRICKLEY, RILEY, and MALLETT, JJ., concurred with BOYLE, J.

LEVIN, J. (*dissenting*). I would affirm the decision of the Court of Appeals.

I

The factual predicate for the premise of the majority that there was a significant delay in payment by the defendant insurer is tenuous. It appears that the insurer, Underwriters at Lloyds of London, offered to pay $19,250, the agreed value of the tractor-trailer,[1] within the sixty days, prescribed by statute, "after receipt of proof of loss by the insurer."[2]

The plaintiff, Benjamin T. Lawrence, declined the offer of $19,250 because the insurer refused to compensate the plaintiff for "down time." Lawrence sought remuneration for "down time" because of an asserted delay in payment.

Lawrence's lawyer forwarded, on May 12, 1982,

[1] The truck was purchased in November, 1981, for $21,000. The parties ultimately agreed, by August, 1982, that the value of the truck in January, 1982, the date of the loss, was $19,500. There was a $250 deductible for theft.

[2] The act provides that a claim "shall be deemed to be paid on a timely basis if paid within 60 days after receipt of proof of loss by the insurer," and that interest at the rate of twelve percent per annum is payable if there is a failure to pay within sixty days "after satisfactory proof of loss was received." MCL 500.2006(3), (4); MSA 24.12006(3), (4).

The policy of insurance does not contain a provision requiring that payment of the claim be made within a specified time.

a proof of loss, dated May 10, 1982,[3] under cover of a letter stating, "[a]t this time, we claim lost wages, mental anguish and other expenses in the amount of $40,000 in addition to the monies claimed under the policy of insurance issued by Lloyds."

The insurer declined to increase its offer to include "down time," or the other elements of damage claimed by Lawrence's lawyer, and promptly so notified Lawrence. After this action was commenced, in April 1985, Lawrence's then-lawyer acknowledged that the policy of insurance did not provide coverage for "down time."

It was not until August 28, 1982, that the insurer might be said to have "received" "satisfactory" proof of loss. On that date, the issue regarding the value of the tractor-trailer having been resolved, the insurer forwarded to Lawrence a proof of loss which, in effect, offered to settle for $19,250 on the understanding that Lawrence's acceptance would, in effect, waive his claim for "down time" and the other asserted claims.[4]

Because the statute[5] provides that a claim shall be deemed to be paid timely if paid within sixty days after receipt of proof of loss by the insurer, payment by the insurer by the latter part of October would have been timely.

It could not properly be said that the insurer acted unreasonably in declining to pay the $19,250 unless Lawrence waived his claim for "down time"

[3] The proof of loss included a claim for contents (personal property such as cassette tapes, a sleeping bag and tools) in the amount of $535. The record indicates that a number of weeks elapsed before Lawrence was satisfied that the policy did not cover contents.

[4] The insurer refused to pay the $19,250 unless Lawrence signed a proof of loss that did not include a claim for "down time."

[5] See n 2.

and the other elements of damage asserted in his lawyer's letter, under the circumstances that

- Lawrence's claim for mental anguish was clearly barred by this Court's decision in *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401; 295 NW2d 50 (1980),[6]

- there was and is, until today, no decision by either the Court of Appeals or this Court upholding an award of consequential damages for delay by an insurer in payment to an insured[7] and

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[6] In *Kewin,* this Court set aside jury verdicts that included $75,000 for mental or emotional distress and $50,000 for exemplary damages for delay in payment under policies providing for disability income protection insurance and life insurance. The Court affirmed the awards of $16,500 for breach of the disability insurance contract, and $798.40 for breach of the life insurance policy. *Id.* at 423.

The Court reviewed the rule set forth in *Hadley v Baxendale,* 9 Exch 341; 156 Eng Rep 145 (1854), and the discussion in Corbin on Contracts and the Restatement of Contracts of the rule of law there stated respecting damages for breach of contract, and concluded that the application of the rule "in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." *Kewin, supra,* pp 414-415.

[7] The majority relies on *Miholevich v Mid-West Mutual Auto Ins Co,* 261 Mich 495; 246 NW 202 (1933). There an automobile insurer promised to satisfy any judgment rendered against the plaintiff, but, as set forth in *Kewin, supra,* p 417, "wilfully neglected to satisfy it until after the plaintiff had been placed in jail for failure to pay the judgment."

Miholevich, thus, did not concern a failure by an insurer to pay the insured, but rather a failure to pay a third party. The injury suffered in *Miholevich,* loss of liberty, is clearly different from the loss, in excess of the statutory twelve percent, of the use of money asserted in *Kewin* and in the instant case.

This Court in *Kewin* did not regard *Miholevich* as precedentially supporting the claim for mental distress and exemplary damages asserted in *Kewin.*

Alderton v Williams, 139 Mich 296; 102 NW 753 (1905), also relied on by the majority, was not an action against an insurance company, but rather an action to recover $5,000 that the plaintiff claimed to have advanced as surety for the defendants in payment of six notes on which the plaintiff and the defendants were joint makers. The

- the statute provides for payment of interest at twelve percent if there is a failure to pay within sixty days "after satisfactory proof of loss was received."[8]

In all events, in August, 1982, and, sixty days later, October, 1982, Lawrence had no valid claim for lost profits because payment by the latter part of October, 1982, would have been timely under the statute. Lawrence delayed the commencement of this action almost three years, until April 22, 1985. Lawrence did not file a motion for partial summary disposition for an additional three and one-half years, until October 25, 1988, shortly before the trial of the instant action, whereupon judgment was entered for $19,250 in Lawrence's favor.

It therefore appears that had Lawrence promptly filed this action, and had promptly moved for partial summary disposition, he could have obtained payment of the $19,250 before the end of 1982. Lawrence was not without an effective remedy for any delay in payment after October, 1982, of the agreed-upon loss in the amount of $19,250.

Whatever may be the correct resolution of our conflicting views regarding the recovery of lost profits for delay in payment of an insurance claim, the judgment entered by the circuit court for lost profits over a five and one-half-year period[9] is problematic under the circumstances that pay-

defendants claimed that after advancing the $5,000, the plaintiff refused to make further advances, and, in consequence, their joint venture failed. The jury found for the defendants, and, on appeal, the plaintiff challenged the instructions. This Court said that the principle underlying cases that limit damages for failure to loan money to the rate of interest are not applicable where the default was "not in making an agreed loan, but in contributing to a joint adventure." *Alderton, supra,* p 301. Lawrence and Lloyds of London were not engaged in a "joint adventure."

[8] See n 2 for text.

[9] From some time in 1982 through December, 1987.

ment by the insurer would have been timely as late as the latter part of October, 1982, and Lawrence delayed three years in commencing this action, and another three and one-half years in filing a motion for partial summary disposition.

Both the insurer and Lawrence were arguably at fault. The insurer could have paid the $19,250 without regard to the validity of the claims asserted by Lawrence's succession of lawyers for mental and emotional stress. But Lawrence, or one or more of his lawyers, was apparently seeking to build up a case, and the legally invalid claims made by them for "mental anguish and other expenses" contradict the assertion that Lawrence's purpose truly was to obtain prompt payment of $19,250 and no more.

II

The facts of this case underscore that this Court should adhere to the tendency of its decisions in *Kewin* and *Kassab v Michigan Basic Property Ins Ass'n,* 441 Mich 433; 491 NW2d 545 (1992), the decision of the Court of Appeals in the instant case, and the result, if not some of the language, in *Parmet Homes, Inc v Republic Ins Co,* 111 Mich App 140; 314 NW2d 453 (1981), denying recovery for consequential damages for delay by an insurer in payment to an insured of an insurance claim. This is not the case to let the camel get his nose under the tent.

The decision of the United States Court of Appeals for the Sixth Circuit in *Salamey v Aetna Casualty & Surety Co,* 741 F2d 874 (CA 6, 1984), is not persuasive. *Salamey* purports to apply Michigan law. It predicts that Michigan would join the "few courts" that have held that an owner of a business may recover lost profits as consequential

damages for delay in payment of an insurance claim. It makes that prediction on the basis of the Court of Appeals decision in *Parmet,* where the Court, acknowledging that lost profits might be recovered in some situations, ruled that lost profits could *not* be recovered as an element of damage for delay in payment of an insurance claim.[10]

In *Salamey, supra,* p 876, Aetna defended the action by attempting to show that Salamey "had an economic motive to set the fire by introducing expert testimony that the store was losing money." I think it most unwise to incorporate into our jurisprudence, through the majority opinion in the instant case, the notion that an insurer runs the risk of becoming responsible for lost profits if it fails to establish, to the satisfaction of the trier of fact, that the insured was the person responsible for the arson loss of a business.[11]

The majority opinion will be read by insureds and their counsel as justifying an action seeking lost profits whenever there is a loss of commercial property,[12] and the insurer has not paid the claim as promptly as a trier of fact might conclude it

[10] *Lorenz Supply Co v American Standard, Inc,* 100 Mich App 600; 300 NW2d 335 (1980), adverted to by the Court of Appeals in *Parmet* and by the Sixth Circuit in *Salamey,* was an action for breach of a distributorship agreement. Lost profits might, indeed, be an appropriate element of damage in such a case.

In *Salamey* the insured had business interruption insurance. Lawrence did not.

[11] In this connection, it is noteworthy that arson was an issue in *Kassab.*

[12] The majority concludes that the "plaintiff submitted enough evidence regarding the element of foreseeability to make out a prima facie case for lost profits" on the basis that "[t]he plaintiff introduced the insurance policy, which noted on its face that the truck would be used for commercial purposes, namely, to haul dry freight," and the testimony of the vice president of the *adjustor* that he understood that the loss of the vehicle would result in lost profits unless it was replaced. *Ante,* pp 13-14.

The tendency of the majority opinion would permit recovery whenever the insured is engaged in a commercial enterprise, and it can be demonstrated, as will readily be done in almost every case, that, until

should have. If that takes hold, this Court will be asked to revisit *Kewin* so that insureds who have not lost commercial property may also recover consequential damages. The majority is entering upon a slippery slope.

III

The remedy provided by the statute for delay in payment of an insurance claim is interest at twelve percent. I am inclined to the view that the Legislature has provided, as a matter of public policy, the sole remedy therefor.[13]

GRIFFIN, J., concurred with LEVIN, J.

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the fire-damaged structure or the collision or fire-damaged truck or machinery is replaced, there will be loss of profits.

[13] See *Kassab, supra,* p 443 (LEVIN, J., concurring).

GARDNER v VAN BUREN PUBLIC SCHOOLS

BOYLE v DETROIT BOARD OF EDUCATION

BACH v FLINT BOARD OF EDUCATION

Docket Nos. 95531, 95532, 95536. Argued November 3, 1993 (Calendar Nos. 11-13). Decided April 19, 1994. Rehearings denied in *Gardner* and *Boyle, post,* 1205.

Anthony Gardner sought worker's compensation benefits, alleging mental disability that arose out of and in the course of his employment with the Van Buren Public Schools. The Worker's Compensation Appeal Board affirmed an award of benefits, finding that the plaintiff suffered a personal injury as a result of actual events that contributed to his mental disability in a significant manner. The Court of Appeals, DOCTOROFF, C.J., and CORRIGAN, J. (JANSEN, J., dissenting), reversed (Docket No. 134246). The plaintiff appeals.

Thomas Boyle sought worker's compensation benefits, alleging mental disability that arose out of and in the course of his employment with the Detroit Board of Education as a result of a mental breakdown caused by mistreatment from students, coworkers, and administrators. The Worker's Compensation Appeal Board affirmed a denial of benefits, finding that the plaintiff had not established a work-related personal injury that arose out of actual events of employment. The Court of Appeals, DOCTOROFF, C.J., and CORRIGAN, J. (JANSEN, J., dissenting), affirmed (Docket No. 130188). The plaintiff appeals.

Donna L. Bach sought worker's compensation benefits, alleging mental disability that arose out of and in the course of her employment with the Flint Board of Education. The Worker's Compensation Appeals Board affirmed a denial of benefits, finding the disability unrelated to actual events of employment accurately perceived by the plaintiff. The Court of Appeals, DOCTOROFF, C.J., and CORRIGAN, J. (JANSEN, J., dissenting), affirmed, concluding that the evidence, when viewed objec-

REFERENCES

Am Jur 2d, Workers' Compensation § 340.

Mental disorders as compensable under workmen's compensation acts. 97 ALR3d 161.

tively, did not support a claim for compensation (Docket No. 135270). The plaintiff appeals.

In an opinion by Chief Justice CAVANAGH, joined by Justices LEVIN, BOYLE, and MALLETT, the Supreme Court *held:*

To establish a compensable mental disability claim under MCL 418.301(2); MSA 17.237(301)(2) arising on or after January 1, 1982, a claimant must prove a mental disability arising out of the actual events of employment and not unfounded perceptions of the events, and that the events contributed to, aggravated, or accelerated the mental disability in a significant manner.

1. Mental disabilities are compensable under MCL 418.301(2); MSA 17.237(301)(2) where they are based on actual, not imaginary, events of employment that contributed to, aggravated, or accelerated the disability in a significant manner. A claimant actually must prove a significant factual causal connection between the events and the disability. Causation is determined by the factfinder, who must consider the totality of the occupational circumstances along with the totality of a claimant's mental health in general, including comparison of nonemployment and employment factors. Once actual employment events have been shown to have occurred, the significance of those events to the particular claimant must be judged against all of the circumstances to determine whether the resulting mental disability is compensable.

2. Employers must take employees as they find them, with all preexisting mental and physical frailties. A claimant's preexisting condition will not bar recovery. Actual events of employment, even if ordinary, can be injurious to the mental health of a predisposed individual. Although the events must be objectively proven to have occurred, and not be based on subjective, imaginary beliefs, by focusing on the individual worker, as opposed to an average worker, both the significant manner requirement and the actual events requirement have substantial subjective elements. It is therefore irrelevant how a reasonable person would react to an objectively established actual event. The inquiry places the focus on the authenticity of the underlying event and the significance of its relationship to the resulting disability.

3. In these cases, the Court of Appeals applied a purely objective standard. In *Bach* and *Boyle,* the WCAB applied a purely objective standard as well, requiring reversal and remand for further proceedings. Because the WCAB applied the correct legal analysis in *Gardner,* its holding is affirmed, requiring reversal of the judgment of the Court of Appeals.

Gardner, reversed.

Boyle, reversed and remanded.

Bach, reversed and remanded.

Justice BRICKLEY, concurring in part and dissenting in part, stated that in amending MCL 418.237(301)(2); MSA 17.237(301)(2) to demand that mental disability claimants establish actual events of employment, not unfounded perceptions of events, the Legislature sought to create a standard of causation that incorporated greater substantive objectivity.

It is clear from the language of the statute that actual employment events must exist to recover for a mental disability. To give effect to this language, "unfounded perceptions" must refer not to the existence of an event, but to a claimant's interpretation or perception of an actual event. This requires that a claimant's perception of the actual event not be unfounded. Causation must be based in part on founded perceptions of actual events. This interpretation demands that a hybrid of subjective and objective considerations be applied to three facets of a person's mental disability claim: the existence of the event, the claimant's perception of the event, and the claimant's reaction to the event. Objective analysis is reflected in the requirements that actual events of employment have occurred and that the claimant's perception of those events are well-founded. Both must be discerned by an objective trier of fact, not the claimant. Once so established the claimant's reaction to the events is judged subjectively, taking into account all the claimant's preexisting infirmities and disabilities.

When this interpretation is applied in these cases, in *Gardner,* the decision of the Court of Appeals should be reversed, and the decision of the WCAB, affirmed; in *Boyle,* the decisions of both the Court of Appeals and the WCAB should be reversed and the case remanded to the WCAB for further proceedings; in *Bach,* the decision of the Court of Appeals should be affirmed.

Justice RILEY, joined by Justice GRIFFIN, dissenting, stated that the majority advocates a highly subjective standard for work-related mental disabilities, contrary to the 1980 amendments of the worker's compensation act. A claimant for a work-related mental disability must establish by a preponderance of the evidence, as a matter of objective reality, an actual and traumatic event; otherwise, the danger that the alleged harm is a mere manifestation of an underlying problem and not a cause is too great. A successful claim should require proof of specific incidents and not merely general conclusions of stress, anxiety, or exertion over a period of time. Without a recognizable, stressful event or at least a physical manifestation of injury occurring close in time to the alleged event, it would be

virtually impossible to determine with a fair degree of certainty whether the allegations of work-related injury are actualities or misperceptions in the absence of expert testimony. The effect of the majority view is to make employers the insurers of their worker's wage losses for mental disabilities without necessarily establishing an adequate causal link.

197 Mich App 247; 494 NW2d 815 (1992), reversed.

197 Mich App 255; 494 NW2d 818 (1992), reversed.

197 Mich App 265; 494 NW2d 845 (1992), reversed.

WORKER'S COMPENSATION — MENTAL DISABILITIES — ACTUAL EVENTS OF EMPLOYMENT.

To establish a compensable mental disability claim arising on or after January 1, 1982, a claimant must prove a mental disability arising out of the actual events of employment, and not unfounded perceptions of the events, and that the events contributed to, aggravated, or accelerated the mental disability in a significant manner (MCL 418.301[2]; MSA 17.237[301][2]).

Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C. (by *Theodore Sachs, Robert G. Hodges,* and *Granner S. Ries*), for plaintiffs Gardner and Boyle.

Thurswell, Chayet & Weiner (by *Lenny Segel* and *Tammy J. Reiss*) for plaintiff Bach.

Lacey & Jones (by *Gerald M. Marcinkoski*) for defendant Van Buren Public Schools.

Charfoos, Reiter, Peterson, Holmquist & Pilchak, P.C. (by *Daniel Peterson* and *Deborah S. Dorland*), for defendant Detroit Board of Education.

Richard E. Cooley for defendant Flint Board of Education.

Amici Curiae:

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Elaine D. Fischhoff,* Assistant Attorney General, for Accident Fund of Michigan.

Conklin, Benham, Ducey, Listman & Chuhran, P.C. (by *Martin L. Critchell*), for Michigan Self-Insurers' Association.

Glotta, Rawlings & Skutt, P.C. (by *Richard M. Skutt*), for Michigan Injured Workers.

Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C. (by *Theodore Sachs* and *Roberta H. Pullum*), for Michigan State AFL-CIO and Detroit Federation of Teachers, *Mark H. Cousens* for Michigan Federation of Teachers, and *White, Beekman, Przybylowicz, Schneider & Baird, P.C.* (by *James A. White*), and *Kelman, Loria, Downing, Schneider & Simpson, P.C.* (by *Donald W. Loria*), for Michigan Education Association.

CAVANAGH, C.J.

I. INTRODUCTION

The issue presented in these cases calls upon the Court to construe MCL 418.301(2); MSA 17.237(301)(2).[1] Specifically, we must decide whether the statute requires an objective or subjective analysis when examining the significance of "actual events of employment" in determining the compensability of mental disabilities.

We hold that to establish a compensable mental disability claim, pursuant to MCL 418.301(2); MSA 17.237(301)(2), a claimant must prove: (1) a mental disability; (2) arising out of the actual events of employment, not unfounded perceptions thereof;

[1] Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof.

and that (3) those events contributed to, aggravated, or accelerated the mental disability in a significant manner.

All that is statutorily required are "actual events of employment," even if objectively unimportant, that contribute to, aggravate, or accelerate a mental disability in a significant manner.

Although the statutory test embodied in MCL 418.301(2); MSA 17.237(301)(2), does contain objective elements, it is not a purely objective test. If one concentrates on the individual worker, as opposed to an average worker, the statutory test has substantial subjective elements as well.

II. FACTS AND PROCEDURAL HISTORY

All three of these worker's compensation cases involve mental disability claims based on MCL 418.301(2); MSA 17.237(301)(2). All the plaintiffs allege that events and or stress from their respective jobs contributed to, aggravated, or accelerated their mental disability. All three claim a date of injury after January 1, 1982, the effective date of MCL 418.301(2); MSA 17.237(301)(2).

There being no showing of fraud, we take the factual findings of the Worker's Compensation Appeal Board as conclusive. Const 1963, art 6, § 28.

A. *BACH v FLINT BOARD OF EDUCATION*

Plaintiff worked for two years as a secretary for one of defendant's elementary schools where Sandra Epps was the principal. She testified that her relationship with Epps initially was cordial. In fact, her first performance review conducted by Epps indicated that she was a satisfactory employee. However, plaintiff soon began to feel alien-

ated. She testified that her emotional and physical problems began in late September or early October of 1981.

Plaintiff felt that Epps was unresponsive to her questions, and she claimed that, at times, Epps snapped at her or answered her questions harshly. Plaintiff also alleged that a number of specific work events added to her feelings of alienation.

One such event occurred when Epps had all members of the staff switch jobs for half a day. Plaintiff performed the duties of a math teacher. She claimed that this made her feel uncomfortable because teaching math was not her job. Another event occurred when Epps had plaintiff tell a substitute teacher that the teacher was fired. Plaintiff initially refused, but Epps told her to think of some excuse and eventually made her dismiss the substitute. Plaintiff claimed that this event upset her. Similarly, she also claimed that Epps had her tell callers that Epps was not in when she was, and that this made her feel uneasy.

Another event involved a school bulletin board. Plaintiff maintained a bulletin board and changed the posted information monthly. Once, when school district administrators were visiting, Epps took responsibility for the bulletin board herself. Plaintiff felt that Epps had done a poor job on the bulletin board and that Epps had shown it off as a "fantastic job." Epps failed to acknowledge plaintiff's contribution in the day-to-day maintenance of the bulletin board. This upset her.

One of the most significant events involved plaintiff's second performance review. She was disturbed by the fact that the second review showed no improvement. She felt that she had made significant improvement in her performance between reviews. Epps' failure to acknowledge plaintiff's perceived improvement upset her. Al-

though she did not say anything at first, she eventually did write a letter to Epps indicating her disappointment. When Epps failed to acknowledge receiving the letter, she approached Epps about the issues she had raised. Plaintiff and Epps discussed the letter, but she left with the impression that the discussion had been fruitless. Their relationship continued to deteriorate after that meeting.

Plaintiff developed headaches and stomach pains, had irregular sleeping patterns, and became depressed. She lost weight, stayed in bed, and stopped doing household chores. After December 1981, she only went to work one or two times a week. Her mental condition steadily worsened. Her last day of work was February 3, 1982.

Epps testified that she was never aware of plaintiff's discomfort. Epps explained her telephone policy, that plaintiff had seemed to enjoy switching jobs for a half day, that numerous people shared responsibility for the bulletin board, and that she deleted some of the comments she made in plaintiff's second performance review after meeting with plaintiff.

Expert testimony went both ways regarding whether plaintiff was mentally disabled. Two doctors diagnosed two different forms of depression; another believed plaintiff was not suffering from any active psychiatric disorder.

The WCAB denied plaintiff's claim because, under MCL 418.301(2); MSA 17.237(301)(2), it was not convinced that plaintiff's disability was related to actual events of employment that plaintiff accurately perceived. The Court of Appeals affirmed the decision of the WCAB.

> Actual "events" did occur in the course of plaintiff's employment. But the meaning plaintiff

> ascribed to these events, which was the basis for the concerns that led to her claimed disability, was not necessarily accurate. There was no convincing showing that Epps was dissatisfied with plaintiff's work or that Epps would not willingly answer plaintiff's questions. There was no convincing evidence showing that plaintiff's working relationship with Epps deteriorated as plaintiff thought it did. [197 Mich App 247, 251; 494 NW2d 815 (1992).]

That Court concluded that the evidence, when viewed from an objective standard, did not support plaintiff's claim for compensation.

B. *BOYLE v DETROIT BOARD OF EDUCATION*

For nearly thirty years, plaintiff worked for defendant as a teacher. During the bulk of his last fifteen years, he was an art teacher at Cooley High School.

Plaintiff testified that his mental distress began in the seventies. Student conduct markedly declined, and his art class became a "dumping ground" for problem students who were failing other subjects. He flunked eighty to ninety percent of his students in some classes because of high absenteeism or inattention. He testified that tardiness was also a serious problem; students in his first-hour classes would straggle in thirty or forty minutes late. Plaintiff found the tardiness problem to be very stressful.

Plaintiff was also upset by incidents that occurred in his classroom when he was not using it. He shared the room with another teacher, Robert Williams. Plaintiff felt that Williams did not maintain proper control of his students. He alleged that Williams let his students carve their initials on the tables and let paint drip on the chairs and

floor. He reported his concerns to the director of the art program, but apparently nothing came of it.

Cutbacks in the art department's budget meant the cancellation of plaintiff's advanced classes. This left him with students who only took his basic art class because they needed an elective course, art being one of the few electives available. Plaintiff called his advanced classes the bright spot of his day. After the cancellation of those classes, he became increasingly depressed by the caliber of students he was left to teach.

Plaintiff was also troubled by actions of the faculty and administration. He believed that some teachers had sex with students. He regarded such relationships as unprofessional.

Plaintiff started to use sick days so that he would not have to go to work. He began drinking heavily during the last four to five years of his employment. On October 28, 1983, he was helping a student draw a face when his hand began to shake uncontrollably. He went home after work and proceeded to go on a rampage. He destroyed his apartment and apparently attempted suicide.

On November 10, 1983, plaintiff was admitted to Woodside Medical, a facility described by the WCAB as being for the "emotionally disturbed and alcoholics." He was treated for alcohol dependency, given psychiatric counseling, and released on November 30, 1983.

Plaintiff briefly returned to work. January 4, 1984, turned out to be his last day of work. On that day, one of his students opened the classroom door before the bell rang. When plaintiff told him to close it, the student responded by calling him a "crazy, old loony." The remainder of the class began chanting the phrase. Plaintiff left work and never returned.

Plaintiff filed a claim for mental disability benefits, claiming his emotional breakdown was due to mistreatment he received from students, coworkers, and administrators.

The experts agreed plaintiff was disabled, but disagreed on the cause. One doctor stated plaintiff's inability to work was directly related to the stress of his employment; another attributed it to alcoholism.

The WCAB denied plaintiff benefits because, under MCL 418.301(2); MSA 17.237(301)(2), the events alleged by him did not establish that a work-related personal injury had arisen out of actual events of employment.

> Assuming that plaintiff is disabled, we are not convinced that his disability occurred in or out of the course of his employment. We find that plaintiff has failed to prove, by a preponderance of the evidence, that he has incurred a disabling injury arising out of or in the course of his employment. [Unpublished opinion of the WCAB, decided May 23, 1990 (Decision No. 645).]

The Court of Appeals affirmed.

> Workers' compensation benefits are not available just because a plaintiff establishes the existence of some incident or "event" that is upsetting to the plaintiff. There must be an injury. The Legislature has required the injury to be based upon the "actual events" of employment. Sections 301(2) and 401(2)(b). This requirement would become meaningless if the ordinary daily conditions and minutiae of employment were sufficient to support a mental disability claim. Thus, ordinary stresses of employment (existing in probably all jobs) are not sufficient to establish the required injury. [197 Mich App 255, 260; 494 NW2d 818 (1992).]

C. *GARDNER v VAN BUREN PUBLIC SCHOOLS*

Between 1978 and 1984, plaintiff worked as a janitor for defendant in various schools. Plaintiff had difficulties with some of his supervisors and co-workers. He cited several events during which his supervisors and co-workers allegedly had mistreated him. He complained that he was given extra work, his supervisors sometimes gave him conflicting instructions, and his co-workers were jealous of his expensive home. The thought of losing his job devastated him.

Plaintiff believed that a supervisor conspired with other employees to have him fired. He discovered that the supervisor had offered some employees time off if they would assist in discovering whether he had a second job, which was against school policy.

Plaintiff's co-workers and supervisors testified that plaintiff was a poor employee. Some of the witnesses even testified that he threatened them or their families with physical harm. Plaintiff also regularly used profanity at work.

The co-workers' testimony confirmed that plaintiff had been given extra work (along with others to compensate for layoffs), and that plaintiff's work was reduced following a grievance hearing. The testimony also showed that certain employees had been offered time off in exchange for "checking up" on the plaintiff.

Plaintiff's last day of work was June 4, 1984. He filed for mental disability benefits, alleging that constant on-the-job harassment led to his mental disability.

The experts agreed plaintiff was disabled, but again differed on the causes. One doctor stated that plaintiff's disorder was directly caused by

stress at work; the other felt it resulted from his genetic makeup.

The WCAB awarded benefits, finding plaintiff to be suffering from a compensable mental disability. It concluded that plaintiff suffered a personal injury due to the grievance proceeding and the supervisor's actions in checking up on the plaintiff. Further, it held that these two events actually occurred and that they contributed to plaintiff's mental disability in a significant manner.

The Court of Appeals reversed, finding error in the WCAB's reasoning.

> An objective analysis is used to determine whether a personal injury (usually in the form of a precipitating work-related event in mental disability cases) significantly affected an employee's mental condition. *Boyle v Detroit Bd of Ed,* 197 Mich App 255; [494] NW2d [818] (1992); *Sobh v Frederick & Herrud, Inc,* 189 Mich App 24, 28; 472 NW2d 8 (1991). As in *Sobh,* in this case the WCAB did not indicate why an objective person would find significant the two incidents that the WCAB found satisfied the requirement of a personal injury. [197 Mich App 265, 270; 494 NW2d 845 (1992).]

III. COMPENSABILITY OF MENTAL DISABILITY IN MICHIGAN

Mental disability, in one form or another,[2] has been recognized as a compensable injury in this

[2] This Court, like most others in the nation, has identified at least three forms of mental disability cases. The first is exemplified by *Harris v Castile Mining Co,* 222 Mich 709; 193 NW 855 (1923), holding that when a specific work-related physical injury causes mental disability, the resulting mental disability is compensable. The second form is exemplified by *Klein v Len H Darling Co,* 217 Mich 485, 488; 187 NW 400 (1922), holding that when a specific mental stimulus ("mental shock") causes physical harm, the resulting physical harm is compensable. The third is exemplified by *Carter v General Motors*

state for over seventy years. Before the legislative amendments of the worker's compensation act in 1982, embodied in 1980 PA 357, the compensability of a mental disability arising from the ordinary events of employment was governed by a line of cases beginning with *Carter v General Motors Corp,* 361 Mich 577; 106 NW2d 105 (1960).

Carter involved a machine worker with a predisposition for paranoid schizophrenia. The worker filed for benefits, claiming that emotional pressures from his daily work triggered his psychosis.[3]

The central issue in *Carter* was whether a mental disability is compensable when it results from a series of ordinary employment events. The disability in *Carter* was unique because the claimant became disabled as a result of stress that gradually accumulated from ordinary events.

> [The claimant's] disability was caused by emotional pressures produced by production line employment not shown by him to be unusual in any respect,—that is, not shown by him to be any different from the emotional pressures encountered by his fellow workers in similar employment. [*Id.* at 585.]

Nonetheless, the Court found that mental disability, triggered by ordinary employment events and pressure, could be compensable.

Carter was expanded by this Court in the controversial *Deziel v Difco Laboratories, Inc (After*

Corp, 361 Mich 577; 106 NW2d 105 (1960), holding that mental disability resulting from the daily events and stresses of work is compensable.

[3] The specific events that contributed to Mr. Carter's mental disability resulted from the fact that he was unable to meet the demands of the job. "[W]hen he took only 1 hub assembly at a time, he fell behind; when he fell behind, he took 2 assemblies; but when he took 2 assemblies, he got the assemblies mixed up and was berated by the foreman." *Id.* at 581.

Remand), 403 Mich 1; 268 NW2d 1 (1978). In *Deziel,*[4] this Court articulated a three-step inquiry to determine the compensability of mental disabilities. Under *Deziel,* a claimant had to prove: (1) a mental disability; (2) arising out of a personal injury (defined as a precipitating work-related event); and (3) an honest, even if mistaken, perception that the employment-related injury was responsible for the disability. *Id.* at 35-37.

This Court determined that the proper causal standard to be applied in mental disability cases was a subjective one:

> We hold, as a matter of law, that in cases involving mental (including psychoneurotic or psychotic) injuries, once a plaintiff is found disabled and a personal injury is established, it is sufficient that a strictly *subjective* causal nexus be utilized by referees and the WCAB to determine compensability. Under a "strictly *subjective* causal nexus" standard, a claimant is entitled to compensation if it is factually established that claimant *honestly perceives* some personal injury incurred during the ordinary work of his employment "caused" his disability. This standard applies where the plaintiff alleges a disability resulting from either a physical or mental stimulus and honestly, even though mistakenly, believes that he is disabled due to that work-related injury and therefore cannot resume his normal employment. See anno: *Workmen's compensation: Neurasthenia as compensable,* 44 ALR 500.
>
> The focal point of this standard is the plaintiff's *own* perception of reality. [*Id.* at 26. Emphasis in original.]

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[4] At that time, § 301, there being no subsection (2), provided:

> An employee, who receives a personal injury arising out of and in the course of his employment . . . shall be paid compensation in the manner and to the extent provided in this act . . . .

Deziel expressly rejected application of an objective causal standard.

> Any attempt to take the inquiry to an objective level, i.e., "did claimant's employment *really* combine with some internal weakness or disease to produce the disability?," is bound to lead to frustration and eventually ad hoc manipulation. This is true because in most cases the question is unanswerable. [*Id.* at 31. Emphasis in original.]

Dissatisfied with the majority's subjective causal analysis, Justice COLEMAN dissented. She suggested an alternative standard:

> The relevant inquiry is whether claimant's employment did, in fact, "aggravate, accelerate or combine with some internal weakness or disease to produce the disability."[14] 1 Larson, Workmen's Compensation Law, § 12.20.
>
> We would add the caveat that the fact finder will have to find more than a "de minimis" relationship between the mental disorder and the occupation before awarding compensation. In other words, in light of the acknowledged relationship between symptoms and non-occupational events, the causal connection must be established in some substantial degree.
>
> [14] The majority rejects this query as too "objective" in nature. We cannot agree with this characterization. If one focuses upon the individual, as distinct from the "average" employee, the "aggravate-accelerate-combine" language is inherently subjective.
>
> [*Id.* at 61.]

It appears therefore, that although Justice COLEMAN was dissatisfied with the "honest perception" causal standard, she too was reluctant to abandon a basic tenet of worker's compensation law: employers take employees as they find them. For her,

the question was not whether the employment would have caused mental disability in an "average" employee. Rather, it was whether the employment did, in fact, play a significant role in aggravating or accelerating a particular employee's mental disability.

Deziel was revisited briefly in *Hurd v Ford Motor Co,* 423 Mich 531; 377 NW2d 300 (1985), and *Peters v Michigan Bell Telephone Co,* 423 Mich 594; 377 NW2d 774 (1985). In *Hurd,* the Court held that MCL 418.301(2); MSA 17.237(301)(2), applies to all personal injuries occurring on or after January 1, 1982. In *Peters,* the Court held that it would not reevaluate the *Deziel* standard because the legislative amendment[5] of MCL 418.301(2); MSA 17.237(301)(2), made such a reevaluation unnecessary. Additionally, this Court wanted to avoid creating a third judicial standard for mental disability cases.

IV. THE LEGISLATIVE REACTION TO *DEZIEL*

Justice COLEMAN was not the only person dissatisfied with *Deziel.* In 1980, the Legislature amended the definition of "personal injury" under chapters 3[6] and 4[7] of the worker's compensation

[5] 1980 PA 357.

[6] Section 301 addresses work-related injuries; for the full text of § 301(2), see n 1.

[7] Section 401 addresses occupational diseases, and provides in pertinent part:

> "Personal injury" shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment. An ordinary disease of life to which the public is generally exposed outside of the employment is not compensable. Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a

act[8] by enacting 1980 PA 357. Public Act 357 amended both chapters to explicitly provide compensation for work-related mental disabilities.

In terms of understanding the purpose of 1980 PA 357, the legislative history provides some insight. Apparently, some members of the Legislature believed that the unamended statute did "not prescribe definite standards as to what constitutes compensable heart or mental disabilities." Workers' Compensation Reform Task Force, *Report of the Special Committee to Study Workers' Compensation,* December 1980, Issue No 2c. Moreover, proponents of the bill maintained that "the lack of such standards has led to reckless judicial interpretation of the disability standard as it applies to heart and mental cases resulting in compensation being paid to workers whose disability was not work related." *Id.*; see also *Dean v Chrysler Corp,* 434 Mich 655, 666-667; 455 NW2d 699 (1990).

So it was the lack of legislative standards combined with "reckless" judicial interpretations that led the Legislature to consider comprehensive reform of the worker's compensation act. A part of that reform was SB 1044, which became 1980 PA 357. The legislative analysis of SB 1044 notes that the act was intended to

> limit compensation for heart conditions and mental disability to cases where employment is shown to have contributed significantly to the condition.
>
> * * *
>
> After December 31, 1981, mental disabilities and conditions of the aging process including heart

significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof. [MCL 418.401(2)(b); MSA 17.237(401)(2)(b).]

[8] MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*

> and cardiovascular conditions will be compensable only if contributed to or aggravated or accelerated by the condition of employment in a significant manner. Mental disability will be compensable if it arises out of actual events of employment; an employee's unfounded perceptions of the employment and its relationship to a mental disability will not be sufficient to substantiate a claim for compensation. [Senate Analysis Service, SB 1044, Second Analysis, January 7, 1981.]

Insight into legislative intent is also provided by examining the economic conditions of the early eighties which fueled much of the political debate concerning comprehensive worker's compensation reform.

> Beginning in late 1979, Michigan's economy had begun to slow. As the nation moved into a recession, the resulting downturn in auto production started to have a severe effect on the general public in terms of high inflation and high [un]employment. . . . By early 1980 Michigan's economic problems were clearly going from bad to worse, and some individuals and groups not usually concerned about the state's "business climate" began to express some concern that the legislature should do something about the real or perceived problem of workers' compensation in an effort to forestall any further plant closings or relocations. [VanderLaan & Studley, *Workers' compensation reform: A case study on the legislative process in Michigan,* 14 U Mich J L Ref 451, 454 (1981).]

Several senators made comments on the senate floor regarding the motivation behind the reform movement. Senator Welborn noted:

> Since 1979, and prior to that, 1978 during the elections, everybody said that worker's compensation is the highest priority in the State of Michi-

gan. We cannot afford to lose industry and jobs in this state. [1980 Journal of the Senate 820.]

Echoing these sentiments, Senator Guastello commented:

> I think we, in Michigan, are leading the nation and perhaps the tip [sic] into one of the most serious economic dilemmas, if not depressions, that this country has ever seen. . . . I think it is incumbent upon all of us who serve here today to do everything that we can do, personally, practically and expediently to solve the problems facing the business community in the State of Michigan . . . . [1980 Journal of the Senate 822.]

Although most agree that 1980 PA 357 was meant to be a substantive change in the law, tightening the requirements for compensable mental disabilities, there is little agreement about exactly what that change means.

V. DISCUSSION

A

We begin by acknowledging the obvious: the Legislature has seen fit to make mental disabilities compensable under this state's worker's compensation act. Worker's compensation law is an area of the law committed to the discretion of the Legislature. The ultimate social and economic goals of the worker's compensation act are for the Legislature, not the courts, to decide. Our duty is merely to determine whether a particular disability is compensable, given the statutory scheme.

Thus the only task facing this Court is to determine what standards are mandated by MCL 418.301(2); MSA 17.237(301)(2). In so doing, this Court need not hone the analytical knife sharper

than the statutory language requires. *Deziel, supra* at 60, n 13 (COLEMAN, J., dissenting).

The statutory provision at issue in these cases provides:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. *Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof.* [MCL 418.301(2); MSA 17.237(301)(2). Emphasis added.]

B

Initially, we are faced with the problem of distinguishing between "actual events of employment" and "unfounded perceptions thereof." A basic maxim of statutory construction is that statutes are to be construed to avoid absurd results. *Franges v General Motors Corp,* 404 Mich 590, 612; 274 NW2d 392 (1979). Although we make no attempt in this opinion to define what a "mental" disability is, we are cognizant of the fact that to some degree many, if not all, mental disabilities are based on "unfounded perceptions" of "reality" or "actual events." An unfounded perception of reality is the very characteristic that distinguishes a mentally disabled person from a "normal" person.

> In finding solutions to their unconscious problems, psychoneurotics and psychotics develop personality problems which make it difficult for them to adapt to reality as it is encountered by so-called "average" or "normal" individuals. This failure of the psychoneurotic or psychotic's reactions and

> adjustment mechanisms can either distort his perception of reality or, in the worst psychotic cases, cause the individual to lose contact with reality . . . . [*Deziel, supra* at 29. See also *Peters, supra* at 626 ("by definition, the [mental disability] claimant may misperceive reality") (RILEY, J., dissenting).]

Thus if one reads MCL 418.301(2); MSA 17.237(301)(2) as prohibiting compensation for claims based on unfounded perceptions of actual events, as opposed to prohibiting compensation for claims based on imagined or hallucinatory events, then one is left with a statute that makes little sense. Where the first part of the provision states that certain work-related mental disabilities *shall* be compensable, the last part excludes the vast majority of all mental disabilities, those based on unfounded perceptions of actual events. What the legislative right hand gives, the left takes. This is an absurd result. This Court has consistently attempted to construe statutes so as to avoid absurd results, and our construction of this statute will be no different.

C

It is also axiomatic that courts are to give effect to legislative intent. *In re Certified Question,* 433 Mich 710, 722; 449 NW2d 660 (1989). We acknowledge, as shown by the legislative history, that 1980 PA 357 was enacted to invalidate *Deziel,* thus effecting a substantive change in the law. We are equally aware of the fact that the legislative history indicates that one goal of that act was to restrict expansive interpretations of the worker's compensation act, such as *Deziel.* However, one must not lose sight of what *Deziel* established and thus what 1980 PA 357 invalidated.

Deziel established a subjective causal analysis based on the honest perceptions of the claimant. The honest perception test has two major problems, which we presume the Legislature intended to change: (1) it allows a compensable disability to be based on imagined events, and (2) it does away with any need to prove a factual causal connection between the disability and the employment events. In enacting 1980 PA 357, the Legislature intended to eliminate *Deziel*'s honest perception test and its subjective causal analysis by requiring "actual events" and a "significant" causal connection.

1

The Legislature effected its change of the first *Deziel* problem by requiring that mental disabilities be based on actual events of employment. Courts and commentators alike realized that *Deziel*'s honest perception test permits a mental disability claim to be based on imagined, hallucinatory, or delusional events. In other words, the honest perception test permits compensation to be based on "unfounded perceptions" that actual events of employment did occur.

This problem is exemplified by this Court's handling of *MacKenzie v Fisher Body,* a companion case decided in *Deziel.* In *MacKenzie,* the WCAB held:

> "[W]e attempted then, and now, to exclude situations where the claimed compensable disability arose from an imagined/perceived/hallucinated stimulus *that has not been proven* [*to have*] *existed or* [*to have taken*] *place,* even in the most normal form—except in the mind of the recipient.
>
> "Applied to the facts of this case . . . we are forced by the medical description of plaintiff's personality to find that it is *at least* as likely an

inference that these [events] were imagined." [*Deziel, supra* at 20. Emphasis in original.]

This Court reversed and held that had the WCAB applied a strictly subjective standard for establishing the causal nexus in *MacKenzie,* it would have awarded compensation. Thus the precedent was established in this state that even imagined, hallucinatory, or delusional events could form the basis of a compensable mental disability notwithstanding the fact that there was no causal connection between the employment and the disability.

Dissatisfied with this result, the Legislature enacted the "actual events" language, thereby partially invalidating *Deziel*'s honest perception test. No longer can imaginary events form the basis of a compensable mental disability claim. A claimant must prove that actual employment events occurred as a matter of objective fact.

2

The Legislature completed its invalidation of *Deziel* by addressing the second *Deziel* problem. It realized that merely requiring a claimed disability to arise out of actual employment events was not sufficient to ensure that a given claim is truly work related. Therefore, the Legislature not only requires "actual events of employment," but also requires that those events contribute to, aggravate or accelerate the claimant's disability "in a significant manner."

The significant manner requirement does away with *Deziel*'s failure to require any factual causal connection whatsoever between the injury and the employment. Under *Deziel,* a claimant was considered disabled simply because of an honest belief of disability. The significant manner requirement now forces a claimant to actually prove a signifi-

cant factual causal connection between the actual events of employment and the mental disability.

The significant manner requirement also imposes on claimants a higher standard of proof. *Farrington v Total Petroleum, Inc,* 442 Mich 201, 216; 501 NW2d 76 (1993). Although *Farrington* deals specifically with heart disease, the significant manner requirement at issue in that case is the same requirement as we are construing here. It is, in fact, contained in the very same provisions. Not surprisingly, the analysis developed in *Farrington* for determining the significance of work-related events applies in mental disability cases as well.

Under the statutory standard, causation is determined by the factfinder. It is not determined by the honest, even if unfounded, perceptions of the claimant. In determining whether specific events of employment contribute to, aggravate, or accelerate a mental disability in a significant manner, the factfinder must consider the totality of the occupational circumstances along with the totality of a claimant's mental health in general.

The analysis must focus on whether actual events of employment affected the mental health of the claimant in a significant manner. This analysis will, by necessity, require a comparison of nonemployment and employment factors. Once actual employment events have been shown to have occurred, the significance of those events to the particular claimant must be judged against all the circumstances to determine whether the resulting mental disability is compensable.[9]

D

In construing this statute, we are also mindful

[9] In making this determination, medical evidence establishing the relationship between the event and the disability may play an important role.

of the presumption that the Legislature is aware of judicial interpretations of existing law when passing legislation. *Dean, supra* at 667, n 18. Perhaps nowhere is this more relevant than in the field of worker's compensation law which has a long and well-established legal history in this state. There are certain longstanding principles of worker's compensation law that are implicated in almost all compensation cases—principles that have not been altered by 1980 PA 357.

For example, it is well established that employers take employees as they find them, with all preexisting mental and physical frailties. A claimant's preexisting condition does not bar recovery:

> Nothing is better settled in compensation law than that the act takes the workmen as they arrive at the plant gate. Some are weak and some are strong. Some, particularly as age advances, have a pre-existing "disease or condition" and some have not. No matter. All must work. They share equally the hazards of the press and their families the stringencies of want, and they all, in our opinion, share equally in the protection of the act in event of accident, regardless of their prior condition of health. [*Sheppard v Michigan Nat'l Bank,* 348 Mich 577, 584; 83 NW2d 614 (1957) (SMITH, J., concurring).]

Worker's compensation law in this state has also recognized that even the most trivial physical event can lead to a compensable physical injury. *Zaremba v Chrysler Corp,* 377 Mich 226, 231; 139 NW2d 745 (1966). The issue is not whether a person of "reasonable" or "average" health would have been injured. It is whether a specific individual, regardless of preexisting conditions, sustained an injury that arose out of, and in the course of employment. Absent an explicit legislative man-

date, mental disabilities should not be treated differently.[10]

Further supporting our reading of this statute is the fact that the worker's compensation act is remedial legislation, and, as such, it is to be liberally construed. *Bower v Whitehall Leather Co,* 412 Mich 172, 191; 312 NW2d 640 (1981). The primary intent underlying the worker's compensation act is to provide compensation to eligible persons for covered disabilities. Accordingly, any statutory ambiguity should generally be construed in favor of awarding compensation. *Id. Deziel, supra* at 34-35.

E

This Court recognizes that actual events of employment, even if "ordinary," can be injurious to the mental health of a predisposed individual. The statute, by excluding "unfounded perceptions" of the actual events of employment, excludes situations in which the claimed events never occurred (i.e., where they are imagined, hallucinatory or delusional).

Although the statutory test embodied in MCL 418.301(2); MSA 17.237(301)(2), does contain objective elements, it is not a purely objective test. The events must be objectively proven to have occurred; they cannot be based on the subjective, imaginary beliefs of the claimant. Furthermore, the causal connection must be objectively established given a particular claimant's preexisting mental frailties. However, by focusing on the individual worker, as opposed to an average worker, both the significant manner requirement and the

[10] We note that the very language of the provision (i.e., "contribute," "aggravate," "accelerate") presupposes a preexisting mental disability. After all, a mental disability must first exist before actual events of employment may "contribute" to it, "accelerate" it, or "aggravate" it.

actual events requirement also have substantial subjective elements.

It is, therefore, irrelevant how a "reasonable" person would react to the objectively established actual events. The relevant inquiry, and the only inquiry presently required by worker's compensation law in this state, is: Did the actual events of employment occur, and do these bear a significant relationship to the mental disabilities? Reduced to its simplest form, the analysis is this: Given actual events and a particular claimant, with all the claimant's preexisting mental frailties, can the actual events objectively be said to have contributed to, aggravated, or accelerated the claimant's mental disability in a significant manner?

This type of inquiry places the focus where it should be: on the authenticity of the underlying event and the significance of its relationship to the resulting disability.

VI. APPLICATION

Turning to the cases at bar, it is clear that the Court of Appeals in all three cases applied a purely objective standard. We reject this standard. Had the Legislature desired to make mental disabilities compensable only when they arise out of unusual events or events likely to cause mental disability in a "reasonable" person, it could have easily and explicitly done so. It did not. Consequently, we reverse the decision of the Court of Appeals in all three cases.

A

We hold that the WCAB in *Bach* and *Boyle* applied a purely objective standard as well. De-

spite the narrow scope of appellate review in these cases, we find that the WCAB erred in determining the proper legal standard to be applied. Const 1963, art 6, § 28; MCL 418.861a(14); MSA 17.237(861a)(14). Accordingly, we reverse the rulings of the WCAB in *Bach* and *Boyle,* and we remand these cases to the WCAC for proceedings consistent with this opinion.

B

We hold that the WCAB applied the correct legal analysis in *Gardner* and thus we affirm its holding. The WCAB held:

> No psychiatric testimony has been presented that plaintiff is not disabled. We see no other finding except that he [Gardner] is unable to function psychiatrically in the workplace.
>
> . . . [T]he fact that plaintiff was required to be subjected to a grievance hearing in regard to excess work and the fact that plaintiff was checked up on by his superiors are not unfounded perceptions, but are fact. . . .
>
> Third, we must determine whether the employment significantly aggravated plaintiff's condition. We find, based on the medical testimony of Dr. Feldstein, that the employment did indeed significantly contribute to plaintiff's condition. [Unpublished opinion of the WCAB, decided September 24, 1990 (Decision No. 1176).]

Although the WCAB in *Gardner* purported to base its analysis on *Deziel,* it found a mental disability arising out of actual events of employment. It further found that the events of employment significantly aggravated the mental disability. This analysis, in fact, comports with our interpretation of MCL 418.301(2); MSA 17.237(301)(2).

VII. CONCLUSION

We hold that to establish a compensable mental disability claim arising on or after January 1, 1982, a claimant must prove: (1) a mental disability; (2) arising out of the actual events of employment, not unfounded perceptions thereof; and that (3) those events contributed to, aggravated, or accelerated the mental disability in a significant manner.

We believe that our interpretation of 1980 PA 357 serves the legislative intent of restricting *Deziel's* expansive causal analysis based on a claimant's honest perceptions, while still providing compensation for mental disabilities. Our interpretation is also in accord with established worker's compensation law in this state. Employers take employees as they find them. Allowing actual, if seemingly unimportant, events to form the basis of a compensable mental disability treats mental injuries the same as physical injuries.

We reject application of a purely objective standard when examining causation in mental disability cases. We will not infer such a radical change in this state's worker's compensation law merely because there is some ambiguity in a given statutory provision.

Accordingly, we reverse the decision of the Court of Appeals in all three cases. We reinstate the award of compensation made by the WCAB in *Gardner,* and we remand to the WCAC in *Bach* and *Boyle* for further proceedings consistent with this opinion.

LEVIN, BOYLE, and MALLETT, JJ., concurred with CAVANAGH, C.J.

BRICKLEY, J. (*concurring in part and dissenting in part*). While I agree with much of the analysis

offered by the majority, I write separately to express my understanding of the proper interpretation of MCL 418.301(2); MSA 17.237(301)(2). It is my opinion that by amending MCL 418.301(2); MSA 17.237(301)(2) to demand that mental disability claimants establish "actual events of employment, not unfounded perceptions thereof," the Legislature sought to create a standard of causation that incorporated greater substantive objectivity. Because the majority seems to leave intact much of the purely "subjective causal nexus" test created by this Court in *Deziel v Difco Laboratories, Inc (After Remand),* 403 Mich 1, 26; 268 NW2d 1 (1978), abrogated by the Legislature in 1982, I respectfully dissent.

I

It is a well-established rule of statutory construction that every word of a statute be given meaning and no word be treated as surplusage or rendered nugatory.[1] MCL 418.301(2); MSA 17.237(301)(2) provides, in pertinent part, that mental disabilities may be compensable "when arising out of actual events of employment, not unfounded perceptions thereof." The majority properly interprets the first part of this phrase (the "actual events" language) as demanding the *existence* of actual (i.e., not delusional or imaginary) employment events. However, the majority interprets the second part of this phrase (the "unfounded perceptions" language) as merely reiterating the requirement that actual events of em-

[1] *Baker v General Motors Corp,* 409 Mich 639, 665; 297 NW2d 387 (1980), *(After Remand),* 420 Mich 463; 363 NW2d 602 (1984), aff'd 478 US 621; 106 S Ct 3129; 92 L Ed 2d 504 (1986); *Stowers v Wolodzko,* 386 Mich 119; 191 NW2d 355 (1971); *Klopfenstein v Rohlfing,* 356 Mich 197; 96 NW2d 782 (1959); *Wyandotte Savings Bank v State Banking Comm'r,* 347 Mich 33; 78 NW2d 612 (1956); *Baird v Detroit Election Comm,* 316 Mich 657; 26 NW2d 346 (1947); *United Ins Co v Attorney General,* 300 Mich 200; 1 NW2d 510 (1942).

ployment have existed.[2] This conclusion is problematic.

It is manifestly clear from the unambiguous language of MCL 418.301(2); MSA 17.237(301)(2) that "actual" employment events must exist to recover for a mental disability—recovery is only possible for disabilities "arising out of actual events of employment." To what, therefore, does the "unfounded perceptions" language refer? The majority's conclusion that this second requirement simply demands that "actual events" have existed renders the "unfounded perceptions" language superfluous, nugatory, and without independent effect. That "actual events" have occurred is already demanded by the first part of this phrase.

A more practical interpretation—one that gives effect to the clear and unambiguous language of MCL 418.301(2); MSA 17.237(301)(2)—is that "unfounded perceptions" refers not to the *existence* of an event, but to a claimant's *interpretation or perception* of an actual event. This conclusion does not reiterate the "actual events" requirement, but instead demands, as an independent matter and without unnecessary surplusage, that a claimant's *perception* of actual events not have been unfounded.[3]

---

[2] Specifically, the majority explains:

> The statute [MCL 418.301(2); MSA 17.237(301)(2)], by excluding "unfounded perceptions" of the actual events of employment, excludes situations in which the claimed events never occurred (i.e., where they are imagined, hallucinatory or delusional). [*Ante* at 49.]

This is just another way of saying that the *existence* of the event must be objectively proven—that the "unfounded perception" or belief in an occurrence is not an "actual event" within the meaning of MCL 418.301(2); MSA 17.237(301)(2). Notably, however, this conclusion places no substantive limitations upon how the event must be perceived or interpreted by the claimant in order to recover benefits.

[3] The requirement that an "actual event" have occurred is, in this

As importantly, this conclusion is consistent with the Legislature's decision to abrogate the holding in *Deziel, supra.* The *Deziel* "subjective causal nexus" test permitted recovery if a claimant honestly perceived that mental injury resulted from an employment event. While the majority explains that "*Deziel's* honest perception test permit[ted] a mental disability claim to be based on imagined, hallucinatory, or delusional *events,*" *ante* at 45 (emphasis added), in fact *Deziel* did not address "events" but, rather, dealt exclusively with "causation" determinations.[4] Accordingly, while the Legislature's 1982 amendment of MCL 418.301(2); MSA 17.237(301)(2), may have added an "actual events" requirement, its motivation was to reverse the *causation* standard created by *Deziel.*

So what is "causation" in a mental disability case? Whether a claimant suffers from a preexisting mental infirmity, or whether the problem only surfaces during employment, compensable mental

sense, a condition precedent to further inquiry under the "unfounded perception" prong of MCL 418.301(2); MSA 17.237(301)(2). Under both this interpretation and the majority analysis an "actual event" will seldom be difficult to establish. In *Bach,* for example, "actual events" would have included such everyday occurrences as claimant having to inform callers that her supervisor was unavailable and the standard job evaluations that claimant received. In *Boyle,* "actual events" would include student absenteeism and declining interest, low student passage rates, curriculum cutbacks, and student disrespect for instructors. In *Gardner,* claimant's grievance hearing, increased workload, and personal conflict with co-workers would suffice as "actual events."

[4] The *Deziel* Court defined the scope of its inquiry as follows:

> This Court views the *real* problem underlying these three cases to be whether the WCAB identified and correctly applied the legal standard for establishing legal causation in workers' compensation cases involving mental and nervous injuries. More succinctly, the Court must decide whether the WCAB properly states the causal nexus to be established by plaintiffs who allege that their disabilities and injuries are psychoneurotically or psychotically rooted . . . . [*Id.* at 21. Emphasis in original.]

disabilities arise from *perceptions* of *events.* Being of a psychological origin, the disability affects the mind not the body. The claimant's mind perceives actual events in such a manner that the compensable mental disability is induced, "contributed to or aggravated or accelerated by" the event in a significant manner. MCL 418.301(2); MSA 17.237(301)(2). Causation, therefore, in this context is nothing more than the process of perceiving events and reacting to them.

Under *Deziel,* this process of perception—i.e., causation—was as subjective as the claimant. Delusional, unfounded or imaginary misperceptions of events were, if honestly perceived by a claimant, potentially compensable. The Legislature inextricably altered this approach. Today, a claimant's *interpretation and perception* of an actual event must not amount to an "unfounded perception" of that event—causation must be based in part on founded perceptions of actual events. To hold, as does the majority, that the "unfounded perceptions" language of MCL 418.301(2); MSA 17.237(301)(2) refers to the existence of actual events, and not to causation or a claimant's interpretation of those events, is simply inconsistent with the Legislature's avowed purpose of invalidating *Deziel.*[5] In fact, the majority holding leaves

[5] Interestingly, at least one passage from the legislative history of SB 1044 (which became 1980 PA 357), cited as supportive by the majority, in fact suggests that the "unfounded perceptions" language of MCL 418.301(2); MSA 17.237(301)(2) was intended to implicate not specific employment events but other aspects of the employment relationship, such as how an employee interpreted those events:

> "After December 31, 1981 . . . [m]ental disability will be compensable if it arises out of actual events of employment; an employee's unfounded perceptions *of the employment* and its relationship to a mental disability will not be sufficient to substantiate a claim for compensation." [*Ante* at 40-41, quoting Senate Analysis Service, SB 1044, Second Analysis, January 7, 1981. Emphasis added.]

intact much of the "subjective causal nexus" test created in *Deziel*—once an "actual event" is established a claimant's delusional, hallucinatory, or imagined perceptions of that event will not prohibit recovery. Thus, in reality, the "focal point" of the majority's new causation standard continues to be "the plaintiff's own perception of reality." *Deziel* at 26.

II

My interpretation of MCL 418.301(2); MSA 17.237(301)(2) does not create a purely objective approach to mental disability determinations. Nor does this approach abrogate the well-established principle of worker's compensation law that "employers take employees as they find them, with all preexisting mental and physical frailties." *Ante* at 48. In fact, this interpretation of MCL 418.301(2); MSA 17.237(301)(2) demands that a hybrid of subjective and objective considerations be applied to three facets of an individual's mental disability claim: 1) the existence of the event, 2) the claimant's perception of the event, and 3) the claimant's reaction to the event.

Objective analysis is reflected in the requirements that *actual events* of employment have occurred and that a claimant's *perception* or *interpretation* of those events have been well-founded. This analysis demands both procedural and substantive objectivity. The existence of actual events and well-founded perceptions must be discerned by an objective trier of fact, not by the claimant. The standard of review is also objective—did the event actually occur, and was claimant's perception of it well-founded?

Conversely, subjective analysis is proper in examining a claimant's *reaction* to actual employ-

ment events, perceived in a well-founded manner. A claimant with a psychiatric disability cannot be expected to *react* to certain events, properly perceived, in a manner entirely consistent with that of a normal, healthy individual. However, neither the Legislature nor the position I advocate here demands such a reaction. While a claimant's *perception* of the event must be objectively well-founded, that same claimant's *reaction* to the event can be very atypical.[6]

In short, a mental disability claimant's perception of actual events of employment must be established as well-founded. Once so established, a claimant's reaction to the events is judged subjectively, taking into account all claimant's preexisting infirmities and disabilities. This subjective analysis, individualized to the claimant, insures continued recognition of employers' general obligation to "take employees as they find them."

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[6] Because the line between *perception* and *reaction* is arguably difficult to discern, I offer the following example to illustrate this important distinction.

Claimant One, who suffers from acute paranoia and a constant fear of death, is a postal worker who sorts mail at a branch office. One day, while at work, the claimant is caught in the cross fire of a shooting spree instigated by a disgruntled former postal employee. The claimant is physically unharmed and understands that the shooting is an isolated incident. Nevertheless, the shooting reinforces the claimant's fear of death and, as a result, the claimant is unable to continue work for the Postal Service or any other employer. Because the claimant's *perception* of this actual event was founded, his *reaction* is assessed subjectively. If the claimant can show that the event "contributed to or aggravated or accelerated" his mental disability in a significant manner, he is entitled to recovery.

Claimant Two, who also suffers from acute paranoia and a constant fear of death, is a postal worker sorting mail in a different branch office. One day, while at work, a fellow employee accidentally drops a heavy box onto the floor. The claimant, standing nearby, hears the loud bang and mistakes it for gunfire. Believing the incident to be a warning that he will soon be shot and killed, the claimant is unable to continue work for the Postal Service or any other employer. Because the claimant's *perception* of this actual event is unfounded, his *reaction* is irrelevant and the claimant is not entitled to recover for a mental disability.

In summary, I agree with the majority that MCL 418.301(2); MSA 17.237(301)(2), as amended, demands that actual events of employment be proven to an objective trier of fact. *Ante* at 46. I also agree that this provision requires objective proof of "a significant factual causal connection between the actual events of employment and the mental disability." *Ante* at 46-47. However, and for the reasons stated above, I disagree with the majority that the "unfounded perceptions" language of MCL 418.301(2); MSA 17.237(301)(2) simply refers to the existence of an employment event.

III

GARDNER v VAN BUREN PUBLIC SCHOOLS

The Worker's Compensation Appeal Board in *Gardner v Van Buren Public Schools,* 197 Mich App 265; 494 NW2d 845 (1992), interpreted and applied MCL 418.301(2); MSA 17.237(301)(2) consistent with my reading of the statute.[7] The Court of Appeals reversed, concluding that the WCAB "did not indicate why an objective person would find significant the two incidents that the WCAB found satisfied the requirement of a personal injury." *Id.* at 270. This "objective analysis" of causality by the Court of Appeals was erroneous insofar as it failed to distinguish between the objective standard for identifying a precipitating employment

[7] Specifically, the *Gardner* panel concluded that claimant had established a psychiatric disability significantly aggravated by two work-related actual events. Notably, the panel did not make an express finding that claimant's perception of these events was founded. Rather, the panel concluded—on the basis of the testimony of three third-party witnesses, not on claimant's testimony—that these events actually occurred as maintained in the complaint for benefits.

It is clear from these findings of fact that the *Gardner* panel implicitly found claimant's perception of actual events not to have been unfounded.

event and the subjective standard for assessing that event's effect on a claimant. Once an actual event of employment is properly perceived by the claimant, it is the *claimant's* reaction—not a hypothetical "objective person['s]"—that matters. For this reason, in *Gardner* I would reverse the decision of the Court of Appeals and affirm the decision of the WCAB.

BOYLE v DETROIT BOARD OF EDUCATION

The WCAB in *Boyle v Detroit Bd of Ed,* 197 Mich App 255, 261; 494 NW2d 818 (1992), concluded that, while claimant established certain events of employment, these events amounted to nothing more than "general allegations of stress and anxiety" and failed to meet the "actual events" requirement of MCL 418.301(2); MSA 17.237(301)(2). Accordingly, the panel never fully addressed whether claimant's perceptions of employment events were founded. The Court of Appeals affirmed, explaining that the "actual events" requirement "would become meaningless if the ordinary daily conditions and minutiae of employment were sufficient to support a mental disability claim." *Id.* at 260. Like the WCAB, the Court of Appeals did not determine whether claimant's perceptions of employment events were founded. Both the WCAB and the Court of Appeals erred.

The WCAB is correct that specific employment events must be pleaded, and established, to support a mental disability claim. However, both the WCAB and the Court of Appeals err in equating ordinary employment events with common workplace stresses. While this might be the normal reaction for the hypothetical reasonable worker, psychiatric disability claimants are often not such objective persons. What matters is whether an

employment *event* occurred, and whether this event was perceived by the claimant in a founded manner. If so, it is then the claimant's reaction that matters. Accordingly, ordinary and minute "actual events" of employment may, if properly perceived by a claimant, serve as the basis for a mental disability claim.[8] I would reverse both the decision of the Court of Appeals and the WCAB in *Boyle,* and remand to the WCAB for further proceedings. See *Farrington v Total Petroleum, Inc,* 442 Mich 201, 225; 501 NW2d 76 (1993) (RILEY, J., dissenting).

BACH v FLINT BOARD OF EDUCATION

The WCAB in *Bach* properly interpreted and applied MCL 418.301(2); MSA 17.237(301)(2) and, accordingly, I would affirm its decision. While the Court of Appeals affirmance is slightly more problematic, I again would affirm.

The Court of Appeals explained that "the WCAB found that plaintiff's *reaction,* which was dependent on plaintiff's *perceptions,* was unfounded." *Bach v Flint Bd of Ed,* 197 Mich App 247, 251; 494 NW2d 815 (1992). This is not an accurate statement of the WCAB decision or of the inquiry demanded by MCL 418.301(2); MSA 17.237(301)(2). The WCAB found that claimant's *perception* of actual employment events was unfounded. Accordingly, the WCAB never considered whether claim-

[8] While I acknowledge probable and understandable frustration of the Court of Appeals with "ordinary daily conditions and minutiae of employment" serving as the basis for a mental disability claim, it is nevertheless clear that the Legislature has only demanded that "actual" employment events, not objectively significant, abnormal, or uncommon incidents, serve as the basis for a mental disability claim. The concerns expressed by the Court of Appeals are more properly infused and analyzed under the "significant manner" causation requirement, not the "actual events" demand, of MCL 418.301(2); MSA 17.237(301)(2).

ant's subjective *reaction* significantly "contributed to or aggravated or accelerated" her mental condition. Further, and contrary to the Court of Appeals decision, claimant's *perception* had to be founded; claimant's *reaction* did not.

With this clarification, and because the remainder of the Court of Appeals opinion is accurate, I would affirm its decision in *Bach.*

RILEY, J. (*dissenting*). Because I believe that the majority advocates a highly subjective standard for work-related mental disabilities, contrary to the 1980 amendments of the Worker's Disability Compensation Act, I respectfully dissent.[1]

As this Court stated in *Hurd v Ford Motor Co,* 423 Mich 531; 377 NW2d 300 (1985), the legislative amendments of the WDCA specifically addressed and rejected this Court's formulation of the entitlement to worker's disability benefits for mental disabilities in *Deziel v Difco Laboratories, Inc (After Remand),* 403 Mich 1, 26; 268 NW2d 1 (1978). In *Deziel,* the majority created a strictly subjective causal nexus between incidents of employment and the disability, which permitted a claimant to establish compensable injury with "honest[ ] perce[ptions]" of work events despite any consideration of reality. The three dissenting justices believed that the new test was a significant departure from the longstanding requirement that a claimant must establish, as a matter of fact, that the alleged work event "aggravate[d], accelerate[d], or combine[d] with some internal weakness or disease to produce the disability." *Id.* at 61 (COLEMAN, J., dissenting), quoting 1 Larson, Workmen's Compensation Law, § 12.20, p 3-381.[2]

[1] See 1980 PA 357. The relevant provisions took effect on January 1, 1982.

[2] Professor Larson has also stated:

My dispute with the majority's ruling regards the causal nexus between work-related incidents and their contribution to a mental disability, which must be "actual" as well as "significant." See MCL 418.301(2); MSA 17.237(301)(2).[3] As I understand it, the 1980 amendments of the WDCA created a form of "objective" criteria with which to assess the merits of a worker's disability claim. Otherwise, there would be no way to narrow or restrict the applicable eligibility qualifications, which was the distinct purpose of reform efforts. See *Farrington v Total Petroleum, Inc,* 442 Mich 201, 216, n 16; 501 NW2d 76 (1993);[4] *Dean v Chrysler Corp,* 434 Mich 655, 666-667; 455 NW2d 699 (1990); VanderLaan & Studley, *Workers' compensation reform: A case study of the legislative process in Michigan,* 14 U Mich J L Ref 451, 459-460 (1981).

The difficulty lies in distinguishing between a worsening of condition resulting from a work-related event and a mere manifestation of a pre-existing mental disability occurring at the workplace. The statute as amended makes clear that the work incidents must be "actual events of employment, not unfounded perceptions thereof."

> The subjective causal nexus test has not fared well since its bold unveiling by the Michigan Supreme Court in 1978. The Michigan legislature repudiated it in 1982, by enacting an amendment stating that "mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof." Alaska, Iowa, Oregon, New Jersey, and Pennsylvania have emphatically rejected the doctrine. The only kind words for it have come from California, in an intermediate appellate court opinion. [1B Larson, Workmen's Compensation Law, § 42.23(d), pp 7-931 to 7-935. Citations omitted.]

[3] In MCL 418.401(2)(b); MSA 17.237(401)(2)(b), which defines mental disability and other conditions of the aging process, the Legislature used the same "significant manner" language.

[4] See also *id.* at 225-229 (RILEY, J., dissenting in part).

MCL 418.301(2); MSA 17.237(301)(2). The majority, however, attempts to blur the distinction between manifestation and causation by distinguishing between "unfounded perceptions" and "imagined or hallucinatory events."[5] *Ante,* p 44. The former would always have a cause under the majority view, while the latter would never have a basis in an actual event.

In this way, the majority establishes the first element of a causal nexus in cases in which there is anything that could be viewed as an actual, work-related event regardless of its propensity to traumatize. Thus, even the most innocuous of work-related events could establish causation without regard to the degree and nature of a *preexisting* mental disability.[6] The only question left would be the significance of the harm to the mental

[5] In effect, the majority strikes the term "unfounded perception" from the statute on the basis that its import would lead to an absurd result. Instead, only purely imagined or hallucinatory events are excluded from coverage under § 301 of the WDCA. *Ante,* p 44. In response, I call attention to the longstanding rule of construction that "[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Baker v General Motors Corp,* 409 Mich 639, 665; 297 NW2d 387 (1980).

In my opinion, the term "unfounded perceptions" is easily reconciled with the rest of the statutory language. As long as the alleged trauma is objectively verifiable, its propensity for contribution to a preexisting condition is established. The only hurdle remaining is for the claimant to prove that the event contributed to or accelerated the preexisting mental condition in a significant manner.

In this way, we would also preserve the distinction between manifestation and causation. Moreover, this view preserves the objective criteria added by the 1980 amendments of the WDCA and previously recognized by this Court. See, e.g., *Hurd, supra.*

[6] An example of this would be an ordinary work request such as a request for some work on overtime that the employee interprets as a conspiracy for termination based on a preexisting mental condition. First, any reaction may be a manifestation of the preexisting condition that could be misinterpreted as the worsening of condition. Second, any worsening of condition that could occur would be from the misperception rather than from the work-related event. Accordingly, I would require that the event itself bear some indicia of trauma that may be verified on an objective basis.

disability, which is a subjective standard. I am unable to discern any form of objective criterion in the majority's formulation of the standard that effectuates the objectivity mandated by the amendments of MCL 418.301(2); MSA 17.237(301)(2). See *Farrington, Dean,* and VanderLaan & Studley, *supra.*

As the dissenting justices argued in *Deziel:*

> Most neurotic and psychotic states do not have a single cause-in-fact and are emotional disorders with a pre-existing, extremely complex etiology originating in childhood. Symptoms are usually preceded by some form of trauma, however minor.[8] The relationship between such trauma and symptoms is more chronological than causal.
>
> * * *
>
> The job becomes a convenient "hook" upon which to hang all one's troubles . . . . Similarly, the suggestive effect of the legal emphasis upon the causative role of the job, necessary to recovery, will not often be lost on the worker who hangs his life's problems on the "hook" of some trivial stimulus or trauma. Indeed, it is the common conclusion of psychiatrists that the compensation process promotes neuroses and has a debilitating effect upon claimants.
>
> [8] Symptoms are the manifestations of the mental disorder. They represent an attempt by the neurotic personality to resolve inner problems and create psychic gain.
>
> [403 Mich 53-54, 57 (COLEMAN, J., dissenting).][7]

I believe that a claimant for a work-related mental disability must establish by a preponderance of the evidence, as a matter of *objective* reality, an actual and traumatic event. Otherwise, the danger that the alleged harm is a mere mani-

[7] See also *Peters v Michigan Bell Telephone Co,* 423 Mich 594, 623-624; 377 NW2d 774 (1985) (RILEY, J., dissenting).

festation of an underlying problem and not a cause is too great. A successful claim should require proof of *specific* incidents and not merely general conclusions of stress, anxiety, or exertion over a period of time. See *Miklik v Michigan Special Machine Co,* 415 Mich 364, 370; 329 NW2d 713 (1982) (a disability claim for an allegedly work-related heart condition). In this way, we would honor the legislative intent as well as preserve the distinction between causation and manifestation.

In *Carter v General Motors Corp,* 361 Mich 577; 106 NW2d 105 (1960), this Court first recognized a work-related mental disability aggravated by ordinary conditions of employment. However, careful review of *Carter* indicates that the work events found highly stressful by the plaintiff occurred over a continuous, two-week period. See *id.* at 580-581. Accordingly, *Carter* does not support the proposition that long-term stress, anxiety, or exertion objectively satisfies the actual event requirement as a matter of objective reality.

Moreover, the plaintiff in *Carter* suffered from an emotional collapse on the final day of the two-week period that led to his hospitalization. Accordingly, there was a clear physical effect of the trauma occurring in the midst of the work-related stress that objectively supported the stress as the actual cause of the mental disability.[8]

Without a recognizable, stressful event or at least a physical manifestation of injury occurring close in time to the alleged event, it would be virtually impossible to determine with a fair degree of certainty whether the allegations of work-

[8] See also 1B Larson, n 2 *supra,* § 42.25(c), p 7-960 (citing jurisdictions, including Michigan, that permit recovery in either sudden-stimulus or gradual-stimulus situations with "the insistence on having something physical to cling to").

related injury are actualities or misperceptions in the absence of expert testimony on the matter. The effect of the majority view would be to make employers the insurers of their workers' wage losses for mental disabilities without necessarily establishing an adequate causal link.

Thus, I am compelled to dissent.

GRIFFIN, J., concurred with RILEY, J.

PULVER v DUNDEE CEMENT COMPANY

Docket No. 94989. Argued January 11, 1994 (Calendar No. 1). Decided May 3, 1994.

Carolyne L. Pulver suffered a compensable injury to her wrist in the course of her employment with Dundee Cement Company and was paid worker's compensation. After trying to secure work within her medical restrictions for over a year, she moved to Florida. Thereafter she was notified that a job within her restrictions was available. However, she rejected the offer because she considered herself a permanent resident of Florida, and the defendant stopped paying benefits. A hearing referee found that although the employer had made a bona fide offer of favored work, the plaintiff's refusal of the offer was reasonable and ordered benefits continued. The Worker's Compensation Appeal Board affirmed. The Court of Appeals, WEAVER, P.J., and TAYLOR, J. (WAHLS, J., dissenting), reversed, holding that the board's decision was based on an error of law (Docket No. 137082). The plaintiff appeals.

In an opinion by Chief Justice CAVANAGH, joined by Justices LEVIN, BOYLE, and MALLETT, the Supreme Court *held:*

Good and reasonable cause is the statutory equivalent of the similar requirement found in the judicially created favored-work doctrine. Whether an employee's refusal of reasonable employment is for good and reasonable cause is a question of fact. Because the correct legal test was applied by the Worker's Compensation Appeal Board, its factual findings should not have been disturbed.

1. In determining whether a refusal of reasonable employment is for good and reasonable cause, the dispositive questions are ones of fact, not law. Findings of fact in worker's compensation proceedings, if supported by any competent evidence, are conclusive. Examples of some factors to consider in gauging reasonableness may include the timing of the offer; if the employee has moved, the reasons for moving; the diligence of the employee in trying to return to work; whether the em-

REFERENCES

Am Jur 2d, Workers' Compensation §§ 399, 609.
See ALR Index under Workers' Compensation.

ployee has actually returned to work with some other employer; and whether the effort, risk, sacrifice, or expense is of the type that would cause a reasonable person not to accept the offer. It is left to the sound discretion of the factfinder to carefully examine the facts and circumstances of each case to determine what is good and reasonable cause in a given situation.

2. In this case, the Worker's Compensation Appeal Board applied the correct legal test, and there is competent evidence to support its factual findings. The Court of Appeals should not have disturbed the findings of the board, requiring reversal of its decision, reinstatement of the decision of the board, and remand to the board for further proceedings.

Reversed and remanded.

Justice RILEY, joined by Justices BRICKLEY and GRIFFIN, dissenting, stated that while the determination whether an employee's refusal of favored work is reasonable is essentially a factual question, the determination whether the WCAB or the WCAC applied the correct criteria in analyzing whether the refusal was reasonable is not a question of fact. Thus, the Supreme Court is not constrained by the limited review applicable to factual findings. The guiding principle in determining whether a refusal of employment is reasonable should be whether such a refusal advances the policies of worker's compensation litigation. Failure to properly consider the policy favoring mitigation, therefore, is an error of law that is not insulated from appellate review.

The reasonableness of an employee's rejection of a bona fide offer of reemployment must take into account more than the employee's motivation for the move into a new locale. A factual balancing of interests is required under the totality of the circumstances that includes whether the employee has found alternate employment, the duration of the employee in the new locale, and the nature of any roots that the employee or family members have established in the new community. Without this inquiry a factual assessment of reasonableness is incomplete, and a ruling by the WCAB or the WCAC that does not assess the facts in light of the purposes of the worker's compensation act is insufficient as a matter of law.

196 Mich App 91; 492 NW2d 778 (1992) reversed.

WORKER'S COMPENSATION — OFFERS OF REASONABLE EMPLOYMENT — REFUSAL OF OFFERS — QUESTIONS OF FACT.

Whether an employee's refusal of a bona fide offer of reasonable employment is for good and reasonable cause is a question of fact, not of law (MCL 418.301[5][a]; MSA 17.237[301][5][a]).

Zamler, Mellen & Shiffman, P.C. (by *Donald Shiffman* and *Joel W. Jonas*); (*Daryl Royal,* of counsel), for the plaintiff.

Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C. (by *Thomas L. Fleury* and *Christopher M. Murray*), for the defendant.

Amicus Curiae:

Jordan Rossen, General Counsel, and *Ralph O. Jones,* Associate General Counsel, for International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW.

CAVANAGH, C.J.

I

In this worker's compensation matter, we must construe MCL 418.301(5)(a); MSA 17.237(301)(5)(a),[1] and determine what constitutes "good and reasonable cause" justifying an employee's refusal of a bona fide offer of reasonable employment.[2]

We hold that "good and reasonable cause" is the

[1] If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.

[2] Plaintiff disputes the conclusion that the job offered met the statutory definition of "reasonable employment." We find that this issue is not properly preserved because plaintiff failed to cross appeal on this issue. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993). We assume, without deciding, that the offer was indeed a bona fide offer of reasonable employment.

statutory equivalent of the similar requirement found in the judicially created favored-work doctrine. Since the Legislature incorporated this common-law requirement into the worker's compensation act without specifically defining it, we assume that the Legislature did not intend to change the common law.

Whether an employee's refusal of reasonable employment is for good and reasonable cause is a question of fact. Questions of fact are committed to the discretion of the WCAC.[3] In the absence of fraud, the WCAC's findings of fact are binding on the courts of this state if there is any competent evidence supporting them.

II

It is undisputed that plaintiff suffered a compensable injury to her wrist in August 1984. It is also undisputed that she suffers an ongoing total disability.

Plaintiff's injury initially caused her to miss five days of work. She eventually returned to her job and worked until March 1985 with various medical restrictions. Her last day was March 5, 1985, at which time defendant began paying benefits.

Corrective surgery was performed on her wrist that March, but she never regained the complete use of her hand. After the surgery she saw several doctors and therapists, but could not return to work because defendant failed to offer work suitable to her medical restrictions. Plaintiff regularly called defendant regarding the availability of work. Defendant regularly informed her that none was available.

Plaintiff's treating physician concluded that she

[3] And formerly, as in this case, the WCAB.

was permanently disabled in October 1985. Unhappy with this diagnosis, defendant sent her to one of its doctors. Defendant's doctor examined her and placed her on disability for six additional weeks.

Approximately six weeks later, plaintiff returned to work and received "favored work"—sweeping floors. She quickly discovered, however, that she could not perform this job without aggravating her wrist. Defendant and plaintiff's union came to an agreement, and plaintiff was sent home that day with the understanding that defendant would continue to pay benefits.

On May 27, 1986, defendant sent plaintiff to see another doctor. That doctor concluded that plaintiff could not return to her former job and that it was very likely that she was permanently disabled.

Shortly after this diagnosis, and after having tried to secure work within her restrictions for well over a year, plaintiff decided to move to Florida. This allowed her to be closer to her family, and she believed the warm weather was better for her wrist. On June 27, 1986, she notified defendant in writing that she was moving and that any further correspondence could be directed to her new address in Florida or to her attorney.[4] Plaintiff sold all of her belongings and left.

In a letter mailed July 15, 1986, and received July 28, 1986,[5] defendant notified plaintiff that a job within her restrictions was now available. After first stalling for time to consult her attorney, she eventually rejected this offer because she now considered herself a permanent resident of Flor-

[4] Both the WCAB and Court of Appeals noted an unfortunate communication problem between the parties that led to defendant's failure to realize that plaintiff had permanently relocated to Florida.

[5] Defendant failed to place the proper postage on the letter.

ida. Defendant stopped paying benefits and plaintiff began this action.

At the hearing, the magistrate held that plaintiff's refusal of defendant's bona fide offer of "favored work"[6] was reasonable. On appeal, the WCAB affirmed.

> [W]e find from the facts that plaintiff had relocated to Florida in June of 1986 and intended to stay in Florida on a permanent basis. Plaintiff was attempting to seek work in Florida, had signed a lease with the condominium association, and was reliant upon family members as she had sold all of her possessions prior to leaving Toledo, Ohio. We find that plaintiff was credible in her testimony and accept that she planned to reside in Florida on a permanent basis. The record discloses that there was nothing to her knowledge that would have her return to Michigan since at the time of her move she did not know that defendant was seeking favored work for her. [Unpublished decision of the WCAB, mailed December 20, 1990 (Decision No. 1617), slip op at 6.]

The WCAB concluded, as did the magistrate, that defendant had made a bona fide offer of "favored work," but that plaintiff's refusal was reasonable.

Defendant appealed, again arguing that plaintiff's refusal was unreasonable. Plaintiff failed to cross appeal on the issue whether the job offer was a bona fide offer of reasonable employment. A divided Court of Appeals reversed the WCAB.

> The only disputed issue properly before us in this appeal is whether plaintiff unreasonably re-

[6] It is clear that this case should have focused on the statutory requirements of reasonable employment because this case is governed by MCL 418.301(5); MSA 17.237(301)(5). For the purposes of this opinion, however, we will ignore this error.

fused defendant's bona fide offer of favored work. We conclude that the appeal board's decision that plaintiff is entitled to continuing benefits because her refusal of favored work was reasonable is based on an error of law and should therefore be reversed.

* * *

[I]t is clear that, inasmuch as plaintiff did not have employment in Florida, her choices, when favored work was offered by defendant, were to accept such work or have her disability benefits terminated. Any other resolution would be contrary to the purpose of the act, as interpreted by our Supreme Court and as enacted, in acquiescence to that interpretation, by the Legislature. [196 Mich App 91, 93-94; 492 NW2d 778 (1992). Citation omitted.]

Dissenting, Judge WAHLS held:

The WCAB found that plaintiff intended to reside in Florida permanently and that she had been seeking employment there. These findings are supported by competent evidence on the record and no fraud has been alleged. This Court may therefore not disturb those findings . . . .

* * *

I would affirm the WCAB's conclusion that the plaintiff's refusal was for good and reasonable cause. [*Id.* at 95-96. Citation omitted.]

III

A

The Legislature partially codified the judicially created favored-work doctrine in the reasonable employment provisions of the worker's compensation act. MCL 418.301; MSA 17.237(301), and MCL

418.401; MSA 17.237(401).[7] However, these provisions are far more than a simple compilation of this Court's prior favored-work decisions. While building on some of those decisions, some of these provisions have significantly changed others. Although the Legislature has made significant changes in the favored-work doctrine, this Court need not ignore all of its prior favored-work decisions in their entirety.[8]

For example, it is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation. *Dean v Chrysler Corp,* 434 Mich 655, 667, n 18; 455 NW2d 699 (1990). Therefore, when the Legislature codifies a judicially defined requirement without defining it itself, a logical conclusion is that the Legislature intended to adopt the judiciary's interpretation of that requirement.

This conclusion is also supported by the associated rule of construction that provides that words and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning when used in statutes dealing with the same subject. *Thornton v Allstate Ins Co,* 425 Mich 643, 648; 391 NW2d 320 (1986); MCL 8.3a; MSA 2.212(1). The statutory requirement of "good and reasonable cause" is analogous to the common-law requirement of "good faith or reasonableness." *Bower v Whitehall Leather Co,* 412 Mich 172, 178; 312 NW2d 640 (1981). The statutory requirement is too similar to the common-law requirement to be dismissed as coincidence.

Applying these basic rules of construction to the statute at hand, we think it obvious that the

[7] 1981 PA 200 and 1981 PA 199, respectively.

[8] Obviously, if there is a conflict between the common law and a statutory provision, the common law must yield.

Legislature did not, nor did it intend to, change the common law for this specific requirement. Accordingly, we turn to an examination of the common law.

B

This Court examined an offer of favored work and the reasonableness of its refusal in *Kolenko v United States Rubber Products, Inc,* 285 Mich 159; 280 NW 148 (1938). In that case, the plaintiff suffered a compensable injury to her arm. After paying compensation for a short period, the defendant stopped. The plaintiff sued, and at the subsequent hearing the defendant alleged that the plaintiff had refused an offer of substitute employment.

The offer was in the form of a request by the defendant that the plaintiff come to the plant where she would be given work. The plaintiff, accompanied by her attorneys, went to the plant to see what type of job the defendant intended to give her. The defendant, however, refused to provide any details of the job. The defendant also refused to allow the plaintiff's attorneys into the plant to determine whether she was capable of performing the unspecified job.

The defendant maintained that these events demonstrated the plaintiff's unreasonable refusal to cooperate with the defendant. Thus, the defendant argued, her benefits should be denied. This Court flatly rejected the defendant's argument that the plaintiff had acted unreasonably.

> The burden was on the defendant to show that it offered plaintiff work which she could perform. . . . Plaintiff was under no obligation to comply with the unreasonable and arbitrary de-

> mand of defendant that she accept whatever work the company thought suitable for her. Plaintiff in her attitude and conduct with regard to the proposed job clearly appears to have been actuated by good faith. The law does not compel her to submit to the capricious dictates of an employer with regard to the kind of work she must accept in order to show cooperation. The only lack of cooperation that appears from the record in this case is on the part of defendant. [*Id.* at 162.]

The Court held that the actions of both the employer and the employee must be judged against standards of good faith and reasonableness. This type of analysis suggests that these questions are questions of fact and, as such, they are committed to the discretion of the factfinder. The *Kolenko* Court said as much when it held:

> The findings of fact of the department were supported by evidence and according to the provisions of the statute are conclusive. These, together with the conduct of defendant regarding plaintiff's reemployment, require that the award of the department of labor and industry be affirmed, with costs to plaintiff. [*Id.* at 163.]

The Court reached this conclusion by examining the conduct of the parties. An examination of the conduct of the parties is, by its very nature, a factual examination.

The *Kolenko* decision was essentially reaffirmed by this Court in *Bower,* a case decided only weeks before the enactment of 1981 PA 200. In *Bower,* the plaintiff suffered a compensable work-related injury. Aggravations of the injury over a span of three-years resulted in the plaintiff quitting his job and moving to Florida. The plaintiff found suitable employment in Florida, but was notified by the defendant nine months after his arrival there, and

on the eve of trial, that favored work was now available at the defendant's plant in Michigan.

This Court held that the primary purpose of the favored-work doctrine is mitigation. The common-law doctrine of mitigation is founded on reasonableness, and application of a reasonableness standard requires the factfinder to examine the facts and circumstances of each case.[9] The reasonableness of the employee's actions as well as the employee's good faith, or lack thereof, are factors that must be considered in determining whether the employee's refusal of favored work will result in a forfeiture of benefits.

> In reaching our decision, we find that the good faith or reasonableness of a worker's actions must be taken into account in determining whether the forfeiture penalty should be imposed, and, further, that factors other than those relating to the physical capacity to perform favored work may be considered in assessing the reasonableness of the refusal. [*Bower* at 178-179.]

Refusal is justified if it is reasonable and furthers the policies underlying the act.

In applying this standard in *Bower,* this Court held:

> Denial [of benefits] would encourage an injured

[9] This Court is presently examining the issue of mitigation in *Marquis v Hartford Accident & Indemnity,* 444 Mich 638; 513 NW2d 799 (1994). In that opinion, Justice GRIFFIN, writing for the majority, observes that mitigation also plays a similar role in the no-fault automobile insurance act:

> This policy [of mitigation] promotes cost savings for consumers as well as insurers by encouraging those injured in an auto accident to rehabilitate themselves . . . . Reasonableness is the touchstone of this obligation and, ordinarily, reasonableness of mitigation is a question for the factfinder. [*Id.* at 655.]

> worker to stagnate, awaiting the possibility that the original employer might offer a job sometime in the future. Certainly the employee would hesitate to seek or accept a job in another city, when he or she could be faced with the no-win choice of incurring the expense and emotional upheaval of returning or suffering a cutoff of benefits.
>
> Denial would also discourage employers from hiring disabled workers. Few employers would be willing to take the risk of employing, and perhaps retraining, injured persons, only to have them forced to quit when called upon by the former employer. [*Id.* at 192-193.]

This Court noted that allowing Bower to collect benefits could encourage injured workers to move away, in an attempt to avoid having to accept favored work while continuing to receive benefits. However, the high cost of relocation, both financially and emotionally, makes this an unlikely danger. Furthermore, this Court realized that the "rare" employee who moves in a bad-faith effort to avoid having to accept favored work would be denied benefits.

This Court emphatically rejected a blanket rule denying benefits whenever an employee moves away from the locale of the employer. "[A]n employer should [not] be able to exert such control over an individual without an assessment of the unique factors in each case." *Id.* at 194.

Bower, like *Kolenko,* makes clear that the reasonableness of an employee's actions are questions of fact. Although not made explicit in *Bower,* this proposition permeates the entire discussion in that case.[10]

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[10] Such a finding was explicitly made by the WCAB in *Bower,* an opinion this Court affirmed. Chairman Gillman, writing for a unanimous appeal board, stated:

> [F]actors other than a claimant's physical ability to perform the work may be taken into account in assessing the reasonableness of the refusal, our function as a reviewing court is *extremely limited.* The findings of fact of the WCAB are *conclusive* in the absence of fraud and will not be disturbed if supported by competent evidence in the record. [*Id.* at 197. Emphasis added and citations omitted.]

C

Given the timing of *Bower,* decided November 23, 1981, some may question the effect it may have had on the reasonable employment provisions of the worker's compensation act that took effect January 1, 1982.[11] That question need not be answered here. *Bower* does not represent a change in the law; rather, it represents a consolidation of the favored-work doctrine. It solidified and made clear that a reasonableness analysis must be undertaken when examining an employee's refusal of favored work. This conclusion was not, and is not, revolutionary. This type of analysis has been a part of the favored-work doctrine since *Kolenko* was decided over fifty years ago.

The Legislature incorporated this Court's common-law requirement of reasonableness into the worker's compensation act when it mandated that a refusal of reasonable employment must be for good and reasonable cause. This requirement, as

> [T]he dispositive questions are not ones of law but of fact: Was the offer reasonably made, or was it a ploy to avoid payment of benefits? Was plaintiff's refusal to accept the offer reasonable under the circumstances? [1977 WCABO 3920, 3921.]

[11] See *Li v Feldt (After Second Remand),* 439 Mich 457, 472; 487 NW2d 127 (1992) (opinion by CAVANAGH, C.J.), stating that the date a law takes legal effect is the relevant date for interpretive purposes.

developed in *Kolenko* and *Bower,* calls for case-by-case analysis.

In determining whether a refusal of reasonable employment is for good and reasonable cause, the dispositive questions are questions of fact, not law. Findings of fact in worker's compensation proceedings, if supported by any competent evidence, are conclusive on the courts of this state in the absence of fraud or unless otherwise provided by law. Const 1963, art 6, § 28; *Holden v Ford Motor Co,* 439 Mich 257, 262; 484 NW2d 227 (1992); MCL 418.861a(14); MSA 17.237(861a)(14).

We do not attempt to define what "good and reasonable cause" is. What is reasonable in one situation may not be in another. Therefore no exhaustive definition could ever be formed to encompass the varied nuances of such a deceptively simple legal principle as "good and reasonable cause." The case at bar does, however, provide examples of some of the factors that may be considered in gauging the reasonableness of an employee's actions.

Those factors may include: (1) the timing of the offer, (2) if the employee has moved, the reasons for moving,[12] (3) the diligence of the employee in trying to return to work, (4) whether the employee has actually returned to work with some other employer and, (5) whether the effort, risk, sacrifice or expense is such that a reasonable person would not accept the offer.

We provide these factors merely as examples. Not every personal consideration will constitute good and reasonable cause entitling an employee to continued benefits after a refusal of an offer of reasonable employment. It is left to the sound

[12] An attempt to avoid accepting a bona fide offer of reasonable employment by moving would never constitute good and reasonable cause.

discretion of the factfinder to carefully examine the facts and circumstances of each case to determine what is good and reasonable cause in any given situation.

IV

The date of injury in this case is after the effective date of MCL 418.301(5)(a); MSA 17.237(301)(5)(a); therefore, that statute controls.

Whether this Court believes that plaintiff's refusal of the offer was for good and reasonable cause is immaterial. Our only concern is whether the WCAB applied the correct legal test and whether there is any competent evidence to support its factual findings.

Even though the WCAB failed to substantively develop its analysis, it did apply the correct legal test.

> The question before us is whether a good-faith bona fide offer of favored work was made by defendant and whether plaintiff reasonably refused to perform the offer of favored work if such offer was reasonable. *Bower v Whitehall Leather Co,* 412 Mich 172 (1981), *Powell v Casco Nelmor Corp,* 406 Mich 332; 279 NW2d 769 (1979), and *Kolenko v U S Rubber Products, Inc,* 285 Mich 159 (1938). In the case at hand, we find that plaintiff was not unreasonable in her refusal to return to Michigan from Florida to perform a bona fide offer of favored work. [Unpublished opinion of the WCAB at 5.]

Furthermore, a review of the record indicates that there is competent evidence to support the WCAB's factual findings. The evidence shows that plaintiff called defendant repeatedly over a one-year period inquiring into the availability of work

suited to her physical limitations. There was evidence that she tried to return to work as demonstrated by her failed attempt to perform the sweeping job. The WCAB found as a matter of fact that plaintiff was credible and that she moved to Florida in a good-faith effort to improve her health, be closer to her family, and to find suitable work. She signed a one-year lease and paid a security deposit, thus substantiating her claim that she intended to live there permanently. Significantly, the WCAB found, again as a matter of fact, that plaintiff did not move to avoid accepting the job offer.

V

We hold that "good and reasonable cause" is the statutory equivalent of the same requirement found in the judicially created favored-work doctrine. Whether an employee's refusal of an offer of reasonable employment is for good and reasonable cause is a question of fact. Our constitution gives considerable discretion to factfinders in worker's compensation proceedings. Neither this Court nor the Court of Appeals should usurp that discretion. Because the correct legal test was applied, we hold that the Court of Appeals should not have disturbed the factual findings of the WCAB.

We reverse the judgment of the Court of Appeals and reinstate the decision of the WCAB. We remand this case to the WCAC for proceedings consistent with this opinion.

LEVIN, BOYLE, and MALLETT, JJ., concurred with CAVANAGH, C.J.

RILEY, J. I respectfully dissent. While the majority's opinion has much to recommend it, I am

troubled over the fact that it does not take adequate account of what I believe to be an overriding policy of worker's compensation law, to wit: an employee's good-faith duty to accept reasonable offers of favored work.

As this Court has clearly recognized, the legislative amendments of the Worker's Disability Compensation Act in the last decade were intended to narrow eligibility qualifications.

> [W]e believe that our decision today is consistent with the intent of the Legislature manifested by its reform efforts during the past decade. A purpose of the comprehensive 1980 and 1981 revisions of the workers' compensation system was to overturn or modify expansive interpretations placed upon the act by this Court. Although the dollar amount of benefits payable to workers eligible for compensation was increased, there can be no doubt that the Legislature also intended through its 1980 and 1981 reform efforts to narrow and restrict the eligibility qualifications. [*Dean v Chrysler Corp,* 434 Mich 655, 666-667; 455 NW2d 699 (1990).]

In addition, the economic and political climate of the time cannot be divorced from consideration of the legislative intent behind the reforms of 1980 and 1981 of the WDCA. In my dissent in *Farrington v Total Petroleum, Inc,* 442 Mich 201, 226; 501 NW2d 76 (1993), I stated:

> The amendments at issue were but a component of a broad reformation of the WDCA, which was motivated by a crippled economic environment and a perceived need to reduce the burden and costs imposed upon free enterprise by the then-existing WDCA.[1]

[1] Indeed, the legislation's proponents explained that reducing the excessive costs of the then-current WDCA was essential to the economic survival of Michigan:

"Since 1979, and prior to that, 1978 during the elections,

everybody said that worker's compensation is the highest priority in the State of Michigan. We cannot afford to lose industry and jobs in this state. We cannot afford to see people going to other states . . . .

* * *

"I think it is a Number One priority; one that we have neglected. One that we have pushed aside. One that we have tried to pacify by saying that we are going to have this study committee, or that study committee, but it is one that is very necessary that we get at if we want to retain Michigan as a state than [sic] can provide jobs and not as an industrial wasteland. [1980 Journal of the Senate 820 (Senator Welborn).]"

Senator Guastello echoed his colleague's premonitions just before introduction of the reform bill:

"[A]ll of us here today, both on the floor of the Senate and in the galleries, are faced with a real moment of truth as far as Michigan is concerned and I think that moment of truth is simply—what are we going to do to insure a healthy economic climate, not only for ourselves in this state, but for our children. [1980 Journal of the Senate 822.]"

See also 1980 Journal of the Senate 1310 (Senator DeMasco).

In light of this historical backdrop, I believe it appropriate to consider the favored-work doctrine and its place amidst the aforementioned reform efforts. In *Bower v Whitehall Leather Co,* 412 Mich 172; 312 NW2d 640 (1981), a majority of this Court was called upon to discern the parameters of the favored-work doctrine.[1] The majority concluded:

> *The primary purpose of the doctrine is that of mitigation.* It allows an employer to reduce or completely eliminate compensation payments by providing work within the injured employee's physical capacity. At the same time, it encourages the employee to return to productive employment rather than to remain idle, thus also serving a rehabilitative function. [*Id.* at 182. Emphasis added, citation omitted.]

Bower involved an injured employee who had

[1] When the *Bower* opinion was issued, the favored-work doctrine was a judicial, rather than a legislative creation. See *id.* at 182.

moved to Florida while he was still receiving worker's disability benefits. Of specific importance to the majority were the facts that the plaintiff had moved nine months before the offer of favored work, that both he and his wife had found employment in Florida, and that the wages plaintiff earned in Florida were credited to the employer against its compensation liability. While recognizing that an employee's refusal of a favored-work offer was subject to a standard of reasonableness, the majority qualified its holding in the following way:

> It should be recognized that we do not hold that just any personal consideration may excuse a refusal of favored work. Nor may an employee avoid returning to work tendered upon a good-faith offer by merely removing himself from the locality of the employer. Only under circumstances similar to those in the instant case, *where the claimant's actions further the policies of the statute,* can such a rejection be justified. [*Id.* at 196.]

Shortly thereafter, the Legislature codified the favored-work doctrine in 1981 PA 200. In light of the reform efforts prevalent at that time, I cannot but conclude that the act of codification, although validating certain aspects of the favored-work doctrine, was intended in part to prevent the types of expansive interpretation that were at the heart of the reform legislation.

Thus, we are faced with a conflict. It is clear from the deferential standard of review that reviewing courts should not cavalierly disregard the fact-finding expertise of the Worker's Compensation Appeal Commission (and formerly, the Worker's Compensation Appeal Board).[2] On the other

[2] See Const 1963, art 6, § 28; MCL 418.861; MSA 17.237(861);

hand, the policies behind the WDCA, which include the duty of an employee to accept reasonable offers of favored work, should not be discounted.

While I agree that the determination whether an employee's refusal of favored work is reasonable is essentially a factual question, the determination whether the WCAB or WCAC applied the correct criteria in analyzing whether the refusal was reasonable is *not* a question of fact, and hence this Court is not constrained by the limited review applicable to factual findings.[3] In the case at bar, the WCAB failed to apply the correct criteria in determining that plaintiff's refusal was reasonable. Consequently, this Court is not precluded from reviewing the WCAB's findings despite the fact that substantial, material, and competent evidence may exist to support the conclusion that plaintiff's refusal was reasonable.

The findings and analysis of the WCAB consisted of the following:

> Nonetheless, we find from the facts that plaintiff had relocated to Florida in June of 1986 and *intended* to stay in Florida on a permanent basis. Plaintiff was attempting to seek work in Florida, had signed a lease with the condominium association, and was reliant upon family members as she had sold all of her possessions prior to leaving Toledo, Ohio. We find that plaintiff was credible in

Holden v Ford Motor Co, 439 Mich 257; 484 NW2d 227 (1992); *Farrington, supra* at 218-219.

[3] See *Cox v Schreiber Corp,* 188 Mich App 252, 256; 469 NW2d 30 (1991) ("This Court may reverse the WCAB's decision if it operated within the wrong legal framework or its decision is based on erroneous legal reasoning"); *Carter v Lakey Foundry Corp,* 118 Mich App 325, 331-332; 324 NW2d 622 (1982) ("Error may be committed by basing a finding of fact on a misconception of law or by failing to correctly apply the law to a finding of fact. . . . Where, however, the board misconstrues the law . . ., an appellate court will be free to overturn the board's decision"). See also 100 CJS, Workmen's Compensation, § 764, pp 1255-1256.

> her testimony and accept that *she planned to reside in Florida on a permanent basis.* The record discloses that there was nothing to her knowledge that would have her return to Michigan since at the time of her move she did not know that defendant was seeking favored work for her. [Emphasis added.]

It is evident from the above passage that the primary basis upon which the WCAB rested its conclusion that plaintiff's refusal was reasonable was its determination that plaintiff *intended* to remain in Florida permanently. Although plaintiff's intent in moving to Florida is *one* factor to consider in determining whether her refusal was reasonable, it should not be dispositive.[4]

The guiding principle in determining whether a refusal of employment is reasonable should be whether such a refusal advances the policies of the worker's compensation legislation. Failure to properly consider the policy favoring mitigation is therefore an error of law that is not insulated from appellate review.

Borrowing the policy concept directly from *Bower,* as implicitly adopted in 1981 PA 200, the Court of Appeals majority focused not merely on the basic facts, but also on the facts as they related to this policy of facilitating reemployment and not continued unemployment. Under the facts of this case, which differ significantly from those

[4] The danger of allowing an employee's intent to control the inquiry is clear. Any employee whose employer had failed to find favored work for such employee could decide to leave town, depriving his employer of the opportunity to mitigate. By merely informing his employer that his move was permanent, the employee could dictate the amount of time given to the employer to find suitable employment for the employee. Although an employee's control over this issue would appear to be circumscribed by the WCAC's conclusion that plaintiff was unaware of defendant's efforts to find her a favored position, this is an insufficient check upon employee manipulation to allow intent to be controlling.

in *Bower,* the majority concluded that plaintiff's actions failed to further the policies of the act and that her refusal of the bona fide work offer was therefore unreasonable. 196 Mich App 91, 94-95; 492 NW2d 778 (1992).

To reconcile the conflict between an employer's interest in an employee's reemployment and the employee's interest in rehabilitation, which are equally important concerns as provided in *Bower* and implicit in the statute as it is now written, the reasonableness of an employee's rejection of a bona fide offer of reemployment must take into account more than the employee's motivation for the move into a new locale. Rather, a factual balancing of interests is required under the totality of the circumstances. Examples of the appropriate questions include whether the employee has found alternative employment, how long the employee has been in the new locale, and the nature of any roots that an employee and family members establish in the new community. Without this inquiry, a factual assessment of reasonableness is incomplete because it would disregard the mitigation prong of the favored-work doctrine.

In the case before us, plaintiff did sell her home near the employer's plant, but her letter notifying the employer of her new address did not make clear that the move was to be permanent.[5] In addition, she initially accepted the offer of favored work over the telephone, but later rejected it after speaking with her attorney. Further, the record does not make clear that plaintiff had good prospects for employment in Florida. Accordingly, I am not convinced that plaintiff's rejection of favored work was reasonable in light of the circumstances, which do not take into account the employer's

[5] In fact, the letter provided that plaintiff was "staying with relatives until further notice."

interests and efforts to ensure reemployment through favored work.

Although I am not certain that plaintiff's rejection was unreasonable, the failure of the WCAB to review plaintiff's claim in light of the purposes of the act, as it relates to the important interest in reemployment rather than unemployment, prevents me from accepting its factual findings without further inquiry. Accordingly, I would hold that a ruling by the WCAB or the WCAC that does not assess the facts in light of the aforementioned policy is insufficient as a matter of law. While an assessment of the facts that respects the mandates of this policy may remain inviolate absent fraud, an assessment that fails to respect the mandates of *Bower* and the statute, i.e., the policy favoring employment over unemployment that is based on personal reasons unrelated to the favored-work offer, cannot alone support a finding of reasonableness. While the hardship of relocation may be weighed in the factual balance, it is by no means dispositive.

For all of the aforementioned reasons, I would affirm the decision of the Court of Appeals or remand for further consideration of the reasonableness of plaintiff's rejection.

BRICKLEY and GRIFFIN, JJ., concurred with RILEY, J.

AMERICAN NATIONAL FIRE INSURANCE COMPANY v FRANKENMUTH MUTUAL INSURANCE COMPANY

Docket No. 97596. Decided May 4, 1994. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave, affirmed the judgment, but not the reasoning, of the Court of Appeals and remanded the case to the trial court for further proceedings.

American National Fire Insurance Company, the insurer of a combine owned by Floyd Campbell, brought an action in the Oakland Circuit Court against Frankenmuth Mutual Insurance Company, the no-fault insurer of Campbell's truck, seeking contribution to a settlement in an underlying wrongful death action against Floyd Campbell arising from an automobile collision involving his combine. The court, John N. O'Brien, J., granted summary disposition for Frankenmuth, ruling that the residual liability policy did not provide coverage because the truck was not involved in the accident. The Court of Appeals, SHEPHERD, P.J., and BRENNAN and L. P. BORRELLO, JJ., vacated the judgment of the trial court and remanded the case for further proceedings (Docket No. 135663). The defendant seeks leave to appeal.

In a memorandum opinion, signed by Chief Justice CAVANAGH, and Justices BRICKLEY, BOYLE, RILEY, GRIFFIN, and MALLETT, the Supreme Court *held:*

The trial court appears to have refused to follow the parties' stipulation of facts, requiring remand to the trial court for further proceedings consistent with the stipulation. The judgment of the Court of Appeals is affirmed, but its opinion is to have no precedential force or effect.

Affirmed and remanded.

Justice LEVIN dissents for the reasons set forth in his separate statements in *Bernthal v Aetna Casualty & Surety Co,* 444 Mich 1217 (1994), and *Ginther v Ovid-Elsie Area Schools,* 444 Mich 1218 (1994).

199 Mich App 202; 501 NW2d 237 (1993) affirmed.

Sommers, Schwartz, Silver & Schwartz, P.C. (by *Leonard B. Schwartz* and *Patrick Burkett*), for the plaintiff.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *James L. Borin* and *Robert D. Goldstein*), for the defendant.

MEMORANDUM OPINION. As observed by the Court of Appeals, this case was submitted to the trial court with an agreed-upon statement of facts. We restate here the Court of Appeals recitation of the facts:

> At approximately 8:25 P.M. on December 2, 1984, a car driven by Scott Whitney, traveling on the southbound lane of Bricker Road in St. Clair County, collided with the rear of a combine that was completely blocking the southbound lane of the road. Whitney's passenger, Christopher Rondo, was killed in the collision. The combine had been used by Floyd Campbell for harvesting corn in a neighbor's field along Bricker Road. Afterwards, Campbell parked the combine in the southbound lane of Bricker Road and used an auger, which extended across the northbound lane of Bricker Road, to convey the harvested load of corn to a pickup truck, which was parked adjacent to the northbound lane of the road. At the time of the accident, the combine was unloading the corn onto the truck, and the auger was still extended. Only the combine was physically struck by Whitney's car.
>
> Both the combine and the truck were owned by Campbell. The combine was expressly covered by plaintiff's farm policy, which included coverage for bodily injury liability, while the truck was covered under defendant's no-fault automobile insurance policy.
>
> The decedent's personal representative filed a wrongful death action against Campbell and Whitney. Plaintiff undertook the defense of Campbell. Plaintiff tendered the defense of the suit to defendant and also sought contribution. Defendant declined both requests.
>
> The wrongful death suit was settled for $350,000

(Whitney provided $50,000 and plaintiff, on behalf of Campbell, provided $300,000). Defendant agreed that the $300,000 payment by plaintiff was a reasonable contribution to the settlement package. The underlying litigation was concluded by a consent judgment and satisfied by plaintiff. On cross motions for summary disposition, the trial court granted defendant's motion, ruling that defendant's residual liability policy did not provide coverage because the truck was not involved in the accident. [199 Mich App 202, 205-206; 501 NW2d 237 (1993).]

The Court of Appeals vacated the trial court's order, which granted the defendant's motion for summary disposition and which denied the plaintiff's cross motion for summary disposition. The case was ordered remanded to the trial court for further proceedings.

Pursuant to MCR 7.302(F)(1), we affirm the judgment of the Court of Appeals, but not for all the reasons stated by the Court of Appeals. We agree with the plaintiff that the trial court appears to have refused to follow the parties' stipulation of facts. We remand the case to the Oakland Circuit Court for further proceedings consistent with that stipulation.

We further order that the opinion of the Court of Appeals shall have no precedential force or effect. See *Bernthal v Aetna Casualty & Surety Co,* 444 Mich 1216 (1994).

CAVANAGH, C.J., and BRICKLEY, BOYLE, RILEY, GRIFFIN, and MALLETT, JJ., concurred.

LEVIN, J. (*dissenting*). I would deny leave to appeal rather than purport to "affirm the judgment of the Court of Appeals" with the flag that "the opinion of the Court of Appeals shall have no precedential force or effect. See *Bernthal v Aetna*

Casualty & Surety Co, 444 Mich 1216 (1994)." *Ante,* p 93.

The Court does not indicate how the Court of Appeals might have erred in its analysis. Today's decision is similar to recent decisions in *Bernthal, supra,* and *Ginther v Ovid-Elsie Area Schools,* 444 Mich 1218 (1994), in which this Court denied leave to appeal with the flag that the reported opinions of the Court of Appeals in those cases shall have no precedential force or effect. I repeat what I said in a separate statement in *Bernthal* and in *Ginther*:

> The Michigan Court of Appeals was established by the 1963 Constitution, and the judges of the Court are elected public officials who perform a function set forth in the constitution. Their published opinions are authoritative statements of law, not by grace of this Court, but by the power vested in the Court of Appeals by the constitution.
>
> The precedential force or effect of an opinion of the Court of Appeals should not be set aside absent a determination by this Court or the United States Supreme Court that the Court of Appeals erred. Such a decision should not be lightly made, and clearly should not be made without plenary consideration, and the resulting notice to other persons who might be favorably or adversely affected by an affirmance or reversal of the decision of the Court of Appeals who might seek to file a brief as amicus curiae.
>
> Further, this Court's order denying precedential force or effect to an opinion of the Court of Appeals avoids compliance with the constitutional imperative that decisions of this Court "shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal." Const 1963, art 6, § 6.

TRAGER v THOR

Docket No. 96434. Argued March 9, 1994 (Calendar No. 12). Decided May 17, 1994.

Randy Trager, as next friend of Rachael Trager, a minor, and Randy and Brenda Trager, for themselves, brought an action in the Oakland Circuit Court against Thomas and Patricia Thor, owners of a dog that bit Rachael, and Robert Thor, who was temporarily supervising Thomas' and Patricia's home when the bite occurred, seeking damages for Rachael's injuries. The court, Frederick C. Ziem, J., granted summary disposition for Robert Thor. The Court of Appeals, MURPHY, P.J., and SHEPHERD and T. S. EVELAND, JJ., reversed in an opinion per curiam, allowing the plaintiffs' common-law strict liability and negligence claims (Docket No. 132240). Robert Thor appeals.

In a unanimous opinion by Justice BOYLE, the Supreme Court *held:*

The temporary caretaker of a domestic animal is not the animal's owner or keeper, as a matter of law, and thus not subject to common-law strict liability, but may be liable in negligence for injuries caused by the animal.

1. Strict liability attaches for harm done by a domestic animal where the possessor of the animal has scienter of the animal's abnormal dangerous propensities and harm results from a dangerous propensity that was known or should have been known. The burden of the loss under common-law strict liability is allocated on an equitable basis to the party who has introduced the potential danger into the community, and either knows of the animal's abnormal propensity or has had the animal long enough to be chargeable with notice of its dangerous habits.

2. Proprietary control akin to ownership must be present to deem a party a keeper and potentially liable. Ownership of the property where an animal resides is not dispositive of keeper status. A person may have sufficient control of a domestic animal cared for on its owner's property to be subject to

REFERENCES

Am Jur 2d, Animals § 92.
See ALR Index under Animals.

liability as a keeper. Temporary caretakers like the defendant in the present case, however, have no choice regarding whether the dangers an animal may present will be introduced into the community, nor have they agreed to assume responsibility for injuries it might inflict, and therefore, should not be held strictly liable because, in such circumstances, the equitable basis for allocation of the cost of injury is absent.

3. The possessor or harborer of a domestic animal with no scienter of a dangerous propensity may be liable for harm done by the animal if negligent in failing to prevent the harm. Such a cause of action also should be available where the defendant's possession is of such a temporary nature as to preclude strict liability as a keeper. Possessors of dogs, and some other domestic animals, generally have no duty to keep them under constant control. However, even persons in temporary possession of such animals have a duty to control them if they have knowledge of a dangerous propensity unique to the animals, or are aware that the animals are in such situations that a danger of foreseeable harm might arise.

4. In this case, viewed in the light most favorable to the plaintiffs, there are sufficient allegations from which a trier of fact could find Robert Thor negligent in fulfilling his duty of care in supervising the dog, thereby subjecting him to liability for the harm done if he failed to exercise ordinary care to prevent foreseeable harm and such failure proximately caused the injury. His knowledge that the dog had bitten a child before this incident might lead the trier of fact to find that he had a duty to and should have exercised greater control over the dog, questions that cannot be resolved in deciding a motion for summary disposition.

Affirmed in part, reversed in part, and remanded.

199 Mich App 223; 501 NW2d 251 (1993) affirmed in part and reversed in part.

ANIMALS — STRICT LIABILITY — NEGLIGENCE — TEMPORARY CARETAKERS.

The temporary caretaker of a domestic animal is not the animal's owner or keeper, as a matter of law, and thus not subject to common-law strict liability, but may be liable in negligence for injuries caused by the animal.

Paul D. Sherr, P.C., for the plaintiffs.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank*), for the defendants.

Amicus Curiae:

Scott D. Sitner for Animals, Inc.

BOYLE, J. Today we are asked to consider which theories of liability are appropriate for an action against one in temporary possession of a domestic animal that inflicts injuries while in such possession. The Court of Appeals allowed the plaintiffs' common-law strict liability and negligence claims against a temporary caretaker of a dog to survive the caretaker's motion for summary disposition. Because we hold that the temporary caretaker in this case did not possess the dog with the requisite proprietary control to be deemed the dog's owner or keeper, we reverse that portion of the Court of Appeals opinion allowing a common-law strict liability cause of action. However, a negligence cause of action may be maintained against a person in temporary possession of a domestic animal, as long as there is a genuine issue of fact regarding the requisite elements of such a claim. We therefore affirm the Court of Appeals decision to allow the plaintiff 's action to go forward under this theory.

I

Most of the facts of this case are not in dispute. On May 1, 1988, Robert Thor went to the home of his son and daughter-in-law, Thomas and Patricia Thor. Robert Thor owned the property, which he rented to his son and his family, and had come to visit his grandchildren and supervise some grading in the backyard that afternoon. When Robert Thor arrived, two neighbor children, Rachael and Nicole Trager, were playing in the Thor's backyard with Thomas and Patricia Thor's children and the Thor's English sheepdog, Chadwick.

Shortly after his arrival, Robert Thor agreed to supervise the home while Thomas and Patricia Thor left to do some shopping. Before leaving, Thomas and Patricia placed Chadwick in the house. When the workman arrived to begin grading the backyard, Robert Thor put the dog in a bedroom and shut the door before going outside. This was done as a precaution against Chadwick escaping through the front door and running loose in the neighborhood. At this point there are disputed facts with regard to whether the Trager children were asked to go home or if Rachael Trager was given permission by Robert Thor to use the bathroom in the Thor residence. What is not disputed, however, is that Rachael Trager ended up in the Thor house, where she was bitten and scratched by Chadwick.

During discovery, Robert Thor indicated that he had knowledge of an incident before that in question where Chadwick had bitten a child. It was Mr. Thor's opinion that the dog had been antagonized and provoked in that instance.

Randy Trager, as next friend of Rachael, and Randy and Brenda Trager, Rachael's parents, individually, filed suit against Thomas and Patricia Thor and Robert Thor to hold them liable for the injuries inflicted by Chadwick.[1] The Court of Appeals having reversed the trial court's summary disposition of the claims against Robert Thor, the issues presented are whether the plaintiffs state a claim upon which the relief sought can be granted on a theory of strict liability or negligence.[2]

[1] This appeal addresses only the possible liability of Robert Thor. Plaintiffs alleged claims against Mr. Thor under (1) MCL 287.351; MSA 12.544, the Michigan dog bite statute, (2) a common-law strict liability theory, and (3) a general negligence theory. The trial court granted Robert Thor's motion for summary disposition, under MCR 2.116(C)(10), on each of the plaintiffs' claims.

[2] The Court of Appeals affirmed the trial court's summary disposi-

II

There has long existed at common law a cause of action against possessors of certain domestic animals[3] for harm caused by those animals, regardless of fault. This common-law theory of strict liability[4] is accurately stated in 3 Restatement Torts, 2d, § 509, p 15, as follows:

> (1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.
>
> (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.

Strict liability attaches for harm done by a domestic animal where three elements are present: (1) one is the possessor of the animal, (2) one has scienter of the animal's abnormal dangerous propensities, and (3) the harm results from the dangerous propensity that was known or should have been known. It is the first of these elements that is at issue in the present case.

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tion regarding the dog bite statute, but reversed the trial court and allowed the plaintiffs to go forward with their strict liability and negligence claims. 199 Mich App 223; 501 NW2d 251 (1993). We granted the defendant's motion for leave to appeal. 444 Mich 903 (1993).

Plaintiffs did not cross appeal the summary disposition of their claim against Robert Thor under the statute. We therefore limit our review to their claims under common-law strict liability and negligence.

[3] A dog that serves as a family pet clearly falls within the definition of a domestic animal, i.e., one "devoted to the service of mankind at the time and in the place in which it is kept." 3 Restatement Torts, 2d, § 506(2), p 10.

[4] We use the term "strict liability" here to encompass the Restatement view and our own common-law theory of liability for injuries suffered without assessment of fault.

A "possessor" of a domestic animal has been interpreted to encompass an "owner" or "keeper." *Knowles v Mulder,* 74 Mich 202; 41 NW 896 (1889); *Kennett v Engle,* 105 Mich 693; 63 NW 1009 (1895). However, plaintiffs do not here claim that Robert Thor is Chadwick's owner, and that characterization clearly cannot be drawn simply from the status of temporary caretaker.[5] Thus the focus of the present inquiry regarding strict liability is whether the temporary caretaker of a domestic animal can be considered a "keeper" as a matter of law.

In defining the term "keeper," it is instructive to examine the rationale for imposing strict liability for harm done by domestic animals. Liability is not imposed because of a failure to restrain the animal, since the utmost care in that regard is not a defense to liability. *Knowles, supra,* p 206. Therefore, negligence analysis in this instance, even regarding the keeping of an abnormally dangerous animal, is improper. The burden of the loss under the common-law rule is instead allocated on an equitable basis to the party who has introduced the potential danger into the community, and either knows of the animal's abnormal propensity or has had the animal long enough to be chargeable with notice of its dangerous habits. 3 Harper, James & Gray, Torts (2d ed), § 14.11, p 269; Prosser & Keeton, Torts (5th ed), § 76, pp 541-543. The liable party is deemed to have chosen to expose those around him to the abnormal danger posed by the animal he chooses to keep and must, as a consequence, shoulder any costs resulting from that danger.

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[5] Summary disposition of plaintiff's claim against Robert Thor on the basis of the dog bite statute was affirmed by the Court of Appeals because of the plaintiff's failure to provide any evidence that Robert Thor was Chadwick's owner. 199 Mich App 232-233.

In order for such allocation to be equitable, the liable party must have sufficient custody and sufficient control of the animal to assess whether a risk is presented by an abnormal propensity and to decide whether an animal should be brought into or remain in the community. It is this proprietary control, akin to ownership, that we hold must be present to deem a party a keeper, and potentially liable, under the common-law strict liability principle.

The thread of proprietary control can be found in Michigan cases that have assessed which parties were keepers under former dog bite statutes. While these statutes imposed liability on both owners and keepers without regard to whether the owner or keeper knew of the animal's propensities,[6] they provide useful guidance regarding the level of control necessary to impose the responsibilities of keeper status.

In *Burnham v Strother,* 66 Mich 519; 33 NW 410 (1887), the defendant, while acknowledging he was the owner of a dog, was held not to be its keeper because the dog had been enticed away from the defendant and kept by the plaintiff's father. *Id.,* p 520. The Court approved an instruction that liability for an injury inflicted by the dog was to be imposed on the basis of where the dog "really lived." *Id.,* p 521. The charge distinguished between visits by a dog and the situation in which the dog was living at the home of a person who had undertaken to control its actions.[7] The

[6] The statutes imposing liability for owners or keepers in the cases discussed below were versions of a statute originally enacted by 1850 PA 161. *Nicholes v Lorenz,* 396 Mich 53, 58; 237 NW2d 468 (1976). The current version of the statute limits liability to owners. MCL 287.351; MSA 12.544.

[7] The instructions stated, in pertinent part:

"Now, you are not to draw inferences that because a man

plaintiff's father had chosen to bring the animal to his property and expose the plaintiff to any danger the dog might pose. The father, therefore, became the keeper to whom the cost of the injury was to be fairly allocated.

Similarly, in *Wetzel* v *Bolster,* 169 Mich 43; 134 NW 1099 (1912), it was held to be proper to instruct the jury that the owner of a dog was not its keeper where the dog had been given to a third party to keep approximately six weeks before the plaintiff's injury. It was the third party who was the keeper of the dog in this case because he had brought the animal to his premises and exposed those in his community to potential injury.

Finally, in *Jenkinson* v *Coggins,* 123 Mich 7; 81 NW 974 (1900), the defendant was found to be the keeper of a dog owned by her son where the son and dog lived on property that was under the defendant's absolute control. This control of the premises where the dog lived was clear evidence that the defendant possessed a proprietary status akin to ownership necessary to be found a keeper.

We do not mean to suggest by our analysis that ownership of the property where the animal resides is dispositive in the determination of keeper status. A person may have sufficient control of a domestic animal that is cared for on the owner's property to be subject to liability as a keeper.[8]

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allows a dog to stay all night at his house, or to come there from time to time occasionally, that he is the keeper of the dog. We all know the habits of these animals, and the habits of children, and it is not an infrequent occurrence for a dog to visit, as well as anybody else. But if the evidence in the case shows that this man Burnham treated this dog as living at his house, and undertook to control his actions, then he was the keeper of the dog . . . ." [*Id.,* p 521.]

[8] In *Gagnon* v *Frank,* 83 NH 122; 139 A 373 (1927), a house sitter who was expressly required to care for the premises owner's three dogs while the owner was abroad was found to have held the dogs in

Possession of an animal sufficient to be found a keeper, however, "cannot be fairly construed as anything short of the exercise of dominion and control similar to and in substitution for that which ordinarily would be exerted by the owner in possession." *Hancock v Finch,* 126 Conn 121, 123; 9 A2d 811 (1939) (interpreting "keeper" under a statutory definition encompassing an owner, harborer, or party in possession of any dog). Thus, in *McEvoy v Brown,* 17 Ill App 2d 470; 150 NE2d 652 (1958), a grandmother who had fed and watered a puppy brought to her house by her grandsons, whom the grandmother had agreed to watch for the afternoon, was held not to be the animal's keeper. The court affirmed that such a perfunctory act would not constitute keeping of the puppy, even though it was performed at the grandmother's home. It was the responsibility of watching the grandchildren, and not the puppy, to which the grandmother had agreed. As a result, the grandmother was not barred, under Illinois' dog bite statute, from recovery for injuries suffered in a fall caused by the puppy running between her legs.

We agree that the situation of Mr. Thor as a babysitter or temporary caretaker is most aptly characterized as akin to that of the grandmother in *McEvoy.* A babysitter does not "undert[ake] to control" the activities of an animal that may be present, in contrast to the father in *Burnham,* but rather agrees to supervise the home for a limited period of time. Temporary caretakers have no

such possession and control as to be the animals' keeper. The house sitter, who was bitten on the hand by one of the dogs, was thus barred from recovery under New Hampshire's dog bite statute, which limited relief to parties that neither owned nor kept the dog that injured them. The court rejected the notion that the house sitter was "merely a servant working on the premises where the owner of the dog harbored it." *Id.,* p 123.

choice regarding whether the dangers an animal may present will be introduced into the community, nor have they agreed to shoulder responsibility for injuries it might inflict. They should therefore not be held strictly liable because the equitable basis for allocation of the cost of injury is absent in these circumstances.

We conclude that the temporary supervisory responsibility of the defendant in the present case did not provide him with sufficient proprietary control to attain keeper status. There is evidence to indicate that Mr. Thor had agreed to temporarily watch the children and manage the home, including supervising the family pet. However, given that one in the position of temporary caretaker normally has no control over the ultimate question whether keeping the animal is worth the risk of exposing the community to any abnormal danger, it would be inequitable to subject him to the common-law strict liability claim.

III

The conclusion that there is no cause of action against a temporary caretaker of a domestic animal under a common-law strict liability theory does not preclude a negligence claim. 3 Harper, James & Gray, *supra,* § 14.11, pp 265-276; 3 Lee & Lindahl, Modern Tort Law (rev ed), § 37.06, p 326. The Restatement, § 518(b), subjects the possessor or harborer of a domestic animal with no scienter[9] of a dangerous propensity to "liability for harm done by the animal if, but only if, he is negligent in failing to prevent the harm." Other jurisdictions, citing the Restatement, have allowed negli-

[9] "Scienter" under the negligence claim is used in the same manner as under the strict liability theory, i.e., whether the party knew or should have known of a dangerous propensity.

gence actions to go forward in domestic animal injury cases. *Medlyn v Armstrong,* 49 Or App 829, 832; 621 P2d 81 (1980); *Arnold v Laird,* 94 Wash 2d 867, 871; 621 P2d 138 (1980).

Negligence actions in domestic animal injury cases have been recognized by the Court of Appeals, usually as an alternative theory of liability to a strict liability claim when scienter cannot be shown. *Rickrode v Wistinghausen,* 128 Mich App 240, 247-248; 340 NW2d 83 (1983); *Papke v Tribbey,* 68 Mich App 130, 135-136; 242 NW2d 38 (1976).[10] We agree, and can find no reason why such a cause of action should not also be available when the defendant's possession is of such a temporary nature that he cannot be held strictly liable as a keeper. The danger of misallocation of loss, as was presented by extending strict liability to the temporary caretaker, is not present. The factfinder is instead judging the action of the caretaker in light of the totality of the circumstances.

In assessing whether duty exists in a negligence action of this type, it is necessary to keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge. It is the province of the court to determine if duty exists. *Buczkowski v McKay,* 441 Mich 96; 490 NW2d 330 (1992), Prosser & Keeton, *supra,* § 37, pp 235-238. Dogs, and some other domestic animals,[11] are generally regarded as so

[10] In *Barnum v Terpening,* 75 Mich 557; 42 NW 967 (1889), this Court held that it was proper to allow a jury to determine if the defendant was negligent in the manner in which he drove a bull along a public highway. The plaintiff in that case had been tossed over a bridge railing into a stream by the bull. The precise question for the jury was whether the defendant had been negligent in tying the bull's head to his foot rather than leading him along the highway by a ring in his nose.

[11] Other animals in this class include "cats, bees, pigeons and

unlikely to do substantial harm that their possessors have no duty to keep them under constant control.[12] Consequently, a mere failure to do so would not constitute breach of any duty of care. 3 Restatement Torts, 2d, § 518, comments g and j, pp 31, 32. However, if the possessor of such an animal, including one in temporary possession, has knowledge of some dangerous propensity unique to the particular animal, or is aware that the animal is in such a situation that a danger of foreseeable harm might arise, the possessor has a legally recognized duty to control the animal to an extent reasonable to guard against that foreseeable danger. *Id.,* comment k, pp 32-33. We therefore adopt the following rule from *Arnold, supra,* p 871, and hold that in a domestic animal injury case:

> [A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen.

Applying these principles to the instant case, viewed in a light most favorable to the plaintiffs, *Blake v Brama,* 343 Mich 27, 29; 72 NW2d 10

similar birds and also poultry, in a locality in which by custom they are permitted to run at large . . . ." 3 Restatement Torts, 2d, § 518, comment j, p 32.

[12] A duty to constantly control an animal may be imposed by statute, such as the obligation to properly hold a dog in leash. MCL 287.262; MSA 12.512. See also *Rickrode, supra,* p 247 (the violation of a city ordinance requiring cats to be kept confined or leashed is evidence of negligence). Because the injury here occurred in the owner's home, this obligation is not at issue in this case.

(1955), we find sufficient allegations from which a trier of fact could find Robert Thor negligent in fulfilling his duty of care in supervising Chadwick. The facts indicate that Robert Thor took temporary possession of Chadwick when he agreed to supervise the home while his son and daughter-in-law went shopping. As a result, Mr. Thor is subject to liability for harm done by Chadwick if he failed to exercise ordinary care to prevent any foreseeable harm, and such failure proximately caused the injury. The defendant would ordinarily be under no duty to constantly control Chadwick; however, plaintiffs have presented evidence that Robert Thor knew Chadwick had bitten a child before this incident. Such evidence may lead the trier of fact to find that Robert Thor had a duty and should have exercised greater control over Chadwick in order to satisfy his requisite standard of care. The factfinder, however, might also determine that putting Chadwick in the back bedroom fulfilled the defendant's duty, even if he had scienter, or that the earlier incident provided no notice of dangerous propensities, because Chadwick had been provoked. Such questions are for the trier of fact, and cannot be resolved on motion for summary disposition.[13]

IV

In sum, we hold that the temporary caretaker of a domestic animal is not the animal's owner or keeper, as a matter of law. We decline to extend the common-law strict liability claim to such a caretaker. However, one in temporary possession

[13] We note that the allegations discussed above are also sufficient to permit a trier of fact to find that Robert Thor accepted responsibility for the care of Rachael Trager while at the Thor home, and had been negligent in fulfilling that duty by allowing her to be exposed to an animal with known dangerous propensities.

of a domestic animal may be liable for injuries caused by the animal under a negligence claim.

We reverse the decision of the Court of Appeals allowing the claim for strict liability, affirm the decision allowing the negligence claim, and remand to the trial court for proceedings consistent with this opinion.

CAVANAGH, C.J., and LEVIN, BRICKLEY, RILEY, GRIFFIN, and MALLETT, JJ., concurred with BOYLE, J.

RASHEED v CHRYSLER CORPORATION

Docket Nos. 95122, 95774. Argued November 3, 1993 (Calendar No. 10). Decided May 17, 1994.

Muhammad Rasheed brought an action in the Wayne Circuit Court under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, against Chrysler Corporation and James Senart, his supervisor at Chrysler, alleging wrongful discharge. Before trial, the court, Richard P. Hathaway, J., ruled that any damages would be limited to the thirteen-month period of unemployment preceding the plaintiff's rejection of an offer by Chrysler to reinstate him to his former position with full seniority, but without backpay. Following trial, the court granted a directed verdict for the defendants on all but the plaintiff's claim of religious discrimination, entering judgment on a jury verdict of that claim for the plaintiff. In a subsequent hearing, conducted without a jury, the court ordered Chrysler to reinstate the plaintiff as a newly hired employee with no seniority. The Court of Appeals, FITZGERALD, P.J., and HOOD, J. (J. C. KINGSLEY, J., dissenting in part), affirmed (Docket No. 129620). Both parties appeal.

In an opinion by Justice RILEY, joined by Chief Justice CAVANAGH, and Justices BRICKLEY, BOYLE, GRIFFIN, and MALLETT, the Supreme Court *held:*

Because the trial court made its decision regarding the appropriate remedy before all factual issues were decided, remand is required to resolve the issue of the reasonableness of the plaintiff's rejection and a reassessment of the appropriate remedy. The trial court properly denied the defendants' motion for a directed verdict on the claim of intentional discrimination because factual questions remained.

1. Trial courts have wide discretion to fashion appropriate remedies in wrongful discharge cases. A discharged employee has a duty to mitigate damages. Failure to do so, whether by failing to seek other suitable employment or by rejecting an unconditional reinstatement offer, is an affirmative defense to be established by the employer. Whether an employee acted reasonably in not seeking or accepting particular employment is to be decided by the trier of fact.

2. Reinstatement offers that are clear on their face may be

construed by the courts as a matter of law. Where an offer properly may be characterized as ambiguous, construction is permitted. Where it becomes necessary to consider the parties' intent, the inquiry is a question of fact. While conditionality may be decided as a matter of law under appropriate circumstances, reasonableness is a question of fact that must be decided independently. An unconditional offer of reinstatement may be used as proof of an unreasonable rejection in satisfaction of the employer's burden. However, if there are any differences between the offer and the previous employment, with the exception of backpay, rejection based in part on the difference precludes a peremptory ruling by the court, and reasonableness in light of the particular circumstances must be determined.

3. Once it is established that a reinstatement offer is unconditional, a rebuttable presumption arises that its rejection is unreasonable. To rebut, the employee must offer reasonable grounds for rejection that are based on the employment as contemplated by the offer rather than for purely personal reasons. Failure by the claimant to provide a legitimate basis for a rejection forfeits the right to front pay. In this case, the issue of the reasonableness of the plaintiff's rejection was improperly removed from the jury. The trial court erred as a matter of law in deciding the continued backpay issue before the factfinder decided the defendants' ultimate liability for the alleged discriminatory discharge, requiring reversal of the Court of Appeals decision and remand to the trial court for reconsideration of the issue of reasonableness and the appropriate remedy.

4. A claimant asserting an intentional discrimination claim must establish as part of a prima facie case a discriminatory predisposition of the employer and an act in furtherance of this predisposition. In this case, the decision to terminate the plaintiff was made entirely on the basis of the supervisor's report, and the court properly allowed the plaintiff to offer proof that the reason asserted was a mere pretext. In unique circumstances, ordinarily neutral mechanisms for termination may qualify as discriminatory employment practices. The facts of this case constitute such unique circumstances. Reasonable jurors could have reached different conclusions regarding whether the labor relations manager was aware of the alleged discrimination and acted in furtherance of it.

Reversed and remanded.

Justice LEVIN, writing separately, stated that federal case law does not support the proposition that Michigan courts have

broad discretion to fashion appropriate remedies in wrongful discharge cases. Federal cases construing title VII of 42 USC 2000e-5(g) are not persuasive where a damage remedy has been sought under the Michigan Civil Rights Act. Nor do those cases grant federal courts the power to deny a plaintiff found to be a victim of an unlawful employment practice a remedy that would make the victim whole.

In wrongful discharge cases, separate determinations of the conditionality of a reinstatement offer and of the reasonableness of a rejection need not be made. In deciding whether a prevailing plaintiff may recover damages for a period following the rejection of an offer of reinstatement, the trier of fact need only determine whether the plaintiff failed to mitigate damages, as is required in other wrongful discharge cases in Michigan and in the federal system where the alleged failure to mitigate concerns the plaintiff's rejection of an offer of employment by the original employer that differs from the original job or when the plaintiff reasonably refuses to accept an offer of employment from another company. The issue of the conditionality of a reinstatement offer does not become a matter of law to be decided by the court simply because the employer has offered to reinstate the discharged employee. Assuming that whether an offer of reinstatement was conditional and whether the plaintiff acted reasonably in rejecting such an offer are proper are separate inquiries, each inquiry presents a question of fact for the trier of fact, and neither may be resolved by the court as a matter of law unless reasonable minds could not draw different conclusions concerning conditionality or reasonableness.

MCL 37.2803; MSA 3.548(803) provides that the Civil Rights Act is not to be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts, simply repeating the language of Const 1963, art 5, § 29, providing for the establishment of a Civil Rights Commission, with powers provided by law to carry out its purposes, and proscribing any construction that would diminish the right of any party to direct and immediate legal or equitable remedies in the courts. Section 803 says nothing at all about what those legal or equitable remedies might be.

Section 801 does not provide that the courts of this state may provide an equitable remedy such as injunctive relief or a damage remedy, as the court thinks best in the exercise of its discretion. Rather, it provides that a person alleging a violation of the Civil Rights Act may bring a civil action for appropriate injunctive relief, or damages, or both. The discretion whether

to seek an equitable remedy, such as injunctive relief as well as damages, is confided by the constitution and the Legislature, consistent with art 5, § 29, to the person alleging a violation of the Civil Rights Act.

The majority has an extravagant view of judicial power in concluding that it may arrogate to the trial courts of this state the power—so clearly confided by the constitution and the Legislature to the victim of a civil rights violation—whether to seek an equitable remedy as an alternative to a legal remedy. While a fair degree of discretion on the part of the trial court might be necessary to make whole a victim of discrimination who seeks an equitable (injunctive) remedy, that does not mean that, where the victim seeks a legal (damage) remedy in the exercise of the choice confided to the victim by the constitution and the Civil Rights Act, the Supreme Court is empowered to confide to the courts of this state a degree of discretion, in the name of making the victim of discrimination whole, to deny the victim of the choice of a legal (damage) remedy.

United States Courts of Appeals, construing the federal statute, have not found it necessary to create a bifurcated or trifurcated procedure. The majority simply prefers to confide to trial courts, and to remove from jury consideration, questions that it is more comfortable having a judge decide. This is judicial legislation, an arrogation of power to the courts in an area in which the majority does not trust the jury. There is ample power under the traditional approach that permits a trial court to remove from jury consideration any issue of fact that, in the judgment of the trial court, all reasonable persons must reach but one result.

196 Mich App 196; 493 NW2d 104 (1992) reversed.

Durant & Durant, P.C. (by *Richard Durant*), for the plaintiff.

Dickinson, Wright, Moon, Van Dusen & Freeman (by *John Corbett O'Meara, Robert W. Powell, Noel D. Massie,* and *Eric J. Pelton*) for the defendants.

Amicus Curiae:

Clark, Klein & Beaumont (by *Dwight H. Vincent* and *J. Walker Henry*) for Michigan Manufacturers Association.

RILEY, J. Today the Court is called upon to consider a host of issues surrounding a claim for discriminatory termination of employment brought under the Michigan Civil Rights Act.[1] Resolution of these issues requires us to explore the legal and procedural parameters of a discriminatory termination claim involving subsequent offers of reinstatement as they relate to the theory of damage mitigation. We conclude that because the trial court made its decision regarding the appropriate remedy before all factual issues were decided, we remand for resolution of the reasonableness of rejection issue and a reassessment of the appropriate remedy. We also find that because defendants waived the statute of limitations defense, it is unnecessary to deal with plaintiff's continuing violations claim. Finally, we affirm the trial court's denial of defendants' motion for a directed verdict on the intentional discrimination claim.

I

Plaintiff began his employment with Chrysler in 1967 at the Huber facility in Detroit. In 1978, plaintiff converted to the Muslim faith. Three years later, plaintiff was transferred to Chrysler's Trenton engine plant where, according to plaintiff, he was subjected to religious and racial harassment from the first day when guards at the plant allegedly attempted to stop him from taking an Islamic newspaper into the facility because it was "subversive," being called "Ayatollah Cockamania" by his supervisor and alleged major antagonist James Senart, the purposeful placing of pork near his work station during the holy month of

[1] MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

Ramadan,[2] numerous remarks about how Muslims should stay in Detroit, attempts to incite anti-Muslim sentiments from the other employees, refusal to replace plaintiff's broken tools while other employees got new tools, several suspensions with racial and religious overtones, and for other similar acts. Plaintiff reported these incidents to union officials and Chrysler managerial employees on numerous occasions. Although the record contains evidence of several meetings between Chrysler management and plaintiff or his union representatives regarding these alleged occurrences, no legal action was taken by plaintiff before his termination.[3]

According to plaintiff, the anti-Muslim atmosphere culminated on July 12, 1984, in a setup orchestrated by Senart and intended to get plaintiff fired from his employment. Senart was allegedly baiting plaintiff,[4] and other employees were improperly removing a storage bin, called a head divider, from plaintiff's work area. When plaintiff retrieved the head divider, Senart allegedly rebuked him for taking it away from another work station. According to defendants, plaintiff kicked the head divider and threw two engine heads onto the ground with such damaging force that they could not be repaired. Senart wrote up a report on

[2] The facts indicate that members of the Islamic faith may neither eat nor even expose themselves to pork products during the holy month. Plaintiff asserted that Senart told a co-employee who was eating a pork chop sandwich to give plaintiff some "American food."

[3] Plaintiff was regarded as a good worker, who did more than his share of the engine repair work; however, plaintiff did appear to have problems with his fellow employees. These problems began to escalate when Senart became his supervisor in November of 1983.

[4] Plaintiff testified that Senart was "bird-dogging" him, i.e., standing near plaintiff's station for long periods of time with a disciplinary report sheet in hand waiting for the opportunity to write plaintiff up for violations of company policy or procedure. According to plaintiff, this type of behavior was a frequent manifestation of the discriminatory animus.

the incident, alleging that plaintiff purposefully destroyed company property, which is a ground for immediate discharge. Shortly thereafter, plaintiff was escorted out of the plant by security guards and placed on disciplinary leave.

Charles Fern, the labor relations manager at the Trenton plant, reviewed Senart's report and attempted to interview plaintiff's co-workers.[5] Fern inspected the two engine heads that were indeed damaged, and he looked at two grooves in the floor of plaintiff's work area that were allegedly caused by plaintiff's act of hurling the engine heads to the ground. Fern also spoke to union representatives and other supervisors. As a result of his investigation, Fern concluded that plaintiff had destroyed company property, and the disciplinary leave was upgraded to termination of employment.

Plaintiff filed the instant action in Wayne Circuit Court against Chrysler and Senart for wrongful discharge based on racial and religious discrimination, for intentional infliction of emotional distress, and for fraud or misrepresentation on the part of Senart. *Before trial,* the court ruled that any damages awarded to plaintiff would be limited to the thirteen-month period of his unemployment preceding his rejection of Chrysler's reinstatement offer.[6] *At trial,* the court granted defendants' motion for a directed verdict on all but the religious discrimination claim. The jury returned a verdict in favor of plaintiff on the religious discrimination claim and awarded him $51,300 for lost wages and

[5] Interestingly, the record indicates that all of plaintiff's co-workers in the area *refused* to speak to Fern. Ultimately, one of plaintiff's co-workers testified at trial that he saw plaintiff toss the engine heads into a bin in the manner that was common to all similarly situated Trenton employees.

[6] Chrysler offered to reinstate plaintiff with full seniority rights and to reduce the charge of destruction of company property to convert his discharge to a disciplinary layoff.

$10,000 for embarrassment or humiliation. In a subsequent hearing conducted without a jury, the court exercised its equitable powers to order Chrysler to reinstate plaintiff as newly hired, with no seniority, within sixty days of the decision.

Defendants appealed the court's decision not to grant the motion for a directed verdict on the religious discrimination claim, as well as the order requiring plaintiff's reinstatement as a newly hired employee. Plaintiff cross appealed the court's refusal to permit recovery for acts occurring before the three-year period of limitation running from the date of termination and for the decision not to reinstate plaintiff with full seniority rights and backpay.

A majority of the Court of Appeals upheld the trial court's decision not to grant defendants' motion regarding the religious discrimination claim, and it upheld the trial court's "equitable power" to fashion the remedy of reinstatement, albeit without any seniority rights. 196 Mich App 196, 200; 493 NW2d 104 (1992). The majority also upheld the ruling of the limitation of backpay to the thirteen-month period before plaintiff's refusal to accept Chrysler's reinstatement offer. Finally, the majority concluded that plaintiff failed to establish all of the elements necessary to invoke the "continuing violation" theory, which would have permitted plaintiff to recover for alleged acts that occurred more than three years before the filing of the complaint. The dissenting judge, relying heavily on federal precedent, would have reversed the trial court's decision to reinstate plaintiff for what he considered to be an unreasonable refusal to accept Chrysler's "unconditional" offer of reinstatement. *Id.* at 210.

This Court granted both parties' application for leave to appeal.[7]

II

A

One year and three months after his termination, Chrysler offered to reinstate plaintiff to his former position with full seniority, but without backpay. The offer provided in its entirety:

> In full settlement of this case, M. Rasheed will be offered reinstatement in accordance with his seniority provided he can meet normal requirements. Upon his return to work his discharge shall be reduced to a disciplinary layoff without back pay for the period during which he was away from the plant.
>
> This action of the Appeal Board shall form no basis or precedent for a decision or settlement in any other case.

On the basis of this offer, defendants moved for partial summary disposition to prevent plaintiff from recovering continued backpay[8] for a failure to accept what they asserted was an "unconditional" offer, as well as to prevent plaintiff's reinstatement. Plaintiff asserted that the offer was conditional because it did not include backpay and

[7] 443 Mich 868 (1993).

[8] Backpay has been broadly defined to include "all monetary awards based on earnings and other fiscal benefits that the plaintiff would have received but for the unlawful employment practice." 2 Larson, Employment Discrimination, § 55.31, p 11-96.1.

In contrast, front pay is defined as "a monetary award that compensates victims of discrimination for lost employment extending beyond the date of the remedial order." *Id.*, § 55.39, p 11-96.121. As case law makes clear after *Ford Motor Co v EEOC,* 458 US 219; 102 S Ct 3057; 73 L Ed 2d 721 (1982), the line of demarcation has been drawn between backpay and the continued right to backpay from the date of a rejection of an unconditional reinstatement offer. Front pay refers to that part of an award that accrues after a decision is rendered.

because it offered to convert the termination into a disciplinary layoff rather than remove the blemish from his employment record.[9]

At the hearing on the motion itself, the trial court concluded as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion is granted as it concerns limiting backpay that Plaintiff can seek, to that period covering July 19, 1984, up to and including August 26, 1985.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion as it concerns the preclusion of reinstatement for Plaintiff is denied, and Plaintiff will be allowed to present proofs concerning the equitable issue of reinstatement to the trier of fact.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that notwithstanding any ruling on reinstatement of the submission of proofs, Plaintiff's backpay is limited to the aforementioned July 19, 1984 to August 26, 1985 period.

It is unclear from this ruling what was the basis for the trial court's conclusion that plaintiff rejected an unconditional offer so that he was not entitled to continued backpay, but that the issue of reinstatement was a question to be decided by the finder of fact. In addressing this issue, we turn first to a discussion of the relevant case law.

B

The law concerning backpay and other remedies in the employment discrimination context has its roots in provisions of the federal Civil Rights Act of 1964, which amended the Civil Rights Act of

[9] Bennie Wright, plaintiff's union steward at the time, testified that the reinstatement offer as presented did not permit plaintiff to return "free and clear."

1957.[10] The avowed purpose of the new provisions was to "provide the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States v N L Industries, Inc,* 479 F2d 354, 379 (CA 8, 1973), quoted in *Albemarle Paper Co v Moody,* 422 US 405, 417-418; 95 S Ct 2362; 45 L Ed 2d 280 (1975). Modeled after a provision in the National Labor Relations Act, the backpay provision was intended to "make whole" anyone suffering from the effects of employment discrimination. *Albemarle, supra* at 418-419.

Almost a decade later, however, the United States Supreme Court recognized a corollary to the backpay provision on the basis of interim earnings language found in 42 USC 2000e-5(g).[11] In the landmark decision *Ford Motor Co v EEOC,* 458 US

[10] 15 Am Jur 2d, Civil Rights, § 3, p 284.

[11] 42 USC 2000e-5(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, . . . hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate. . . . *Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.* [Emphasis added.]

The remedies listed under article 8 of the Michigan Civil Rights Act, MCL 37.2801 *et seq.*; MSA 3.548(801) *et seq.,* simply permit "appropriate injunctive relief or damages, or both," MCL 37.2801(1); MSA 3.548(801)(1), reasonable costs and attorney fees, MCL 37.2801(3); MSA 3.548(801)(3) and MCL 37.2802; MSA 3.548(802), and any other "direct or immediate legal or equitable remedies in the courts of this state." MCL 37.2803; MSA 3.548(803). There is no specific statutory provision requiring claimants to mitigate their damages by accepting unconditional offers of employment.

219; 102 S Ct 3057; 73 L Ed 2d 721 (1982), the Supreme Court specifically imposed on a discharged employee the duty to mitigate damages under title VII of the federal Civil Rights Act of 1964[12] by accepting unconditional offers of reinstatement even when the offers do not include backpay.[13] The majority held:

> An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g). This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he *forfeits his right to backpay* if he refuses a job *substantially* equivalent to the one he was denied. Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages. [*Id.* at 231-232. Emphasis added.]

According to the majority, this duty provides in-

[12] 42 USC 2000a *et seq.* Equal employment opportunities are addressed in 42 USC 2000e *et seq.*

[13] It should be noted that the weight of federal authority holds that backpay should be awarded if discrimination is found unless there are special circumstances dictating otherwise. See *Albemarle, supra* at 419-420; *Los Angeles Water & Power Dep't v Manhart,* 435 US 702, 719; 98 S Ct 1370; 55 L Ed 2d 657 (1978); *Rasimas v Dep't of Mental Health,* 714 F2d 614, 626 (CA 6, 1983); *Head v Timken Roller Bearing Co,* 486 F2d 870, 876 (CA 6, 1973); *McCormick v Attala Co Bd of Ed,* 541 F2d 1094 (CA 5, 1976). Special factors that would constitute exceptional circumstances and prevent backpay awards are exceedingly rare. *Albemarle, supra* at 417; *Meadows v Ford Motor Co,* 510 F2d 939, 945 (CA 6, 1975). Theoretically, the issue of mitigation as it relates to a *reinstatement offer,* and not other efforts to secure alternative employment, only concerns circumstances occurring on or after the date of the reinstatement offer. Thus, any entitlement to backpay before the date of the offer is not affected.

centive for employers to voluntarily comply with title VII because it permits the employer to avoid liability for backpay damages and thereby avoid economic waste. *Id.* at 228-229. Moreover, "the victims of job discrimination want jobs, not lawsuits." *Id.* at 230.

Thus, a reinstatement offer, in order to be considered "unconditional" for federal purposes, need not include an offer of retroactive seniority, which may nonetheless be awarded if the claimant is successful in an employment discrimination claim. *Id.* at 232-233.[14] However, a claimant does not violate the duty to mitigate damages by refusing to accept a position that is an unreasonable distance from his home,[15] to accept a position that is not the substantial equivalent of the one sought or from which he was terminated,[16] or to accept an offer with any other unreasonable condition attached to it.[17] Generally, it is the duty of the trier

[14] But see *Franks v Bowman Transportation Co,* 424 US 747, 766; 96 S Ct 1251; 47 L Ed 2d 444 (1976) (although discretion to fashion a remedy is broad, "ordinarily [awards of seniority rights] will be necessary to achieve the 'make-whole' purposes of the Act").

[15] See, e.g., *NLRB v Oman Construction Co, Inc,* 144 NLRB 1534 (1963), enforced 338 F2d 125 (CA 6, 1964), cert den 381 US 925 (1965); *Jackson v Wheatley School Dist,* 464 F2d 411 (CA 8, 1972).

[16] See *Rasimas,* n 13 *supra* at 625.

[17] See *Toledo v Nobel-Sysco, Inc,* 892 F2d 1481 (CA 10, 1989) (a requirement that a claimant drop a title VII claim and pass polygraph and physical tests in an offer precluded a finding that the offer was unconditional); *Kilgo v Bowman Transportation, Inc,* 789 F2d 859 (CA 11, 1986) (an invitation to apply for a position was not an unconditional offer of employment). See also *Taylor v Teletype Corp,* 648 F2d 1129, 1139 (CA 8, 1981), cert den 454 US 969 (1981), wherein the United States Court of Appeals for the Eighth Circuit ruled:

> The failure to accept an offer of reinstatement does not automatically terminate an employee's right to relief.
>
> "In determining whether the right to relief extends beyond the date of an offer of reinstatement, the trial court must consider the circumstances under which the offer was made or rejected, including the terms of the offer and the reasons for refusal." [*Id.* at 1139. Citation omitted.]

of fact to weigh the evidence to determine whether a reasonable person would refuse the offer of reinstatement. *O'Donnell v Georgia Osteopathic Hosp, Inc,* 748 F2d 1543, 1551 (CA 11, 1984), disavowed on other grounds in *Lindsey v American Cast Iron Pipe Co,* 810 F2d 1094 (CA 11, 1987); *Fiedler v Indianhead Truck Line, Inc,* 670 F2d 806, 808 (CA 8, 1982).

Under title VII, the federal courts have wide discretion to fashion a remedy in a discriminatory hiring or discharge case.[18] For example, the award of backpay is treated as an equitable remedy to be decided as a matter of law. *Albemarle, supra* at 417; 2 Larson, Employment Discrimination, § 55.32, pp 11-96.2 to 11-96.4. A court's decision on the issue of backpay is a matter of discretion, and may only be reversed for abuse. *Albemarle, supra* at 415-416; Larson, *supra,* § 55.33, pp 11-96.4 to 11-96.7. At least one circuit court has stated that this discretion permits a denial of backpay accruing before the reinstatement offer as well as front pay. *O'Donnell, supra* at 1550.[19] On the other hand, a

But see *Giandonato v Sybron Corp,* 804 F2d 120 (CA 10, 1986) (a refusal to accept an offer of reinstatement in an age discrimination case for illness of claimant's wife, generalized aversion to working under a district manager, and generalized assertions of the "uncertainty" of the offer was unreasonable); *Morvay v Maghielse Tool & Die Co,* 708 F2d 229 (CA 6, 1983) (an offer of reinstatement conditioned only upon the claimant's submission to a psychiatric examination in light of questionable past behavior terminated continued backpay liability); *Boomsma v Greyhound Food Management, Inc,* 639 F Supp 1448 (WD Mich, 1986) (the rejection of reinstatement offer because it did not include backpay and did not offer compensation for certain medical expenses, and because claimant was happy with his new job, precluded an award of continued backpay).

One point worthy of note is that the Sixth Circuit has previously recognized that an offer of reinstatement may be insufficient to bar awards of continued backpay if it is conditioned upon, among other things, the failure to restore seniority rights. *Morvay, supra* at 232.

[18] On the issue of recoverable damages in the federal system generally, see Larson, n 8 *supra,* §§ 55.00-55.46, pp 11-57 to 11-96.141.

[19] The language in *O'Donnell* upon which defendants rely is dicta.

court's discretion is "hardly . . . unfettered by meaningful standards or shielded from thorough appellate review." *Albemarle, supra* at 416.

On the issue of reasonableness, a claimant required to make reasonable efforts to mitigate damages is not held to the highest standards of diligence. *Rasimas v Dep't of Mental Health,* 714 F2d 614, 624 (CA 6, 1983), cert den 466 US 950 (1984). Moreover, "the claimant's burden is not onerous, and does not require him to be successful in mitigation." *Id.* Finally, the burden of proof on this question shifts to the employer once a prima facie case of employment discrimination has been established. *Id.* at 623-624.

C

The approach of state courts on the issue of backpay/continued backpay is in harmony with that utilized by the federal courts.[20] First, this jurisdiction recognizes a duty of a discharged employee to mitigate damages. See *Shiffer v Gibraltar School Dist Bd of Ed,* 393 Mich 190, 197; 224 NW2d 255 (1974) ("The principle of mitigation is a

First, the Eleventh Circuit's opinion on the backpay/front pay issue is based solely on "logic." 748 F2d 1550. Second, the court reversed the district court's decision to remove from the jury the question whether it was reasonable for the plaintiff to reject the reinstatement offer. *Id.* at 1551.

[20] The Michigan Civil Rights Act, though clearly modeled after title VII, provides an independent basis for state claims of wrongful discharge. Although federal precedent is persuasive, it is not binding on state courts. See *Clark v Uniroyal Corp,* 119 Mich App 820, 824; 327 NW2d 372 (1982); *Northville Public Schools v Civil Rights Comm,* 118 Mich App 573, 576; 325 NW2d 497 (1982). Moreover, the legislative intent behind title VII has been interpreted to permit aggrieved employees to pursue remedies under state and federal laws independent of a title VII claim. See *Alexander v Gardner-Denver Co,* 415 US 36, 48-49; 94 S Ct 1011; 39 L Ed 2d 147 (1974).

Nonetheless, this Court has already relied on federal authority as being persuasive in this area. See *Dep't of Civil Rights ex rel Cornell v Edward W Sparrow Hosp Ass'n,* 423 Mich 548, 560-563; 377 NW2d 755 (1985) (opinion of WILLIAMS, C.J.).

thread permeating the entire jurisprudence . . . it is part of the much broader principle of 'avoidable consequences' "); *Flickema v Henry Kraker Co,* 252 Mich 406; 233 NW 362 (1930) (an offer of reinstatement by an employer to a discharged employee was admissible in evidence on the issue of mitigation of damages). Second, the failure of a discharged employee to mitigate damages, whether by seeking other employment or by rejecting an unconditional reinstatement offer, is an affirmative defense to be established by the employer. *Higgins v Kenneth R Lawrence, DPM, PC,* 107 Mich App 178, 181; 309 NW2d 194 (1981). Third, the question whether an employee was reasonable in not seeking or accepting particular employment is one to be decided by the trier of fact. *Id.; Riethmiller v Blue Cross & Blue Shield of Michigan,* 151 Mich App 188, 194-195; 390 NW2d 227 (1986); *Jenkins v Southeastern Michigan Chapter, American Red Cross,* 141 Mich App 785, 797; 369 NW2d 223 (1985).[21] Fourth, state courts also have a wide

[21] Cf. *Sparrow,* n 20 *supra* (the refusal to comply with a discriminatory dress code as a precondition to reinstatement did not run afoul of the duty to mitigate damages). See also SJI2d 105.41, which provides in pertinent part:

> Whether the plaintiff was reasonable in not seeking or accepting particular employment is a question for you to decide. However, the plaintiff is obligated to accept an offer of employment which is of "a like nature." In determining whether employment is of "a like nature," you may consider, for example, the type of work, the hours worked, the compensation, the job security, working conditions, and other conditions of employment.
>
> (If you find that the defendant unconditionally offered to [hire/promote/reinstate] the plaintiff to the position [previously held/applied for] or a substantially equivalent position, you shall not award damages for loss of compensation after the date the plaintiff rejected the offer. Substantially equivalent position means one with virtually identical promotion opportunities, compensation, job responsibilities, working conditions, and status. An offer is not unconditional if the job offered involves discriminatory conditions.)

discretion to fashion appropriate remedies in wrongful discharge cases. MCL 37.2801(1); MSA 3.548(801)(1).

We conclude, therefore, that the crux of this case concerns the subtle interplay between a court's broad equitable powers to fashion the appropriate remedy in cases of discriminatory discharge and the factfinder's function of determining whether the rejection of a reinstatement offer was reasonable. As stated earlier, the trial court, without indicating the basis for its decision, held that plaintiff's right to continued backpay was terminated by the "unconditional" offer of reinstatement, but that the issue of reinstatement was a question to be decided by the trier of fact. Critical to our effort to reconcile this ruling are the underlying contractual principles relevant to this area of the law. Thus, it is to a consideration of these principles that we next turn.

III

A

Over the years, various legislatures and the courts have added certain restrictions to the contractual relationship between employer and employee in cases where ordinary contract law did not adequately protect important rights of the parties. Examples are the law on discriminatory discharge, which has been the topic of numerous regulations,[22] guidelines on the right of labor to

> The defendant has the burden of proving that the plaintiff failed to mitigate [his/her] damages for loss of compensation.

[22] Examples include title VII of the federal Civil Rights Act, 42 USC 2000e *et seq.*; the Michigan Fair Employment Practices Act, MCL 423.301 *et seq.*; MSA 17.458(1) *et seq.* (since repealed and replaced by the Michigan Civil Rights Act); and the Michigan Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*

organize,[23] and even rules concerning compensation for work-related injuries.[24] However, although special rules have been adopted in the context of employment law, the contractual basis of the employment relationship remains intact.[25] Therefore, in our attempt to reconcile these two areas of the law in the context of this case, we conclude that the questions that must be addressed are: whether the courts may construe offers of reinstatement using contract principles and, if so, how a ruling on their conditionality affects an employee's right to reject an unreasonable offer. We are persuaded that the application of contract principles will provide a principled basis for discerning the conditionality of reinstatement offers. However, to ensure the statutory rights of employees against

[23] 29 USC 151 *et seq.* (the National Labor Relations Act).

[24] MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.* (the Worker's Disability Compensation Act).

[25] For example, the employment relationship has always been called an employment *contract.* The conflict between the presumption of employment at will and termination for just cause relies heavily on contract principles such as express and implied promises, oral promises, and interpretation. Whatever language the courts use in issues surrounding this presumption, it is clear that it is nothing less than a "gap-filler," i.e., a term supplied by the courts in the absence of a specific provision. See, e.g., Restatement Contracts, 2d, § 204, pp 96-97, which provides:

> When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

See also MCL 440.2201(1); MSA 19.2201(1) ("A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable . . . beyond the quantity of goods shown in such writing"); 17A Am Jur 2d, Contracts, § 195, p 205.

One of the two theories of just-cause employment is "grounded solely on contract principles 'relative to the employment setting.' " See, generally, *Rood v General Dynamics Corp,* 444 Mich 107, 118; 507 NW2d 591 (1993), and authorities cited therein.

Even the duty to mitigate damages derives from contract law. See, e.g., Calamari & Perillo, Contracts (3d ed), § 14-15, pp 610-613.

discriminatory employment practices, we must reconcile the contractual aspects of reinstatement offers with their civil rights counterparts. Thus, we first turn to the contractual principles to be applied to reinstatement offers.

A reinstatement offer that is clear on its face may be construed as a matter of law by the courts.[26] Where the language of the reinstatement offer is properly characterized as "ambiguous,"[27] construction is permitted. *Berk v Gordon Johnson Co,* 232 F Supp 682, 687 (ED Mich, 1964). Where it becomes necessary to consider the parties' intent, the inquiry is a question of fact. *Liberty Mutual Ins Co v Curtis Noll Corp,* 112 Mich App 182, 191; 315 NW2d 890 (1982); *Robinson v A Z Shmina & Sons Co,* 96 Mich App 644, 649; 293 NW2d 661 (1980); 17A Am Jur 2d, Contracts, § 339, p 346.[28] Against this backdrop, we now turn to the interplay between the conditionality of a reinstatement offer and the reasonableness of a rejection.

In a number of federal cases, the courts appear to have decided whether a condition was reasonable so that rejection of the reinstatement offer cut off the right to continued backpay. Careful review of these cases, however, indicates that these decisions were made following review of the trial

[26] See *Dykema v Muskegon Piston Ring Co,* 348 Mich 129, 138; 82 NW2d 467 (1957); *Kilburn v Union Marine & General Ins Co, Ltd,* 326 Mich 115, 118; 40 NW2d 90 (1949); *In re Loose,* 201 Mich App 361, 366; 505 NW2d 922 (1993); 17A Am Jur 2d, Contracts, §§ 337, 339, pp 342-344, 346.

[27] *Raska v Farm Bureau Mutual Ins Co of Michigan,* 412 Mich 355, 362; 314 NW2d 440 (1982) ("A contract is said to be ambiguous when its words may reasonably be understood in different ways"); *Goodwin, Inc v Orson E Coe Pontiac, Inc,* 392 Mich 195, 212; 220 NW2d 664 (1974); *Adkins v Home Life Ins Co,* 143 Mich App 824; 372 NW2d 671 (1985); 17A Am Jur 2d, Contracts, §§ 338, 356, pp 345, 374-375.

[28] The primary goal in the construction or interpretation of any contract is to honor the intent of the parties. See *Stine v Continental Casualty Co,* 419 Mich 89, 112; 349 NW2d 127 (1984); *Brauer v Hobbs,* 151 Mich App 769, 774; 391 NW2d 482 (1986).

courts' rulings on motions for summary judgment,[29] on motions for directed verdict,[30] or on decisions entered in bench trials, i.e., where the trial court acted as factfinder.[31] In other words, these decisions derive from factual determinations of the courts or from federal motion practice.

On the basis of the foregoing, we conclude that the issues of conditionality and reasonableness of rejection are discrete under the federal as well as the state systems.[32] While the conditionality issue may be decided by the courts as a matter of law

[29] See *Fiedler, supra* at 809 (decided under FR Civ P 56[e]); *Giandonato,* n 17 *supra* at 121-122.

[30] See, e.g., *O'Donnell, supra.*

[31] See, e.g., *Rasimas, supra* at 620. See also *Toledo,* n 17 *supra* at 1493; *Boomsma,* n 17 *supra.*

[32] The various circuits' holdings are not without anomalies. See, e.g., *Stanfield v Answering Service, Inc,* 867 F2d 1290 (CA 11, 1989). In *Stanfield,* the Eleventh Circuit reversed an award of reinstatement, but affirmed the denial of interim and front pay. Our review of federal precedent reveals that the district court in *Stanfield* had the discretion to choose between reinstatement and front pay once the jury concluded that the plaintiff was the victim of age discrimination. The appellate court, however, stated "that Stanfield's rejection of the offer was unreasonable is implicit in the trial court's refusal to grant Stanfield interim and frontpay." *Id.* at 1295. Thus, the claimant was left without any backpay, front pay, or reemployment.

This ruling effectively wipes out the plaintiff's right to backpay *even for the period preceding the offer of reinstatement.* If rejection of the offer was unreasonable, this unreasonableness did not arise from the date that the plaintiff was terminated. It is our belief that the Eleventh Circuit mistakenly assumed that the district court relied on some fact-finding power rather than on its equitable power to fashion an appropriate remedy. In turn, the appellate court rested its reversal of the reinstatement on a nonexistent factual finding, which thereby enabled it to ignore the fact that the reasonableness question was one for the jury and not for the courts absent some appropriate form of motion practice. Although we agree that avoidance of the duty to mitigate should cut off benefits, removal of the question from the factfinder disregards the weight of federal authority, improperly shifts the burden of proving mitigation onto claimants, and runs afoul of the primary purposes of title VII, to wit: eradication of discriminatory employment practices and making the victims of such practices whole for injuries suffered.

If for no other reason, we decline to follow *Stanfield* on the basis that the Michigan Civil Rights Act provides a basis of recovery independent of the provisions of title VII. See n 20.

under appropriate circumstances, the reasonableness issue must be decided on an independent basis. Thus, the first step in these cases is to determine the import of a reinstatement offer using contract principles. The second step is to assess whether a rejection is reasonable. An unconditional offer of reinstatement may be used as proof of an unreasonable rejection in satisfaction of the employer's burden. In fact, the federal courts appear to treat unconditional offers as dispositive. However, if there are any differences between the offer and the previous employment position, with the exception of backpay, then a discharged employee's act of rejection, if based in part on that difference or condition, precludes a peremptory court ruling.[33] Rather, the question of reasonableness is one of fact that must take into account the particular circumstances of each case.[34] Once this two-step inquiry has been completed, a court may exercise its broad equitable powers over fashioning the appropriate remedy. See MCL 37.2801(1); MSA 3.548(801)(1); *Ford Motor Co,* 458 US 226; *Albemarle,* 422 US 415-416; Larson, *supra,* § 55.33, pp 11-96.4 to 11-96.7.

On the other hand, we do not wish to trivialize the importance of the mitigation doctrine. It is well established that a discharged employee must

[33] An unconditional job offer presumes that the employment is the job previously sought by an applicant or, in the case of a discharge, the old job. Therefore, the offer of a different job would constitute either a condition to the offer's acceptance *or* a factor that may provide the employee with a reasonable excuse to reject the offer. For purposes of simplicity, we hold that a different job may provide an employee with a valid reason to reject an employer's offer, which is to be decided under the reasonableness inquiry.

[34] See *Fiedler, supra* at 808; *Taylor,* n 17 *supra* at 1139; *Rasimas, supra* at 623. See also *Jenkins, Riethmiller,* and *Higgins, supra.*

It matters little whether the issue is framed as a reasonable/unreasonable condition or as a reasonable/unreasonable rejection as long as the courts' power to construe contracts is not extended to remove the rejection question from the finder of fact.

make every reasonable effort to mitigate damages. See *Ford Motor Co, supra* at 231; *Shiffer, supra* at 197-198; *Riethmiller, supra* at 195; *Higgins, supra* at 181. To the extent that the reasons for rejection of a reinstatement offer are unrelated to the offer and the conditions of employment that the offer contains, such reasons would be outside the purview of title VII and the Michigan Civil Rights Act.[35] Moreover, a rejection on grounds unrelated to the employment contained in the reinstatement offer clearly runs afoul of the mitigation doctrine. Because the burden of proving unreasonableness has shifted onto the employer once a discriminatory discharge is established, the onus is on an employer to establish that the true reasons for a rejection are unrelated to any conditions of the employment as are manifest in the reinstatement offer. As the previous discussion has indicated, this requires, first, the interpretation of a reinstatement offer to determine its conditions if they exist and, second, consideration of the reasons for rejection under the circumstances of a particular case.[36]

[35] Under title VII, the duty to mitigate damages has been codified at 42 USC 2000e-5(g). See n 11. Thus, there is statutory federal authority to indicate that unreasonable rejections were never intended to benefit from the protections of title VII. In this jurisdiction, the mitigation doctrine has been adopted in the discriminatory discharge context by cases such as *Riethmiller* and *Higgins, supra.* Although the duty to mitigate has not been codified in the Michigan Civil Rights Act, we nonetheless conclude that rejections of a reinstatement offer for reasons unrelated to the terms of that offer are unreasonable.

For examples of rejections found to be unrelated and therefore unreasonable in the federal courts, see n 17.

[36] As is clear particularly in some of the federal cases cited previously, an employer is not precluded from having unsupported claims of reasonable rejection dismissed under court rules such as MCR 2.116(C)(10), which permits partial or total dismissal of a claim, made as a matter of law, where there is no genuine issue of material fact. See 7 Callaghan's Michigan Pleading & Practice (2d ed), § 43.04.10, p 11. The purpose of the court rule is to avoid "expense, vexation, and delay" and to eliminate "improper issues." *Id.,* § 43.01.50, p 3. Finally, this does not shift the burden of proving the reasonableness issue

At this juncture, there is another inherent conflict that must be considered, to wit: the policy behind creating an incentive for discharged employees to mitigate damages as provided in *Ford Motor Co*[37] and the law of affirmative defenses, which places the burdens of pleading and proof on

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onto the employee. Rather, the burden is one of production: specifically, the production of evidence.

> A party opposing a motion for summary disposition based on the lack of a genuine issue of material fact has the burden of coming forth with some evidentiary proof that a genuine issue of fact does exist in order to avoid the granting of the summary judgment. Mere conjecture does not meet the burden of presenting evidence . . . . The party opposing a motion for summary disposition based on an alleged lack of genuine issue as to any material fact must at least assert that such a dispute exists and support the allegation with some independent evidence . . . . [*Id.*, § 43.05.50, p 33.]

[37] The *Ford Motor Co* case involved two job applicants who were offered positions after they had been recalled by their previous employer. Rather than accept Ford Motor's reinstatement offer, the claimants opted to remain with their then-present employer. Later, the claimants were again laid off, resuscitating their claims for front pay. Accordingly, the rejections of the job offers were based on a personal choice to remain with the present employer and *not* for any reason arising from the terms of the defendant's offers. 458 US 236. On the basis of this procedural posture, the United States Supreme Court did not decide the conflict between the incentive to mitigate damages and the burdens of proof concerning affirmative defenses. Rather, the Court sought to prevent the "perverse result of requiring the employer . . . to insure the claimant against the risk that the employer might win at trial" in cases where the claimant has found an equivalent or a better position before the job offer and chooses to keep that employment *and* the possibility of recovery in the discrimination claim rather than accept a defendant employer's attempt to make amends. *Id.* at 238. See also 239-240 and n 26. In short, claimants who have the option of accepting an unconditional offer or of retaining equivalent employment secured after the discriminatory act forfeit any right to front pay when they reject the defendant's offer.

There was a third claimant in the *Ford Motor Co* case whose employment was not the substantial equivalent of the job sought with defendant. However, careful review of the opinion indicates that the third claimant's interests were not addressed in the majority's analysis, being parts II-V of the majority opinion. Presumably, her claim for front pay damages in excess of her earnings at the subsequent employment remained.

the party raising them.[38] An affirmative defense presumes liability by definition.[39] Thus, the burden falls squarely onto the employer to prove mitigating circumstances that would lower a damages award. This burden does not, however, alter a claimant's burden of proving the elements of a discriminatory hiring or discharge decision.

Today we adopt a middle ground that attempts to reconcile these competing interests. Thus, we hold that once it is established that a reinstatement offer is unconditional, a rebuttable presumption arises that the rejection of the offer is unreasonable. To rebut, an employee must offer reasonable grounds for rejection that are grounded in the employment as contemplated by the reinstatement offer and not a purely personal reason.[40]

In so holding, we shift to a claimant the burden of *production,* i.e., reasonable grounds for rejection, without shifting the burden of *proof* on the issue of mitigation. The failure of a claimant to provide a legitimate basis for a rejection forfeits the right to front pay for the reason that a rejection unrelated to conditions of employment under the reinstatement offer would be based on personal choice and would therefore be unprotected by discrimination laws. See pp 129-130. In this way, we honor the policy behind *Ford Motor Co* without violating the law surrounding the affirmative defense of damage mitigation.[41]

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[38] See pp 123-124.

[39] See Black's Law Dictionary (5th ed), p 55 ("new matter which, *assuming the complaint to be true,* constitutes a defense to it") (emphasis added).

[40] The reinstatement offer in this case required plaintiff to accept a blemish on his work record: the termination was to be reduced to the penalty of disciplinary layoff. Facts on record indicate that previous disciplinary action is considered when new controversies arise and that a prior record justifies harsher penalties for the controversy at hand.

[41] The approach we adopt today is modeled after the burden-shifting

B

In this case, the issue of reasonableness concerning plaintiff's rejection was improperly removed from the jury by way of the grant of partial summary disposition. As defendants point out, an award of front pay and an award of reinstatement are two sides of the same coin.[42] Thus, the choice between these two remedies, if warranted at all under the circumstances of a particular case, can only be made after the other issues have been resolved. Both center on the question whether a rejection of a reinstatement offer was reasonable.

We are persuaded that the trial court was exer-

analysis first created in *McDonnell Douglas Corp v Green,* 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), a race discrimination case. Recounted briefly, a claimant in an employment discrimination case bears the burden of proving by the preponderance of the evidence that a prima facie case of discrimination exists. If successful, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Once a valid reason is given, the burden shifts back to the employee to prove that the reason given by the employer is a mere pretext. See also *Clark v Uniroyal Corp,* n 20 *supra.*

In this case we recognize the same shifting of burden, only we reverse it to respect the fact that the initial burden of proof regarding the damages mitigation issue lies with the employer rather than with the employee or applicant. We also point out that the second step is more accurately characterized as the shifting of the burden of production (i.e., producing a valid business reason) than as the shifting of the burden of proof. See n 36. Furthermore, this shifting burden analysis does not preclude the grant of summary disposition on the basis of the absence of any genuine issue of material fact. See *Clark, supra* at 825.

[42] Professor Larson states:

> "Front pay" is a monetary award that compensates victims of discrimination for lost employment extending beyond the date of the remedial order. Front pay is considered the equitable equivalent of reinstatement and it is awarded in two situations: first, when reinstatement cannot occur immediately because of the temporary lack of availability of a position or the undesirability of "bumping" another employee; and second, when the remedy of reinstatement is simply not appropriate, usually because of the hostility that has developed between the parties. [Larson, *supra,* § 55.39, p 11-96.121.]

cising its broad equitable powers when it removed the continued backpay and the front pay issues from the jury while preserving the issue of reinstatement as a question for the trier of fact. Regardless of the basis for this decision, however, we hold that the trial court erred as a matter of law by deciding the continued backpay issue *before* the factfinder decided defendants' ultimate liability for the alleged discriminatory discharge, which must take into account the conditions of the offer and the reasonableness of the plaintiff's rejection.[43]

Accordingly, we reverse the Court of Appeals holding in this regard and remand to the trial court for reconsideration of the reasonableness issue and the appropriate remedy.[44]

IV

Plaintiff also appeals the trial court's ruling that he could not avail himself of the continuing violations doctrine in order to recover for alleged, discriminatory acts occurring before the three-year period of limitation. According to plaintiff, defendants waived the statute of limitations defense for failure to raise it as required by the court rules. Defendants argue that the defense was preserved

[43] See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991) (questions decided as a matter of law are subject to review de novo).

[44] Defendants also argue that awards of reinstatement may cause unfair burdens on employers and other employees when reinstatement requires demoting an employee who filled the position of the terminated employee. We submit that this policy consideration, though valid, is within the discretion of that court called upon to fashion an appropriate remedy. As mentioned earlier, the primary purposes of title VII and related laws are to eradicate discrimination in the workplace and to make the injured employee whole. In light of this solemn trust, we cannot adopt a general rule precluding reinstatement where it would affect the seniority rights of other employees. Cf. *Franks*, n 14 *supra*.

in its motion for summary disposition. After careful review of the record, we agree with plaintiff that defendants failed to properly raise the defense as it relates to the claim for humiliation damages under the continuing violations doctrine. Thus, it is unnecessary for us to address this claim.

V

Finally, defendants also argue that they were entitled to a directed verdict because the decision to terminate plaintiff was made by someone who based the decision on Senart's report and not on any discriminatory animus. It is true that a claimant asserting an intentional discrimination claim must establish a discriminatory predisposition of the discharging party and an act in furtherance of this predisposition as part of a prima facie case.[45]

In this case, Charles Fern made the decision to terminate plaintiff for destruction of company property entirely on the basis of the report created by Senart. There are no allegations that Fern engaged in any discriminatory behavior. However, plaintiff offered evidence that Fern was made aware of the alleged discriminatory treatment of plaintiff on numerous occasions. Moreover, the record indicates that other employees refused to discuss the incidents of July 12, 1984, with Fern.

We believe that the trial court properly allowed plaintiff to offer proof that Fern's reason for discharge was a mere pretext. This Court has already ruled that ordinarily neutral mechanisms for termination may, in unique circumstances, qualify as

[45] See *Schipani v Ford Motor Co,* 102 Mich App 606, 617; 302 NW2d 307 (1981), disavowed on other grounds in *Kostello v Rockwell Int'l Corp,* 189 Mich App 241; 472 NW2d 71 (1991); *McDonald v Union Camp Corp,* 898 F2d 1155, 1160-1161 (CA 6, 1990); *Hawkins v Ceco Corp,* 883 F2d 977, 980 (CA 11, 1989).

discriminatory employment practices. In *Sumner v Goodyear Tire & Rubber Co,* 427 Mich 505, 524-525; 398 NW2d 368 (1986), the plaintiff was discharged for striking a supervisor. Though the decision was made by company officials who were not involved with the alleged harassment, this Court recognized that the harassment may have been orchestrated to cause the plaintiff to commit an offense that would lead to immediate discharge in an attempt to make the termination decision appear to be neutral rather than discriminatory. *Id.* at 539-542. Thus, the discriminatory animus of the plaintiff's supervisors was imputed to the company officials who ultimately made the decision to terminate. We believe that the facts of this case likewise constitute unique circumstances.

Accordingly, we agree with the Court of Appeals that reasonable jurors could have reached different conclusions on the issue whether Fern was aware of the alleged discrimination and whether he acted in furtherance of it, which translates into a predisposition to terminate for discriminatory reasons.

CONCLUSION

In sum, we affirm the trial court's denial of defendants' motion for a directed verdict on the intentional discrimination claim. However, because the trial court made its decision regarding the appropriate remedy before all factual issues were decided, we remand for resolution of the reasonableness of rejection issue and a reassessment of the appropriate remedy. And, finally, because we find that defendants waived the statute of limitations defense on the continuing violations claim, we do not address plaintiff's claim.

Reversed and remanded to the trial court for proceedings consistent with this opinion.[46]

CAVANAGH, C.J., and BRICKLEY, BOYLE, GRIFFIN, and MALLETT, JJ., concurred with RILEY, J.

LEVIN, J. (*separate opinion*). I concur in the result of the majority opinion, which remands for further proceedings. I write separately because I

[46] Our brother Justice LEVIN makes several points in his separate opinion that deserve consideration. Justice LEVIN indicates that the remedy provision of the Michigan Civil Rights Act does not afford the same wide discretion to fashion a remedy as the federal courts enjoy under the federal Civil Rights Act. We disagree. First, the remedy statute at issue, MCL 37.2801(1); MSA 3.548(801)(1), provides for *injunctive* relief as well as for damages. In addition, MCL 37.2803; MSA 3.548(803) provides for "direct or immediate legal *or equitable* remedies . . . ." (Emphasis added.) However, these terms are not defined in the statutes nor could we find state precedent providing definitions.

The Michigan Civil Rights Act is fairly succinct. Thus, we are convinced that the Legislature intended that our courts look to the more comprehensive federal statutes and precedent for guidance. In fact, state courts have already ruled that federal precedent, although not binding, is persuasive authority. *Robson v General Motors Corp,* 137 Mich App 650, 653; 357 NW2d 919 (1984), rev'd on other grounds in *Sumner, supra; Clark,* n 20 *supra.* The federal remedy statute, 42 USC 2000e-5(g) gives *courts* the power to enjoin discriminatory practice, order reinstatement or hiring of employees with or without backpay, or "any other equitable relief as the court deems appropriate." Not only are we convinced that the spirit behind the Michigan act emulates that behind the federal Civil Rights Act, but we could find no direct support indicating a difference between the remedy provisions of the Michigan statutes and the federal ones.

Second, we recognize from cases such as *Albemarle* that a court's discretion is " 'hardly . . . unfettered by meaningful standards or shielded from thorough appellate review.' " See p 123. The viewpoint of the separate opinion seeks to remove guidelines found in federal precedent without offering any meaningful standards to fill the void. We also note the fact that the separate opinion relies exclusively on federal precedent to make this point. The approach we take today is intended to ensure that victims of discrimination are made whole, and a fair degree of discretion is necessary to implement this goal.

Third, we advocate a clear procedure for resolving matters of this nature rather than countenance a convoluted jury question that includes issues of law, as well as issues of fact, in the melange. It is our design to remove the type of uncertainty caused by the lack of clear procedural guidelines that is evident from the specific facts of this case.

do not join in the trifurcated procedure or in a number of other statements in the majority opinion.

I

The majority asserts that Michigan courts have broad discretion to fashion appropriate remedies in wrongful discharge cases.[1] The majority cites in support the following provision of the Civil Rights Act:

> A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both. [MCL 37.2801(1); MSA 3.548(801)(1).]

The cited provision—stating that a person alleging a violation of the Civil Rights Act has a choice whether to seek injunctive relief *or* to seek damages—supports, rather, the view that the court has no discretion. It would appear that where a plaintiff brings an action seeking damages, it is for the trier of fact to decide whether there has been a violation of the Civil Rights Act and the damages to be awarded therefor.

In the instant case, the plaintiff does not seek damages for "front pay." He sought and continues to seek reinstatement. There is, therefore, no need to decide whether the Civil Rights Act should be read as granting a court, in a case in which the plaintiff brings an action seeking damages, the discretion, on a finding that the Civil Rights Act has been violated, to order reinstatement in lieu of an award of front pay.

The implication in the majority opinion that federal cases support the proposition that a Michi-

[1] *Ante*, pp 124-125.

gan court has broad discretion to fashion a remedy under the Civil Rights Act ignores the significant differences between title VII and the Civil Rights Act. The federal cases on which the majority relies construe an act of Congress (title VII) providing that on a finding that the respondent intentionally engaged in an unlawful employment practice "the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may be appropriate,* which *may* include, but *is not limited to,* reinstatement or hiring of employees, *with or without* back pay . . . , *or any other equitable relief as the court deems appropriate.*"[2] No such discretionary language appears in the Civil Rights Act. Thus, while it may be appropriate to look to federal title VII cases construing some aspects of the Civil Rights Act, they are not persuasive where a damage remedy has been sought under the Civil Rights Act.

II

Nor is there anything in the federal title VII cases that grants federal courts the power to deny a plaintiff who has been found to be the victim of an unlawful employment practice a remedy that would make him whole.

The majority correctly observes that federal court decisions speak of broad discretion, under the federal legislation, concerning the fashioning of the remedy, but the majority does not state the full picture. While the federal courts have discretion in determining *how* to make a plaintiff whole, at least where a plaintiff has not unreasonably rejected an unconditional offer of reinstatement, they do not appear to have discretion to determine

[2] 42 USC 2000e-5(g) (emphasis added).

whether to make a plaintiff whole. Further, the discretion concerning how to fashion the remedy does not appear as broad as the majority implies.

In *Albemarle Paper Co v Moody,*[3] the United States Supreme Court held that backpay generally should be awarded to a successful claimant because this is necessary to make him whole.[4] United States district courts and circuit courts of appeal have applied the *Albemarle* presumption—that a court should award the relief necessary to make the plaintiff whole—in cases in which plaintiffs have sought relief other than backpay. These cases indicate that a federal court must choose a remedy that makes the plaintiff whole; those remedies that often most effectively make a plaintiff whole, such as reinstatement, seem to be favored.

A number of federal courts have applied the *Albemarle* presumption to reinstatement. In *Henry v Lennox Industries, Inc,* 768 F2d 746, 752-753 (CA 6, 1985), the United States Court of Appeals for the Sixth Circuit said:

> While the statute, 42 USC 2000e-5(g), clearly provides for reinstatement, the scope of the remedy rests within the discretion of the district court. . . . A finding of intentional discrimination presumptively entitles the plaintiff to reinstatement. . . . "[R]einstatement, like backpay, should be denied 'only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination . . . .'" *Grubb* [*v Foote Memorial Hosp,* 533 F Supp 671, 676 (ED Mich, 1981)] (quoting *Albemarle Paper Co v Moody,* 422 US 405, 421; 95 S Ct 2362, 2373; 45 L Ed 2d 280 [1975]).

Similarly, in *Taylor v Teletype Corp,* 648 F2d

[3] 422 US 405, 419-420; 95 S Ct 2362; 45 L Ed 2d 280 (1975).

[4] *Ante,* p 121, n 14.

1129, 1138 (CA 8, 1981), cert den 454 US 969 (1981), cited by the majority, the United States Court of Appeals for the Eighth Circuit said:

> In a Title VII action, however, a court may deny reinstatement "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." [*Albemarle Paper Co v Moody,* 422 US 405, 421; 95 S Ct 2362, 2373; 45 L Ed 2d 280 (1975).]

Professor Larson said:

> Once it has been established that this kind of adverse employment action [discharge, demotion, or transfer] has occurred because of unlawful discrimination, the courts will normally award reinstatement unless special circumstances exist that make it inappropriate. This presumption is derived indirectly from *Albemarle Paper Co v Moody,* in which the Supreme Court established a similar presumption in favor of the award of back pay. There seems no reason to treat reinstatement differently, especially since *Albemarle*'s holding is grounded in the "make whole" purposes of Title VII. [2 Larson, Employment Discrimination, § 55.21, p 11-63.]

From *Henry, Taylor,* and Larson, it seems fair to conclude that a federal court does not have especially broad discretion to determine whether to order reinstatement. If reinstatement is necessary to make a plaintiff whole, it should generally be awarded. To be sure, there might be special circumstances in which reinstatement might be in-

appropriate,[5] and a federal court has discretion to determine whether these special circumstances exist, and, on finding special circumstances, to refuse to order reinstatement. As a general matter, though, a federal court does not appear to have broad discretion to refuse to reinstate a victim of unlawful employment discrimination.

Even when a federal court determines that reinstatement would not be appropriate, it appears that the court's discretion in fashioning a remedy may not be as broad as the majority implies. When "the court has determined that reinstatement is deserved but *cannot be ordered* . . . [it will] most commonly award 'front pay'—that is, compensation for loss of future earnings—in lieu of reinstatement"[6] if such an award is necessary to fully compensate a victim of discrimination and can reasonably be calculated. In the words of the United States Court of Appeals for the Tenth Circuit:

> Although the cases discuss the award of front and back pay as being in the trial court's discretion, the United States Supreme Court has made it clear that this discretion must be exercised so to make possible the fashioning of the most complete relief possible. See *Albemarle Paper Co v Moody,* 422 US 405, 421; 95 S Ct 2362, 2373; 45 L Ed 2d 280 (1975). [*EEOC v Safeway Stores, Inc,* 634 F2d 1273, 1282 (CA 10, 1980) (remanding and ordering an award of front pay).]

[5] One "common reason for denying reinstatement is that such an order would require 'bumping' another employee from the position offered for reinstatement. Whether a court will order that an innocent incumbent be bumped depends on a balancing of the equities of the situation. A court may be more likely to order reinstatement, even though it entails bumping, when the position is unique in terms of responsibilities, prestige, working conditions, and salary." 2 Larson, Employment Discrimination, § 55.22, pp 11-69 to 11-70.

[6] 2 Larson, *supra,* § 55.22, p 11-70 (emphasis added).

In short, where reinstatement is not possible and front pay is necessary to make whole a victim of discrimination, it appears that front pay is presumptively available to that victim.[7]

Indeed, the *Albemarle* presumption—that a plaintiff is entitled to the relief that is necessary to make him whole—may control a court's decision whether to award front pay in lieu of reinstatement. A treatise states:

> The widespread use of the terms "backpay" and "front pay" suggests that these two awards are distinct, perhaps even that § 706(g) [42 USC 2000e-5(g)] authorizes the former by the term "backpay" and authorizes the latter by the phrase "other equitable relief." The result is that some appellate courts view the *Albemarle* presumption in favor of a backpay award as inapplicable to a front pay award. It seems more likely, however, that both backpay and front pay are authorized by the "backpay" provision in § 706(g). After all, if the purposes of "backpay" are to compensate an employee for his wage losses and to provide incentive for employer compliance, Congress probably intended the award to include wage losses sustained after the date of judgment. If front pay is an aspect of backpay, the *Albemarle* presumption should have equal applicability to the front pay award. But, even if the two awards have different statutory origins, their close similarity and common purposes require the same approach to their availability. [2 Sullivan, Zimmer & Richards, Em-

[7] The United States Court of Appeals for the Eleventh Circuit said, "[i]n addition to back pay, prevailing Title VII plaintiffs are presumptively entitled to either reinstatement or front pay." *Weaver v Casa Gallardo, Inc,* 922 F2d 1515, 1528 (CA 11, 1991). In a recent age discrimination case brought under the Age Discrimination in Employment Act, the United States Court of Appeals for the Fifth Circuit said that while reinstatement is preferred over front pay, "[g]enerally, if reinstatement is not feasible, front pay will be awarded." *Brunnemann v Terra Int'l, Inc,* 975 F2d 175, 180 (CA 5, 1992).

ployment Discrimination (2d ed), § 14.4.3, pp 24-25.][8]

A federal court thus must choose a remedy that makes whole a victim of discrimination.

III

The majority provides for a trifurcated procedure on remand, allocating to the court the determination whether the offer of reinstatement in the instant case was unconditional, allocating to the trier of fact the "resolution of the reasonableness of rejection issue," and allocating to the court "a reassessment of the appropriate remedy."[9]

The majority needlessly requires separate determinations of the conditionality of the reinstatement offer and of the reasonableness of the rejection. In my opinion, there is only a single determination to be made—did the plaintiff fail to mitigate his damages—respecting whether a prevailing plaintiff may recover damages for a period following rejection of an offer of reinstatement. This issue should be decided by the trier of fact just as it is in other wrongful discharge cases in this state,[10] and just as it is in the federal system

[8] To be sure, as with reinstatement, there will be instances in which front pay will not be an appropriate remedy. Professor Larson states that front pay has been denied where "the plaintiff misrepresented facts on his employment application," where "the business [that previously employed the plaintiff] ceased operations," where "the defendant had already begun to fix the offending employment conditions," and where "the plaintiff had found comparable substitute employment." 2 Larson, *supra,* § 55.39, p 11-96.125.

These examples, though, do not change the general presumption, adverted to in the Sullivan, Zimmer, and Richards Employment Discrimination treatise that front pay should generally be awarded when it is necessary to make whole a victim of discrimination.

[9] *Ante,* p 113.

[10] See *Riethmiller v Blue Cross & Blue Shield of Michigan,* 151 Mich App 188, 194; 390 NW2d 227 (1986); *Brewster v Martin Mar-*

where the alleged failure to mitigate concerns the plaintiff's rejection of an offer of employment (by his original employer) that differs from his original job or where the plaintiff reasonably refuses to accept an offer of employment from another company.[11] The issue of the conditionality of a reinstatement offer does not become a matter of law to be decided by the court simply because the employer has offered to reinstate the discharged employee.[12]

Assuming arguendo that whether an offer of reinstatement was conditional and whether the plaintiff acted reasonably in rejecting such an offer are proper are separate inquiries, each of these inquiries presents a *question of fact* for the *trier of fact,*[13] and neither may be resolved by the court as a matter of law unless reasonable minds could not

ietta Aluminum Sales, 145 Mich App 641, 663; 378 NW2d 558 (1985); *Higgins v Kenneth R Lawrence, DPM, PC,* 107 Mich App 178, 181; 309 NW2d 194 (1981).

[11] As the United States Court of Appeals for the Fifth Circuit has explained:

> We think that the cases decided both before and after *Ford Motor Co* [*v EEOC,* 458 US 219; 102 S Ct 3057; 73 L Ed 2d 721 (1982)] establish that the central question with respect to damage mitigation is for the trier of fact: what amount could the employee have earned through the exercise of reasonable diligence? . . . If the employee has refused the offer of a specific job, whether from defendant or another employer, the question is basically the same: was the employee's refusal of the job reasonable? [*EEOC v Exxon Shipping Co,* 745 F2d 967, 978 (CA 5, 1984).]

[12] Asking only the question whether the plaintiff failed to mitigate his damages will provide the proper incentives for both the discharged employee and the employer. The employee will have an incentive not to reject a reasonable offer to return to work because if the trier of fact were to determine that the employee rejected such an offer, the employee's damages would be significantly limited. Similarly, an employer will have an incentive to make a bona fide and unconditional offer of reinstatement to limit the damages.

[13] In *Pierce v F R Tripler & Co,* 955 F2d 820, 830 (CA 2, 1992), the United States Court of Appeals for the Second Circuit explained:

draw different conclusions concerning conditionality or reasonableness. It will be a rare case in which reasonable minds could not differ concerning the conditionality of an offer or the reasonableness of a rejection.[14]

IV

The majority states that it disagrees with the "indication" in this opinion that the remedy provision of the Civil Rights Act "does not afford the same wide discretion to fashion a remedy as the

> "Generally, it is the duty of the trier of fact to weigh the evidence to determine whether a reasonable person would refuse the offer of reinstatement." *Fiedler v Indianhead Truck Line, Inc,* 670 F2d 806, 808 (CA 8, 1982). *Whether an offer was unconditional for purposes of mitigation is similarly a question for the trier of fact. Cf. Bruno v W B Saunders Co,* 882 F2d 760, 770 (CA 3, 1989) . . . . [Emphasis added.]

The Second Circuit recently reaffirmed this passage from *Pierce* in *Clarke v Frank,* 960 F2d 1146, 1151 (CA 2, 1992), where it wrote, "[w]hether the employer made an unconditional offer of reinstatement, and whether the employee rejected that offer, are *questions of fact* to be determined by the district court." (Emphasis added.)

Holmes v Marriott Corp, 831 F Supp 691, 711 (SD Iowa, 1993), similarly indicates that whether an offer of reinstatement was conditional is normally a question for the trier of fact. In that case, the court granted the defendant's motion for summary judgment (limiting its liability for backpay) on the basis that the plaintiff had rejected an unconditional offer of reinstatement. The court only granted the motion because "there is simply nothing about the offer of reinstatement that a trier of fact could find would be anything but unconditional." The clear implication is that conditionality is normally a question for the trier of fact.

[14] In the instant case, on first blush it may appear that Chrysler's offer of reinstatement was unconditional because Chrysler offered Rasheed his old job with his seniority intact. The offer, however, would have required Rasheed to accept a disciplinary incident on his record, and this blemish could have subjected Rasheed to serious punishment if he committed another disciplinary infraction. A trier of fact could therefore conclude that Chrysler's offer was conditional. See *ante,* p 132, n 40.

The facts of this case also illustrate that it will rarely be possible to determine whether an offer is conditional solely on the basis of the wording of the offer.

federal courts enjoy under the federal Civil Rights Act."[15]

A

The majority states three reasons. The "first" reason is that § 801 of the Civil Rights Act[16] "provides for *injunctive* relief as well as for damages," and § 803[17] "provides for 'direct or immediate legal *or equitable* remedies,' " (emphasis added in the majority opinion), and "these terms are not defined in statutes nor could we find state precedent providing definitions."

The majority continues that the Civil Rights Act "is fairly succinct," and "we are convinced that the Legislature intended that our courts look to the more comprehensive federal statutes and precedent for guidance." The majority adds that it is also convinced that the "spirit" behind the Civil Rights Act "emulates that behind the federal" act, and that it "could find no direct support indicating a difference between the remedy provisions of the Michigan statutes and the federal ones."

Section 803 does not support the majority's construction. Section 803, quoted in its entirety, provides: "This act shall not be construed to diminish the *right of a person* to direct or immediate *legal or equitable* remedies in the courts of the state." (Emphasis added.) This provision simply repeats the language of the constitution providing for the establishment of a Civil Rights Commission, with powers "provided by law to carry out its purposes." The next sentence reads: "Nothing contained in this section shall be construed to diminish the *right of any party* to direct and immediate

[15] *Ante,* p 137, n 46.

[16] MCL 37.2801(1); MSA 3.548(801)(1).

[17] MCL 37.2803; MSA 3.548(803).

legal or equitable remedies in the courts of this state."[18]

Manifestly, § 803 simply repeats the concepts set forth in the constitution, and provides, in effect, only that neither the creation of a Civil Rights Commission, nor the provisions of the Civil Rights Act, shall diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state. That says nothing about what those legal or equitable remedies might be.

The majority is quite right that § 801 provides for "injunctive relief as well as for damages." The majority reads this as empowering the courts of this state to substitute an equitable remedy for a damage remedy. Section 801 does not provide that the courts of this state may provide an equitable remedy, such as injunctive relief, or a damage remedy, as the court thinks best in the exercise of its discretion. It rather provides that "[a] person alleging a violation of this act *may bring* a civil action for appropriate injunctive relief *or damages,* or both." (Emphasis added.)

The discretion whether to seek an equitable remedy, such as injunctive relief "as well as" damages, is, confided by the constitution and the Legislature to the person alleging a violation of the Civil Rights Act. That is consistent with the constitutional provision stating that nothing contained in the constitutional provision establishing a Civil Rights Commission or in legislation enacted to carry out the purposes of that constitutional provision shall be construed to diminish the right of a person[19] to direct and immediate legal or equitable remedies in the courts of this state.

To state the obvious, damages are a legal rem-

[18] Const 1963, art 5, § 29 (emphasis added).

[19] The constitution uses the word "party." Section 803 uses the word "person."

edy, an injunction is an equitable remedy. The choice whether to seek a legal (damage) or equitable (injunctive) remedy is, once again, confided by the constitution, as well as by the Legislature (§ 803), to the person alleging a civil rights violation.

The majority has an extravagant view of judicial power in concluding that it may arrogate to the trial courts of this state the power—so clearly confided by the constitution and the Legislature to the victim of a civil rights violation—whether to seek an equitable remedy as an alternative to a legal remedy.

B

The majority states "second" that this opinion is deficient in removing guidelines found in federal precedent without offering any meaningful standards to fill the void. As set forth earlier in this opinion, there is no need to address this issue at all because Rasheed seeks an equitable remedy rather than a damage remedy, and therefore there is no need to address the question whether, had he sought a damage remedy, the courts of this state could impose an equitable remedy as an alternative, and what the standards might be in such a case.

I do not rely on the federal precedent. I discuss it because the majority relies on the federal precedents that are not in point because the federal cases construe an entirely different remedial provision[20] that, as construed by the United States Supreme Court, confides to trial courts the decision whether to provide an equitable or other remedy.

The majority states that "a fair degree of discre-

[20] Note 2 and accompanying text.

tion is necessary to implement" the goal of ensuring that victims of discrimination are made whole. I might agree that where a victim of discrimination seeks an equitable (injunctive) remedy, a "fair degree of discretion" on the part of the trial court might be necessary to implement such a goal. That does not mean that where the victim of discrimination seeks a legal (damage) remedy in the exercise of the choice confided to the victim of discrimination by the constitution and the Civil Rights Act, this Court is empowered to confide to the courts of this state a degree of discretion, even a fair degree of discretion, in the name of making the victim of discrimination whole, to deny the victim his choice of a legal (damage) remedy. Comes the revolution there will be strawberries in January, you will like strawberries in January, and you will eat strawberries in January.

C

The majority's "third" point is that the trifurcated procedure that it imposes is a "clear procedure for resolving matters of this nature," and that the alternative is to countenance "a convoluted jury question that includes issues of law, as well as issues of fact, in the melange," and that it seeks to eliminate "uncertainty caused by the lack of clear procedural guidelines."

There is nothing convoluted about asking a jury to decide whether the terms of an offer of reinstatement were, in the circumstances of the case, conditional, and, if not, whether the victim of discrimination was reasonable in rejecting an offer found by the jury to have been unconditional. The question is far simpler than questions frequently posed to juries in patent and antitrust cases and in ordinary litigation. The jury can be asked to pro-

vide a special verdict "in the form of a written finding on each issue of fact . . . ."[21]

As set forth earlier in this opinion,[22] United States Courts of Appeals, construing the federal statute, have not found it necessary to create a bifurcated or trifurcated procedure. The majority simply prefers to confide to trial courts, and to remove from jury consideration, questions that the majority is more comfortable having a judge decide. This is judicial legislation, an arrogation of power to the courts in an area in which the majority does not trust the jury.

There is ample power under the traditional approach that permits a trial court to remove from jury consideration any issue of fact that, in the judgment of the trial court, all reasonable persons must reach but one result. The majority will have no difficulty reaching the results it believes are manifestly correct under that approach. It does not need a bifurcated or trifurcated procedure to work its will in individual cases.

V

I would direct that on remand the circuit court should enter a partial judgment, in accordance with this Court's affirmance of the finding of discrimination, awarding the plaintiff the $50,000 awarded by the jury plus interest. I would further direct that the defendant be required to reinstate the plaintiff—who sought an equitable remedy[23] and not a legal remedy[24]—as soon as possible.

I would also order the circuit court to set for trial the issue whether the plaintiff failed to miti-

[21] MCR 2.514(A).

[22] Notes 10-12 and accompany text.

[23] An injunction requiring reinstatement.

[24] Except for backpay.

gate his damages by unreasonably refusing the offer of reinstatement tendered by the defendant, and, on a finding that he did not unreasonably reject the offer, require the jury to determine the damages to be awarded until the plaintiff is reinstated, less the amount included therefor in the $50,000 already awarded.

SKINNER v SQUARE D COMPANY

Docket No. 94875. Argued December 2, 1993 (Calendar No. 11). Decided May 17, 1994. Rehearing denied *post,* 1233.

Doris L. Skinner, as personal representative of the estate of Chester W. Skinner, deceased, and others brought a products liability action in the Oakland Circuit Court against Square D Company, claiming that the decedent's electrocution while using a homemade tumbling machine was caused by a defective switch manufactured by the defendant. The court, Fred M. Mester, J., granted summary disposition for the defendant, ruling that the plaintiffs had not shown as a specific issue of fact that the switch had caused the death. The Court of Appeals, JANSEN, P.J., and GRIFFIN, J. (MICHAEL J. KELLY, J., dissenting), affirmed, finding that no plausible theory was advanced regarding how the defective switch caused the accident and that there were insufficient facts to proceed on the separate claims of failure to insulate and failure to warn (Docket No. 127703). The plaintiffs appeal.

In an opinion by Chief Justice CAVANAGH, joined by Justices BRICKLEY, BOYLE, RILEY, and MALLETT, the Supreme Court *held:*

The plaintiffs failed to offer evidence from which reasonable minds could infer that the alleged defect caused the decedent's death. Because the defendant's motion for summary disposition was properly supported and the plaintiffs' evidentiary response was not adequate, the trial court correctly granted the motion. In addition, the trial court properly dismissed the plaintiffs' claims of failure to insulate and failure to warn.

1. A prima facie case for products liability requires proof of a causal connection between an established defect and injury. While the plaintiff bears the burden of proof, the evidence produced need not positively eliminate every other potential cause; rather, the evidence is sufficient if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories.

2. A trial court tests the factual support of a claim when it

REFERENCES

Am Jur 2d, Products Liability §§ 273, 282; Summary Judgment § 26.

See ALR Index under Products Liability; Summary Judgment.

rules on a motion for summary disposition under MCR 2.116(C)(10) by considering the affidavits, pleadings, depositions, admissions, and documentary evidence. The court may not assess credibility or determine facts; instead, its task is to review the record evidence, and all reasonable inferences to be drawn from it, and decide whether a genuine issue of any material fact exists to warrant a trial. The test is whether the kind of record that might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue about which reasonable minds might differ.

3. In this case, the issue is cause in fact, not proximate cause, requiring a showing that but for the defendant's actions, the plaintiff's injury would not have occurred. Cause in fact must be established before proximate cause becomes a relevant issue. In products liability cases, circumstantial proof may be utilized to establish the requisite causal link between a defect and an injury; however, the mere happening of an unwitnessed mishap neither eliminates nor reduces the duty to effectively demonstrate causation. To be adequate, the circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. At a minimum, a causation theory must have some basis in established fact. The plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

4. In this case, the circumstantial evidence did not afford a reliable basis from which reasonable minds could infer that more probably than not, but for the defect in the switch, the decedent would not have been electrocuted. The record does not manifest a genuine issue of causation in fact. Thus, there was no error in the grant of summary judgment for the defendant.

Affirmed.

Justice LEVIN, dissenting, stated that the estate produced sufficient evidence to require submission to the jury of the question whether Skinner's death was caused by the conceded defect in design and failure to insulate the on/off switch of the tumbling machine. The plaintiff's theory that Skinner touched the electrical wires after relying on the on/off switch that erroneously indicated that the power was off is both the product of reasoned inferences from the evidence and is more probable than any other reasonable theory of causation.

Because there is substantial evidence that the tumbling machine was not operating when Skinner touched the wires, a trier of fact reasonably could conclude, without resorting to conjecture, that the electrified wires were not connected to the

tumbler when he touched them. Alternatively, if the wires were connected to the tumbling machine when Skinner touched them, the trier of fact reasonably could conclude that power was not flowing through the wires when he touched them. Further, sufficient evidence was produced to create a question of fact regarding whether Skinner relied on the on/off switch before touching the wires.

With regard to the plaintiff's claim of failure to insulate, the Court of Appeals erred in failing to advert to and consider expert and nonexpert testimony about the magnitude of the shock that Skinner was receiving, which was sufficient to create a question for the trier of fact concerning whether the uninsulated handle contributed to his death.

Justice GRIFFIN took no part in the decision of this case.

195 Mich App 664; 491 NW2d 648 (1992) affirmed.

1. PRODUCTS LIABILITY — CAUSATION — BURDEN OF PROOF.

A prima facie case for products liability requires proof of a causal connection between an established defect and injury; while the plaintiff bears the burden of proof, the evidence produced need not positively eliminate every other potential cause; rather, the evidence is sufficient if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories.

2. MOTIONS AND ORDERS — SUMMARY DISPOSITION — COURT RULES.

A trial court tests the factual support of a claim when it rules upon a motion for summary disposition by considering the affidavits, pleadings, depositions, admissions, and documentary evidence; the court may not assess credibility or determine facts; instead, its task to review the record evidence, and all reasonable inferences to be drawn from it, and decide whether a genuine issue of any material fact exists to warrant a trial; the test is whether the kind of record that might be developed, giving the benefits of reasonable doubt to the opposing party, would leave open an issue about which reasonable minds might differ (MCR 2.116[C][10]).

3. PRODUCTS LIABILITY — CIRCUMSTANTIAL PROOF — CAUSATION — REASONABLE INFERENCES.

In products liability cases, circumstantial proof may be utilized to establish the requisite causal link between a defect and an injury; however, the mere happening of an unwitnessed mishap neither eliminates nor reduces the duty to effectively demonstrate causation; to be adequate, the circumstantial proof must facilitate reasonable inferences of causation, not mere specula-

> tion; at a minimum, a causation theory must have some basis in established fact; the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

Nolan, Reincke, Thomsen & Villas, P.C. (by *Lawrence P. Nolan*), for the plaintiffs.

Dickinson, Wright, Moon, Van Dusen & Freeman (by *Barbara Hughes Erard* and *Theresa M. Serra*) for the defendant.

Amicus Curiae:

O'Leary, O'Leary, Jacobs, Mattson & Perry, P.C. (by *John P. Jacobs*), for Michigan Defense Trial Counsel, Inc.

CAVANAGH, C.J. Plaintiffs, representatives for the decedent Chester W. Skinner, appeal from the Court of Appeals decision affirming the trial court's grant of the defendant's motion for summary disposition under MCR 2.116(C)(10). 195 Mich App 664; 491 NW2d 648 (1992). This Court granted plaintiffs' application for leave to appeal, limited to the following questions:

> (1) whether the trial court erroneously determined that there were no genuine issues of material fact and that as a matter of law defendants' switch could not have caused decedent's death, thus entitling defendants to a grant of summary disposition, and (2) whether the trial court erred in dismissing plaintiffs' case without ruling on their claims regarding defendants' failure to insulate the switch's handle and defendants' failure to warn. [443 Mich 884 (1993).]

We find that the plaintiffs failed to offer evidence from which reasonable minds could infer

that the alleged defect caused the decedent's death. Because the defendant's summary disposition motion was properly supported, and the plaintiffs' evidentiary response was not adequate, we hold that the trial court correctly granted the defendant's motion. For the reasons stated by the Court of Appeals, we also hold that the trial court properly dismissed plaintiffs' claims for failure to insulate and failure to warn.

I

We borrow from the Court of Appeals accurate summary of the relevant facts in this case:

> Plaintiffs brought this products liability action against defendant, Square D Company, following the death of plaintiffs' decedent, Chester W. Skinner. Mr. Skinner was electrocuted by his own homemade tumbling machine on which he had installed a switch manufactured by defendant.
>
> * * *
>
> [Mr. Skinner] was in the business of cleaning and finishing metal parts. To this end, [he] routinely used a homemade tumbling machine that he had designed and built himself. Essentially, the machine consisted of a large metal drum mounted on a frame. Rough metal parts were placed inside the drum along with a quantity of abrasive detergent. An electric motor then rotated the drum in one direction to wash the parts. After allowing the drum to rotate for a period of time, the operator would reverse the direction of the tumbler and the finished parts would be ejected from the drum.
>
> Because of the way Mr. Skinner had designed the machine, reversing the direction of the drum's rotation was a dangerous task. The motor that turned the drum was controlled by a switch manufactured by defendant. Mr. Skinner had connected the Square D switch to the motor by using three wires with insulated "alligator clips" on the ends.

In order to reverse the direction of the machine, the operator was required to disconnect two of the alligator clips from the motor by hand and reverse them. For obvious reasons, it was important for the operator to make sure that the Square D switch was in the off position before disconnecting the wires from the motor.

On February 21, 1986, Mr. Skinner was in his shop, working in the room with the tumbling machines. Mrs. Skinner and two other women, Beulah McBride and Violet Whiting, were in another room, racking parts. Suddenly, the women heard Mr. Skinner cry out. They ran into the room where Mr. Skinner was, and found him standing with his hands above his head, each hand grasping an alligator clip. Electric current was passing through Mr. Skinner's body. Aware of what was happening, Mr. Skinner cried out to the women, "don't touch me!" He then freed his left hand from the alligator clip and reached for the Square D switch. Mr. Skinner threw the switch into the off position, twisted, and fell over dead. [195 Mich App 665-666.]

Plaintiffs claim that the Square D switch was defectively designed because it had a large "phantom zone" that sometimes made the switch appear to be "off" when it was actually "on." Plaintiffs assert that this defect proximately caused Mr. Skinner's death.

The defendant responds that, even assuming the switch is defective, the plaintiffs' evidence does not show that Mr. Skinner was misled by the switch when he was fatally electrocuted.[1] Following numerous depositions and written discovery requests, the defendant filed a motion for summary disposi-

[1] The defendant does not concede that the switch is defective. Rather, for purposes of this litigation, the defendant deems the alleged defectiveness to be an irrelevant issue in view of plaintiffs' inability to show causation.

tion pursuant to MCR 2.116(C)(10),[2] effectively claiming that because plaintiffs are unable to establish a genuine issue of causation, it is entitled to judgment as a matter of law.

The trial court granted the defendant's motion, ruling that the "Plaintiff has produced no evidence to show a specific fact issue to support his theory that the switch somehow caused Plaintiff's decedent's death." The Court of Appeals affirmed, over the dissent of Judge MICHAEL J. KELLY. The majority found that "at no time did plaintiffs advance a plausible theory regarding how the defective switch caused the accident." 195 Mich App 668. The Court further concluded that there were insufficient facts to proceed on plaintiffs' separate claims of failure to insulate and failure to warn.[3]

II

It is well settled under Michigan law that a prima facie case for products liability requires proof of a causal connection between an established defect and injury. *Mulholland v DEC Int'l Corp,* 432 Mich 395, 415; 443 NW2d 340 (1989). While the plaintiff bears the burden of proof, the plaintiff is not required to produce evidence that positively eliminates every other potential cause. Rather, the plaintiff's evidence is sufficient if it

[2] MCR 2.116(C)(10) provides:

> (C) Grounds. The motion [for summary disposition] may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> * * *
>
> (10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

[3] Judge KELLY did not express any disagreement with the majority's disposition of these latter two issues.

"establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support." *Id.*

As indicated, the defendant in the instant products liability suit argued that the plaintiffs failed to establish a genuine issue of causation, entitling it to summary judgment.

The Michigan Court Rules provide a precise description of the respective burdens that litigants must bear when a motion for summary judgment is filed pursuant to MCR 2.116(C)(10). Specifically, MCR 2.116(G)(4)[4] mandates that the party seeking summary judgment must specify the issues for which it claims there is no genuine factual dispute. Provided the moving party's motion is properly supported, MCR 2.116(G)(4) dictates that the opposing party must then respond with affidavits or other evidentiary materials that show the existence of a genuine issue for trial. If the opposing party does not so respond, the rule provides that "judgment, if appropriate, shall be entered against him or her." MCR 2.116(G)(4). In a similar fashion, this Court has explained the burden of the nonmovant as follows:

> Once a party is challenged as to the existence of the facts upon which he purports to build his case,

[4] MCR 2.116(G)(4) provides:

> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

> the sum and substance of the summary judgment proceeding is that general allegations and notice pleading are not enough. Matters upon information and belief and alleged common knowledge are not enough. *That party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. If he fails, the motion for summary judgment is properly granted.* [*Durant v Stahlin,* 375 Mich 628, 640; 135 NW2d 392 (1965). Emphasis added.][5]

III

A trial court tests the factual support of a plaintiff's claim when it rules upon a motion for summary disposition filed under MCR 2.116(C)(10). *Lichon v American Universal Ins Co,* 435 Mich 408, 414; 459 NW2d 288 (1990). The court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted or filed in the action.[6] The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment. *Zamler v Smith,* 375 Mich 675, 678-679; 135 NW2d 349 (1965). Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial.[7]

---

[5] While there was no majority opinion in *Durant,* we recently reaffirmed this principle in *McCart v Thompson, Inc,* 437 Mich 109, 115; 469 NW2d 284 (1991) (" 'When properly challenged, plaintiff must establish that he has a case on the law and that *there are some evidentiary proofs to support his allegations as to any material fact*' ") (emphasis added).

[6] Specifically, MCR 2.116(G)(5) requires that the trial court examine "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence . . . submitted by the parties" when reviewing a motion filed under MCR 2.116(C)(10).

[7] As we noted in *Durant* at 646-647, "there is a great difference between an inquiry to determine whether or not there is an issue of fact and a trial to decide a disputed issue of fact."

To determine if a genuine issue of material fact exists, the test is "whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Farm Bureau Mutual Ins Co v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1991).

Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party. *Moll v Abbott Laboratories,* 444 Mich 1, 27, n 36; 506 NW2d 816 (1993).

Applying these rules, we find that the defendant fulfilled its burden under MCR 2.116(G)(4) when it effectively indicated in its motion that there was no genuine dispute regarding causation. In addition, we conclude that the plaintiffs failed to satisfy their duty because, for the reasons set forth below, their proofs did not establish a genuine issue of causation.

IV

So as to avoid any possible confusion, we make plain that the specific causation issue before the Court in this case is one of cause in fact, and not legal cause or "proximate cause." That said, we also take this opportunity to clarify what is typically required to establish cause in fact.

Under Michigan products liability law, as part of its prima facie case, a plaintiff must show that the manufacturer's negligence was the *proximate cause* of the plaintiff's injuries. *Brisboy v Fibreboard Corp,* 429 Mich 540, 547; 418 NW2d 650 (1988) (emphasis added). We have previously explained that proving proximate cause actually entails proof of two separate elements: (1) cause in

fact, and (2) legal cause, also known as "proximate cause." *Moning v Alfono,* 400 Mich 425, 437; 254 NW2d 759 (1977).

The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. Prosser & Keeton, Torts (5th ed), § 41, p 266. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Moning* at 439. See also *Charles Reinhart Co v Winiemko,* 444 Mich 579, 586, n 13; 513 NW2d 773 (1994). A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. We find that the plaintiffs here were unsuccessful in showing a genuine issue of factual causation. Accordingly, we need not and do not address legal cause or "proximate cause" in this case.

Because no one was present in the shop with the decedent immediately before the accident, the plaintiffs had to rely on circumstantial evidence to establish that the alleged defective switch was the cause in fact of the decedent's death. This Court has repeatedly recognized that plaintiffs may utilize circumstantial proof to show the requisite causal link between a defect and an injury in products liability cases. *Mulholland* at 415; *Holloway v General Motors Corp (On Rehearing),* 403 Mich 614, 618; 271 NW2d 777 (1978); *Schedlbauer v Chris-Craft Corp,* 381 Mich 217, 223; 160 NW2d 889 (1968); *Bronson v J L Hudson Co,* 376 Mich 98; 135 NW2d 388 (1965).

While plaintiffs may show causation circumstantially, the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation:

> That there was no eyewitness to the accident does not always prevent the making of a possible issue of fact for the jury. But the burden of establishing proximate cause . . . always rests with the complaining party, and no presumption of it is created by the mere fact of an accident. [*Howe v Michigan C R Co,* 236 Mich 577, 583-584; 211 NW 111 (1926), cert den 274 US 738 (1927).]

To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. In *Kaminski v Grand Trunk W R Co,* 347 Mich 417, 422; 79 NW2d 899 (1956), this Court highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence."

We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substan-

tial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.[8]

We have consistently applied this threshold evidentiary standard to a plaintiff's proof of factual causation in negligence cases:[9]

> "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." [*Mulholland* at 416, n 18, quoting Prosser & Keeton, Torts (5th ed), § 41, p 269.]

> The mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two. [*Jordan v*

[8] However, where several factors combine to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a "substantial factor" in producing a plaintiff's injuries. *Brisboy* at 547. See also Prosser & Keeton, Torts (5th ed), § 41, p 266.

[9] While some of these cases involve a motion for a directed verdict, the test regarding the sufficiency of causal proof is essentially the same in the contexts of summary judgments and directed verdicts, namely, whether reasonable minds, taking the evidence in a light most favorable to the nonmovant, could reach different conclusions regarding a material fact. Accord *Anderson v Liberty Lobby, Inc,* 477 US 242; 106 S Ct 2505; 91 L Ed 2d 202 (1986) (" 'The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.' In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law") *id.* at 251-252 (citations omitted).

Whiting Corp, 396 Mich 145, 151; 240 NW2d 468 (1976).]

> There must be substantial evidence which forms a reasonable basis for the inference of negligence. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess . . . . [*Daigneau v Young,* 349 Mich 632, 636; 85 NW2d 88 (1957). Citations omitted.]

> Something more should be offered the jury than a situation which, by ingenious interpretation, suggests the mere possibility of defendant's negligence being the cause of the injury. [*Howe* at 584.][10]

In light of the above pronouncements, we concur with the observation made in 57A Am Jur 2d, Negligence, § 461, p 442:

> All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is

[10] The United States Supreme Court, in addressing summary judgment motions under the parallel FR Civ P 56(c), has also explicitly recognized that the nonmoving party must offer evidence of a character which demonstrates a need for trial:

> If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. [*Anderson,* n 9 *supra* at 249-250. Citations omitted.]

equally consistent with contradictory hypotheses, negligence is not established.

Our case law effectively illustrates the degree of circumstantial proof required to enable jurors to reasonably infer the existence of a causal relationship between a defendant's actions and a plaintiff's injuries. For example, in *Schedlbauer,* a plaintiff boat owner suffered injuries when his pleasure boat exploded. The plaintiff filed suit against the boat manufacturer, claiming that a defectively porous fuel pump caused gasoline to leak into the boat's bilge area, ultimately resulting in the explosion. The controlling question was whether the plaintiff could offer enough evidence to establish that the gasoline entered the bilge area via the allegedly defective fuel pump, thereby producing the blast.

The plaintiff relied upon circumstantial proof to verify his causation theory. The proofs included: the plaintiff's testimony that, while the boat had operated without incident in the past, immediately before the explosion, the engine started to "run 'rough' ";[11] the plaintiff's expert testimony that if there had been a leak in the fuel pump, the engine would not turn off, but it would " 'run roughly' ";[12] the expert's opinion that the gasoline entered the bilge area through the fuel pump and caused the explosion; the expert's view that if gasoline had entered the bilge area in any other way, the engine would have necessarily shut off automatically during the explosion; and the plaintiff's testimony that during the explosion the motor continued to run until he manually turned it off.

In particular, this Court emphasized that the expert's testimony "fairly indicate[d] 'a logical

[11] *Schedlbauer* at 228.

[12] *Id.* at 226.

sequence of cause and effect' "[13] between the alleged defect and resulting injury. The Court also acknowledged the defendant's alternative causation theories, but found them to be less than probable. On the basis of the plaintiff's circumstantial evidence, the Court concluded that a jury would have sufficient ground to infer that the defendant's defective fuel pump caused the explosion and, in turn, the plaintiff's injuries.

Kaminski also highlights the level of circumstantial evidence needed to adequately establish causation. A plaintiff factory worker incurred injuries when he was hit by a trailer that was parked near a railroad track. The plaintiff filed suit against the defendant railroad company, claiming that the conductor's negligent failure to see the trailer caused the train to push the trailer into the plaintiff, injuring him. The collision occurred at night, and there were no eyewitnesses to the accident.

The plaintiff's circumstantial proof showed that moments before the accident the plaintiff had stopped within six feet of the train track, the dark green trailer was parked near the track on the same side that the plaintiff had stopped, and the train was approaching the area where both the plaintiff and trailer were located. Nearer to the time of the collision, the evidence indicated that the train conductor heard a screeching noise coming from the side of the train where both the plaintiff and trailer were situated. At the time of the collision, the plaintiff, also having heard the same screeching noise, was suddenly struck by something he could not see. Immediately after the collision, the plaintiff found himself lying on top of the trailer. The evidence also indicated that, other

[13] *Id.* at 224.

than the moving train, there were no other objects in the area that could have pushed the trailer into the plaintiff.

The Court found that these circumstantial proofs could facilitate a jury in inferring a logical causal relationship between the defendant's negligence and the plaintiff's injuries. The Court mentioned the defendant's contrary causation theories, but in the end dismissed them, explaining that while they were "possible," they were "not probable."

In contrast to these cases, the circumstantial evidence offered in *Jordan* did not afford jurors an opportunity to deduce a causal link between a defendant's actions and an injury. In *Jordan,* the plaintiff's decedent was electrocuted while repairing an overhead crane. The plaintiff brought suit against the manufacturer of the crane, asserting that the manufacturer had negligently failed to ground the crane's electrical system, and that this negligence caused the decedent's death. There were no eyewitnesses to the accident.

The plaintiff was unable to offer any evidence establishing where the decedent was located on the crane or what he may have been touching when he was electrocuted. The sole evidence presented consisted of testimony from the plaintiff's expert regarding purely hypothetical situations. The expert was unable to give an opinion regarding whether the lack of grounding had any causal correlation with the decedent's particular electrocution. On the basis of the lack of evidence, the Court concluded that plaintiff failed to adequately establish causation.

In *Howe,* the circumstantial causal proof was equally deficient. A brakeman for a railroad company was getting off a waycar in the dark when he fell to his death from the bridge on which the car

had stopped. The brakeman's representative brought suit against the railroad company, claiming that the railroad's negligent failure to provide more space between the track and the edge of the bridge resulted in the decedent's death. The misadventure occurred on a dark and rainy night, and no one observed the actual fall.

The circumstantial evidence established that the train had stopped on the bridge, and, pursuant to his duties, the decedent prepared to get off the train to set up flagman signals. The decedent was last seen buttoning his coat by the rear door of the car with two lanterns at his feet. The decedent's representative argued that it was reasonable to infer that the decedent thereafter alighted from the train, and that the insufficient landing space caused the decedent to fall off the bridge. The Court regarded this causation theory as unlikely without additional facts and circumstances for support, reasoning:

> This is one possible explanation of the manner decedent came to his death. It is by no means the only one. No eye saw him after he left the car. No one even knows from which side of the car he left. Is it not just as possible that he stumbled or slipped from the platform or steps of the car and fell into the river? If he did, the space afforded him for walking between the car and the edge of the bridge had nothing to do with it. One theory is as reasonable as the other. Additional ones might be and have been advanced, but the jury should not be permitted to conjecture that he fell from one cause and not from another. [*Id.* at 583-584.]

V

Unlike the circumstantial proofs submitted in *Schedlbauer* and *Kaminski,* and more like those

offered in *Jordan* and *Howe,* the plaintiffs' circumstantial evidence here did not afford a reliable basis from which reasonable minds could infer that more probably than not, but for the defect in the Square D switch, Mr. Skinner would not have been electrocuted.

Plaintiffs' causation theory is that the faulty switch caused the decedent to be confused about whether the machine was on or off; that this confusion induced him to touch the live wires; and that this contact resulted in his electrocution. To support this theory, the plaintiffs offered testimony from co-workers who stated that, in the past, the decedent was always a careful worker, and always turned the power off before he manually reversed the alligator clips. On the basis of this testimony, the plaintiffs urge that the switch must have confused the decedent regarding whether the machine was on or off on the day that he touched the wires and that this confusion led to his electrocution. The lower courts explicitly exposed the critical problem with this theory.

If the machine had been operating, the decedent could not have been confused by the switch in the way that the plaintiffs contend. The plaintiffs do not dispute that when the tumbler is running, it makes a considerable amount of noise, and that the drum moves in a circular motion. The decedent could not have been confused regarding the power's status because either the noise or the visual appearance of movement would have affirmatively cued him regarding whether the power was on or off—regardless of what the switch may have indicated.

In view of this factually established phenomenon, the plaintiffs had to offer an alternative sequence of cause and effect, whereby the decedent was confused by the switch, but the machine was

not in operation. The plaintiffs proposed an hypothesis under which Mr. Skinner thought that the machine was off because of a faulty indication from the switch, the power was actually on, but the machine was not running *because the wires were not attached to the alligator clips.* Under this hypothetical situation, the following antecedent events would necessarily had to have transpired: the machine had to have been turned off, the wires then unhooked, and, the machine thereafter turned back on. This scenario is fatally flawed in two respects.

First, the plaintiffs failed to produce any evidence from which a jury could reasonably conclude that the wires were unhooked when Mr. Skinner began using the machine just before the accident. In fact, the only record evidence pertaining to how the wires and clips were maintained indicated that they would probably have been connected.[14] Second, the plaintiffs did not offer any proof from which it rationally could be inferred how the machine would have been turned back on after the wires had been unhooked.[15]

Of course, the plaintiffs' offered scenario is a *possibility.* However, so are countless others. As explained above, causation theories that are mere possibilities or, at most, equally as probable as

[14] In his deposition, Carl Jacobs, a co-worker of the decedent, described the normal status of the wires:

> *Q.* So, when you would come in in the morning, to start your shift, how would you go about starting up everything?
>
> *A.* Well, usually what I have to do is go to the off and on box and I have to turn it on, and I have to—when I turned it on, *the wires are automatically hooked up,* and I would see which way the barrel is running . . . . [Emphasis added.]

[15] Plaintiffs claim that the switch was defective because it gave the appearance that the power was off when it was really on. They have never suggested that the switch was flawed because it sometimes made the power automatically go back on after it had been turned off.

other theories do not justify denying defendant's motion for summary judgment.[16]

Plaintiffs further argue that the testimony of their experts proved factual causation. In *Jordan,* this Court taught that expert opinion based upon only hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury.[17] Moreover, in *Mulholland* at 411, we stated that "there must be facts in evidence to support the opinion testimony of an expert."[18]

Plaintiffs' expert testimony did not sufficiently establish causation. Plaintiffs' experts maintained that the switch was defective, and that the defect was the proximate cause of the decedent's death.

[16] We believe the Court of Appeals dissent was incorrect with regard to two presumptions—one in fact, the other in law. First, it assumed that there was evidence that the wires were unhooked, and, second, it assumed that a *possible* theory of causation was sufficient to withstand a motion for summary judgment:

> [I]t was clearly established by experts for both parties that the power could be on with the switch in an ambiguous position, the tumbler not turning, and the motor not running, *because the reversible wires were disconnected.* . . . It does not take a journeyman electrician, let alone a distinguished professor, to make sense of that *possible occurrence.* [195 Mich App 672-673. Emphasis added.]

[17] In *Jordan,* because the experts' testimony did not corroborate with any established facts, we ruled that a directed verdict was appropriate:

> The sole evidence presented consists of expert testimony that a hypothetical person making simultaneous contact with a live conductor and metal would have a "70 or 80 per cent chance of extracting himself from that connection" if the crane were grounded. The mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two. [*Jordan* at 150-151. Citation omitted.]

[18] The expert in *Mulholland* had sufficient evidentiary support for his opinion, which, in particular, was premised on the expert's first-hand perceptions of the incidents in question.

The experts' causation theories were deficient, however, because each lacked a basis in established fact. Specifically, each expert either assumed, or was asked to assume, that (somehow) the wires were unhooked, and that the power was on when Mr. Skinner began working on the machine. Because the experts' conclusions regarding causation are premised on mere suppositions, they did not establish an authentic issue of causation.

Taking the record evidence in the light most favorable to the plaintiff, we conclude that the record facts do not manifest a genuine issue of factual causation. The offered evidence only established that an accident took place. Michigan law does not permit us to infer causation simply because a tragedy occurred in the vicinity of a defective product. The plaintiffs were required to set forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. Instead, the plaintiffs posited a causation theory premised on mere conjecture and possibilities.[19]

We recognize that motions for summary judgment implicate considerations of the jury's role to decide questions of material fact. At the same time, however, litigants do not have any right to submit an evidentiary record to the jury that would allow the jury to do nothing more than guess.

We are also aware that courts should exercise restraint when deciding to dismiss a suit for lack of evidence. *Holloway* at 622.[20] Nonetheless, in this

[19] Moreover, plaintiffs' attempts to refute the defendant's offered theories of causation have no effect. Under MCR 2.116(G)(4), the plaintiffs must come forward with a set of evidentiary facts establishing their *own* genuine theory of causation.

[20] "It is true that where an injury occurs that cannot be accounted for and where the occasion of it rests wholly in

case we are confident that the plaintiffs were unable to establish an essential element of proof. The decedent's tragic death remains a matter of speculation.[21]

Because the plaintiff did not show a genuine issue of material fact for trial as required under MCR 2.116(G)(4), we find that the lower courts did not err in granting the defendant's motion for summary judgment.

VI

For the reasons stated by the Court of Appeals, we also find that the trial court did not err in granting the defendant's motion for summary judgment on the plaintiffs' claims of failure to warn and failure to insulate.

Accordingly, we affirm the judgment of the Court of Appeals.

BRICKLEY, BOYLE, RILEY, and MALLETT, JJ., concurred with CAVANAGH, C.J.

LEVIN, J. (*dissenting*). The estate of Chester W.

conjecture, the case may fail for want of proof. . . . But such cases are rare, and that rule should never be so extended as to result in a failure of justice, or in denying an injured person a right of action where there is room for balancing the probabilities, and for drawing reasonable inferences better supported upon one side than upon the other." [*Id.,* quoting *Schoepper v Hancock Chemical Co,* 113 Mich 582, 586; 71 NW 1081 (1897).]

[21] Language from our decision in *Howe* seems particularly fitting in this regard:

"I cannot see in any of this evidence anything which would enable a jury to do more than speculate; that would enable a jury to fall back upon any proof as to what caused the accident. . . . It impresses me as being one of the unfortunate, but inexplicable happenings, which is not susceptible of proof, and in the absence of proof it seems to me that the plaintiff's action must fail." [*Howe* at 585. Citations omitted.]

Skinner commenced this action claiming that his death was the result of a defect in design of an on/off switch manufactured by Square D Company, or a failure properly to insulate the switch, or a result of both such defect and failure.

The question presented is whether the estate produced sufficient evidence to resist Square D's motion for summary disposition that contended the estate's theory of causation was not reasonably inferable from the evidence. Square D in effect conceded, for the purposes of the motion, that the switch was defectively designed and not properly insulated.[1]

The circuit judge granted the motion, and the Court of Appeals affirmed, one judge dissenting.

I would hold that the estate produced sufficient evidence to require jury submission of the question whether Skinner's death was caused by the defect in design and failure to insulate so in effect conceded.

I

Skinner was in the business of cleaning and finishing metal parts. He was electrocuted while working with a homemade tumbling machine activated by turning, from off to on, the Square D switch that he had installed between the machine and the outside source of power.

Skinner would place the parts to be cleaned in the tumbler's metal drum and then turn on the power to spin the drum. After the parts had been spun for a period of time, Skinner would reverse the direction of the drum.

Skinner reversed the direction of the drum by unhooking, by hand, two of three alligator clips

[1] This concession was explicit with respect to the defective design and implicit with respect to the failure to insulate.

that connected electrical wires from the tumbling machine to the Square D on/off switch. Skinner would then reattach the clips to different ports on the tumbling machine, and turn the Square D switch from off to on to start the drum going in the reverse direction.

It was, as the Court of Appeals observed, imperative that the operator of the tumbling machine assure that the power was off before he touched the alligator clips. 195 Mich App 664; 491 NW2d 648 (1992).

On February 21, 1986, Skinner was working in the area of the tumbling machine. His wife, Doris L. Skinner, who commenced this action as personal representative of his estate, and her two sisters, all employees at Skinner's shop, were working in an adjacent room when they heard Skinner cry for help. The women ran to the tumbling room to find Skinner in excruciating pain, with electricity flowing through his body, standing with his hands above his head and an alligator clip in each hand. As the women began to move toward Skinner, he warned them to stand back and not to touch him.

Skinner struggled to release his hands from the clips. He was able to free his left hand, and, with the left hand, pulled down the handle on the Square D on/off switch to move it to, or further to,[2] the off position. Skinner then spun around, fell to the floor, and died.

II

The estate's theory of causation is that the

[2] The estate's expert witnesses testified that there was a phantom zone in which, although the switch appeared to be in an off position, it was not entirely off, and, thus, the switch could falsely indicate that the power was off. Again, for purposes of its motion for summary disposition, Square D conceded that the on/off switch was so defective.

defective on/off switch caused Chester Skinner's death in the following manner. Skinner entered, or had been working in, the room containing the tumbling machine. The tumbling machine was not being operated immediately before Skinner touched or picked up the electrical wires. Before touching the wires, in accordance with his habit, he looked at the on/off switch.

The concededly[3] defective on/off switch falsely indicated that it was in the off position,[4] and thus that there was no electricity flowing through the wires. Relying on his reading of the on/off switch, Skinner touched the wires and suffered the excruciating electrical shock.

III

We agree with the majority[5] that Square D's motion for summary disposition, asserting that the estate's theory of causation is not reasonably inferable from the evidence, poses the question whether, as stated by the United States Supreme Court, "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v Liberty Lobby, Inc,* 477 US 242, 250; 106 S Ct 2505; 91 L Ed 2d 202 (1986). The Court continued that the "standard mirrors the standard for a directed verdict" that a "trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict;" "[i]f reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.,* pp 250-251.

[3] See n 1 and accompanying text.

[4] See n 2.

[5] *Ante,* p 166, n 10.

The United States Supreme Court also observed that "the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.' " *Id.,* p 251.

This Court in *Mulholland v DEC Int'l Corp,* 432 Mich 395, 415; 443 NW2d 340 (1989), said that on a motion for directed verdict in a product liability case " 'the question is whether it is reasonable to infer from the evidence, direct or circumstantial, that the accident was probably caused by a defect attributable to the manufacturer. Questions of comparative probability are to be resolved by the trier of fact.' " Quoting *Holloway v General Motors Corp (On Rehearing),* 403 Mich 614, 622; 271 NW2d 777 (1978). The Court, in *Mulholland,* continued:

> A plaintiff in a product liability action need not offer evidence which positively excludes every other possible cause. It is enough that the plaintiff establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support. *Id.,* p 623. In reviewing the trial court's ruling on a defendant's motion for a directed verdict, we examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the plaintiffs.[6] [*Id.,* pp 415-416.]

[6] The majority, *ante,* p 165, quotes approvingly the following from *Mulholland:*

> " 'The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the

Although this Court has cautioned that "where all theories of causation rest only on conjecture, no jury question [is] presented," *Cummings v Grand Trunk W R Co,* 372 Mich 695, 697; 127 NW2d 842 (1964), it has also emphasized that " 'such cases are rare, and that rule should never be so extended as to result in a failure of justice, or in denying an injured person a right of action where there is room for balancing the probabilities, and for drawing reasonable inferences better supported upon one side than the other.' " *Id.,* pp 697-698, quoting *Schoepper v Hancock Chemical Co,* 113 Mich 582, 586; 71 NW 1081 (1897) (emphasis added).[7]

Kaminski v Grand Trunk W R Co, 347 Mich 417; 79 NW2d 899 (1956), demonstrates how a court should decide whether "reasonable inferences" are "better supported upon one side than the other." The Court in *Kaminski,* in holding that reasonable inferences favorable to the plaintiff could be drawn

result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.' " [*Id.,* p 416, n 18, quoting Prosser & Keeton, Torts (5th ed), § 41, p 269.]

[7] In *Kaminski v Grand Trunk W R Co,* 347 Mich 417, 421; 79 NW2d 899 (1956), the Court said that a directed verdict on the issue of causation is appropriate only in unusual circumstances:

> It is thus right to say that the trial judge's immediate duty, motion for direction having been made with address to the rule of conjectural choice between equally plausible inferences, is to determine on favorable view of the inference plaintiff relies upon whether it stands equiponderant at best with such as is, or are, urged by the defendant. *If the answer is affirmative, then and only then will the judge be justified in proceeding as moved.* [Emphasis added.]

See also *Emery v Chesapeake & O R Co,* 372 Mich 663; 127 NW2d 826 (1964), quoting the statement in *Schoepper v Hancock Chemical Co, supra,* p 586, that cases in which the choice between theories of causation is mere conjecture are rare.

from the evidence, contrasted the defendant's theories of the accident with those advanced by the plaintiff. After scrutinizing the defendant's theories, the Court concluded that "the trouble with the defendant's 'other explanations' is the comparative improbability thereof." *Id.,* p 427.

The majority quotes approvingly from *Kaminski,* but ignores the rule of *Kaminski* requiring scrutiny not only of the plaintiff's theory, but also scrutiny of the defendant's theory, and an assessment of the comparative probability or improbability of the competing theories. The majority in the instant case rejects plaintiff's theory, in the abstract, without engaging in such comparative probability or improbability analysis.

This is not a "rare case" in which all theories of causation are "mere conjecture." A comparison of the contrasting theories indicates that "reasonable inferences" are "better supported upon one side [plaintiff's] than the other."

IV

The plaintiff's theory that Skinner touched the electrical wires after relying on the on/off switch that erroneously indicated the power was off both is the product of reasoned inferences from the evidence and is more probable than any other reasonable theory of causation.

The majority asserts that there are two "fatal flaws" in the plaintiff's theory. First, "the plaintiffs failed to produce any evidence from which a jury could reasonably conclude that the wires were unhooked when Mr. Skinner began using the machine just before the accident."[8]

[8] *Ante,* p 172.

Although the majority speaks of the absence of evidence that the wires were unhooked before Skinner began "using the *machine* just

The majority ignores that there is substantial evidence that the tumbling machine was *not* operating when Skinner touched the wires.[9] If the wires had been connected to the tumbler and had power been running through them, the tumbler would have been operating. Since there is substantial evidence that it was not operating, a trier of fact could reasonably conclude, without resorting to conjecture, that the electrified wires were not

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before the accident" (emphasis added), surely the majority means that the plaintiff failed to produce evidence from which a jury could reasonably conclude that the wires were unhooked when Skinner "*touched*" them just before the accident.

There is no evidence that the machine itself was being operated just before the accident, and substantial evidence to the contrary. See n 9.

[9] Although none of the deponents stated unequivocally that the tumbler was not operating at the time of the accident, a fair reading of the deposition testimony yields this conclusion. First, Doris Skinner testified that she did not believe that Chester Skinner had run the tumbler at all on the day of his death. She testified as follows:

> *Q.* Do you know if he had been working on that machine [the tumbling machine] all day?
>
> *A.* No, I don't think he run it. Mostly, I think, he was welding because he had another machine he was working on. The man come [sic] and picked it up. It wasn't completed.

Doris Skinner would almost surely have known if the machine had been running at the time of the accident. She testified as follows concerning the noise that the machine made when it was cleaning parts:

> *Q.* When the tumbler was running, the one that your husband was injured on, was it a noisy machine?
>
> *A.* When you put a ton of parts in a machine, it is noisy.
>
> *Q.* Could you tell the difference in noise level when the machine stopped, when the motor stopped?
>
> *A.* Well, if it is not running, you would know, yes.

Carl Jacobs, the only person besides Skinner to operate the tumbler machine, also testified that the machine made quite a bit of noise when it was operating.

There is no testimony that any of the women who were working in the room adjacent to the tumbler room heard the noise of the tumbler during the period immediately preceding the accident.

connected to the tumbler when Skinner touched them.[10]

Alternatively, if the wires were hooked up to the tumbling machine when Skinner touched them, the trier of fact could reasonably conclude—because of the evidence that the tumbler was not operating—that power was not flowing through the wires when Skinner touched them and removed them from the machine. If that was the case, then the situation would have been exactly the same as if the wires had been unhooked from the machine sometime before Skinner touched them just before the accident.

This brings us to the second "fatal flaw" highlighted by the majority when it states that the plaintiff failed to "offer any proof from which it rationally could be inferred how the machine would have been turned back on after the wires had been unhooked."[11]

There are not an infinite number of ways in which the power could have been restored to the wires. Skinner could have purposely restored power to the wires and then forgotten that he had done so before touching them. Another person could have restored power to the wires before

[10] It is true that "the only record evidence pertaining to how the wires and clips were maintained indicated that they would probably have been connected." *Ante,* p 172. The evidence referred to in the majority opinion is the testimony of Carl Jacobs to the effect that the wires were usually connected to the tumbler.

The record indicates, however, that the accident occurred at one of those unusual moments when the wires were unhooked. There was substantial evidence that the tumbler was not operating at the time of or immediately before the accident. The electrical wires must have been unhooked because they were electrified, and the tumbler was not running.

[11] *Ante,* p 172.

Again, the majority misspeaks. The question is not whether it can be inferred "how the *machine* would have been turned back on after the wires had been unhooked" (emphasis added), but rather how the *power* would have been turned back on after the wires had been unhooked.

Skinner touched them. Skinner could have accidentally restored power to the wires as he was holding the wires (by falling on the switch), or some object could have fallen on the handle thereby turning the power on as Skinner was holding the wires.[12]

Taking the last possibility first, there is no evidence that any object with a mass great enough to move the on/off switch fell on the switch as Skinner was holding the wires. No witness reported finding such an object in the vicinity of the tumbler, and there does not appear to be a shelf above the on/off switch from which such an object could have fallen.

The evidence seems to clearly establish that Skinner did not fall on the switch. When the three women found Skinner, he was standing on a wooden pallet with his arms above his head.[13] Surely, he could not have fallen on the switch and regained his balance while suffering a tremendous electrical shock—one that no doubt crippled his muscles.[14]

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[12] As the majority observes, there is no claim that the power could accidentally turn on without some force being applied to the on/off switch.

[13] Beulah McBride testified during deposition concerning her discovery of Skinner:

> *Q.* And what exactly did you see when you saw him?
> *A.* He was standing with his hands up in the air like this.
> *Mr. Nolan* [plaintiffs' counsel]: You had both hands up over your head, so the record reflects. Go ahead.
> *Ms. Neilson* [defense counsel]: Yeah. You can go ahead.

[14] During the course of discovery, the defendant advanced theories of how the accident could have occurred. The defendant first hypothesized that Skinner was electrocuted when he attempted to unhook the wires from the tumbler while the power was on. It appears that this could not have happened simply because had the electrified wires been attached to the tumbler before Skinner touched them, the tumbler would have been operating. The unequivocal testimony of the three women who found Skinner, however, establishes that the tum-

A theory that posits that something or someone restored power to the wires by falling on the switch can be discarded because the power was "on" when the switch was in the "up," not the "down," position.[15] Any downward pressure on the switch would have turned the power off, not on.

That leaves only the possibilities that either Skinner[16] or some other person restored power to the wires. Under both of these remaining explanations of how power was restored to the wires—either by Skinner accidentally before he touched or picked up the wires or by another person—Skinner would have had an opportunity to rely on the faulty on/off switch before touching the wires.

The dispositive question then becomes whether the plaintiff presented sufficient evidence to create a question of fact whether Skinner relied on the on/off switch before touching the wires. I conclude that the plaintiff produced sufficient evidence. The evidence consisted of the uncontradicted testimony of Violet Whiting that Skinner always looked at the on/off switch before he would touch the

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bler was not operating at the time of the accident or immediately before the accident. Violet Whiting also testified that Skinner always made sure that the power was off before he changed the wires on the machine. See n 17.

The defendants also suggested that Skinner may have grabbed the live wires as he fell to the ground. This theory, too, is refuted by the testimony of the women who found Skinner. They testified that Skinner was standing up with his hands above his head. It would not have been possible for Skinner to have grabbed the clips, received a tremendous shock, fallen, and then regained his balance and put his hands above his head.

[15] The trier of fact could properly conclude that the power was "on" when the switch was in the "up" position because Violet Whiting and Beulah McBride both testified that Skinner pulled the switch *down* to shut off the power when he was being electrocuted.

[16] To be sure, if Skinner had turned on the power and then had forgotten that he had done so, that would have been a lot of comparative negligence. But the issue on which summary disposition was granted was the absence of the requisite causal relationship.

wires.[17] A trier of fact could reasonably conclude from the habit evidence that Skinner looked at the on/off switch before he touched the wires and, thus, that he only touched the wires after satisfying himself that they were not energized.[18]

V

I also conclude that the Court of Appeals erred in affirming the circuit court's grant of summary

[17] Violet Whiting testified during deposition:

> *Q.* Every time you saw him reverse the machine, did he always throw the switch to the off position and stop the machine before he took the wires?
>
> *A.* Yes he did.
>
> *Q.* Would he look at the switch to observe the switch to see if it was in an off position before he would touch the wires?
>
> *A.* I think he always did.
>
> *Q.* When you saw him, he always did?
>
> *A.* Yes. *He always made sure it was off.* [Emphasis added.]

[18] MRE 406 provides that evidence of habit is admissible to establish that, on a given occasion, an individual acted in conformity with a previous pattern of behavior.

This Court has said that "[t]here is general agreement that habit evidence is highly persuasive as proof of conduct on a particular occasion." *McKinstry v Valley Obstetrics-Gynecology Clinic, PC,* 428 Mich 167, 182, n 6; 405 NW2d 88 (1987).

The Court of Appeals has held that habit evidence is admissible to prove that a decedent acted in conformity with his previous behavior pattern. *Hoffman v Rengo Oil Co, Inc,* 20 Mich App 575; 174 NW2d 155 (1969); *Kovacs v C & O R Co,* 134 Mich App 514, 538; 351 NW2d 581 (1984).

Other courts have reached similar conclusions. See *Frase v Henry,* 444 F2d 1228, 1232 (CA 10, 1971) (under Kansas law, evidence regarding specific driving practices of a decedent was admissible as tending to show that the deceased acted in conformity with past practice at the time of a fatal accident); *Gardner v Geraghty,* 98 Ill App 3d 10, 15-16; 423 NE2d 1321 (1981) (evidence of a decedent's habit of carefully crossing streets was admissible as tending to show that the decedent was carefully crossing street at the time of the accident, at least where there is no eyewitness to the accident); *State v Libby,* 546 A2d 444, 449 (Me, 1988) (evidence of a decedent's bathing habits in a criminal trial arising out of drowning in a bathtub was admissible as tending to show that the decedent would have avoided total immersion bathing).

disposition against the plaintiff on the failure to insulate claim.

The plaintiff's failure to insulate claim asserted that Skinner did not die from the initial shock, but instead died when he touched the uninsulated handle of the Square D on/off switch. The plaintiff claims that when Skinner touched the uninsulated handle of the on/off switch, the magnitude of the shock he was receiving increased, thereby killing him.

The Court of Appeals found this claim to be "disingenuous." *Id.,* p 670. The Court said that the plaintiff presented no evidence that could have established that it was only at the instant that Skinner touched the on/off switch that the shock became fatal. The Court stressed that even the plaintiff's expert witness conceded that Skinner could have been electrocuted even if the on/off switch had been insulated and that Skinner could have been electrocuted before he reached for the on/off switch. The Court also emphasized that a pathologist "testified that Mr. Skinner had already completed the circuit by the time he grabbed for the switch, with the current entering his right hand and exiting through the balls of his feet." *Id.*

The Court of Appeals erred in failing to advert to and consider the testimony of two expert witnesses for the plaintiff who testified that the magnitude of the shock that Skinner was receiving could have been increased when he grabbed the uninsulated handle of the Square D switch.[19]

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[19] Mr. James Dutton, an engineer for Square D, testified during deposition:

> *Q.* [I]sn't it true that you could be receiving a less substantial shock from the wires, and then touch this metal on the switch and increase the substance of the electrical shock by which you're being given?
>
> *A.* You could touch that handle, or any grounded surface, and the possibility of increasing it is there.

The Court of Appeals also erred in failing to advert to and consider the nonexpert testimony of the women who found Skinner suffering from shock. Doris Skinner and Violet Whiting testified that when they ran into the room where the tumbling machine was located, they found Skinner conscious and in severe pain from the shock. As the women began to approach Skinner, he apparently recognized that the women would be in danger if they touched him as he was receiving the shock, and he warned them not to touch him.[20] The women further testified that it was not until Skinner freed his left hand and grabbed the uninsulated handle that he lost consciousness and dropped to the ground.[21]

After testifying that the uninsulated handle was a secondary, not primary, cause of the electricity running through Skinner's body, the pathologist was asked if the secondary cause would increase the magnitude of the shock that Skinner was receiving. He answered, "[s]ure."

[20] Beulah McBride testified during deposition that Skinner said, "don't touch me," when the women entered the room. Violet Whiting similarly testified that when the women entered the room Skinner said, "don't touch me."

[21] Beulah McBride explained how Skinner struggled to free one hand, grabbed the uninsulated switch, and then slumped to the floor:

> *Q.* And then what happened?
> *A.* Well, he got one hand loose, his left hand. He reached over, and pushed on the switch, and he made a half turn and fell to the floor.

Violet Whiting similarly testified that Skinner was struggling to free himself from the clips and did not fall or lose consciousness until he touched the handle:

> *Q.* Now, you indicated that you saw him reach for the switch; is that correct?
> *A.* Yes, I did.
> *Q.* Could you see that yourself?
> *A.* The switch?
> *Q.* Yes.
> *A.* Yes, I could.
> *Q.* Could you see the front of Mr. Skinner from where you were standing?

Although the testimony of the women conflicts with that of the defense expert witnesses who testified that Skinner was, in effect, "dead" before he touched the uninsulated handle, their testimony is nonetheless evidence that Skinner did not die from the initial shock. Skinner was able to think rationally and communicate while he was receiving the initial shock.

The law requires that all reasonable inferences must be drawn in favor of the nonmoving party. The testimony of the women who found Skinner and of the expert witnesses who opined that the uninsulated handle could have increased the magnitude of the shock that Skinner was receiving is sufficient to create a question for the trier of fact concerning whether the uninsulated handle contributed to Skinner's death.

GRIFFIN, J., took no part in the decision of this case.

A. Well, he had his back to us, until he got loose, and then he turned around and he came down.

CHASE v SABIN

Docket No. 95889. Argued January 11, 1994 (Calendar No. 9). Decided May 17, 1994.

Durward Chase, Jr., brought a negligence action in the Marquette Circuit Court against Fred C. Sabin, M.D., and Marquette General Hospital, alleging that the loss of anesthetic control by a certified registered nurse anesthetist during cataract surgery performed by Dr. Sabin in 1963, which was discovered during the pursuit of a worker's compensation claim in 1988, led the partially conscious plaintiff to damage his eye and eventually lose his vision. The court, Edward A. Quinnell, J., granted summary disposition for the hospital on the ground that the statute of limitations barred the negligence claim. The Court of Appeals, GRIFFIN, P.J., and WEAVER, J. (MCDONALD, J., dissenting), affirmed in an unpublished opinion per curiam (Docket No. 143398). The plaintiff appeals.

In an opinion by Chief Justice CAVANAGH, joined by Justices LEVIN, BOYLE, and MALLETT, the Supreme Court *held:*

In a cause of action for the negligent acts of a hospital and its agents, the discovery rule governs when the cause of action accrues.

1. A statute of limitation should provide plaintiffs with a reasonable opportunity to commence suit. The term "wrong" as stated in the accrual statute, designates the date on which the plaintiff was harmed, as opposed to the date the defendant acted negligently. Because statutes of limitation do not evidence a legislative intent to extinguish a cause of action before the plaintiff is aware of the possible cause of action, the discovery rule was adopted.

2. In this case, while the plaintiff's claim lies in negligence, the essence of the hospital's alleged wrong is substantially similar to medical malpractice. In malpractice cases, the period of limitation does not begin to run until the date the plaintiff discovers, or by the exercise of reasonable care should have

REFERENCES

Am Jur 2d, Limitation of Actions §§ 136, 137, 146.
See ALR Index under Limitation of Actions.

discovered, the wrongful act. Because a statute of limitation is not a statute designed to abrogate a common-law cause of action, it must afford a reasonable time within which suit may be brought.

3. Statutes of limitation are intended to afford plaintiffs a reasonable opportunity to bring suit, to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend, to relieve a court system from dealing with stale claims, and to protect potential defendants from protracted fear of litigation. In this case, the twenty-six-year-old negligence claim is stale; however, it is inappropriate to prohibit the plaintiff's suit for circumstances beyond his control. The hospital and its agent were in a superior position to recognize the occurrence of the negligent act. They controlled the evidence as well as the plaintiff's knowledge of the evidence. While the plaintiff was aware that he lost his eye, because of the representation by Dr. Sabin and the silence of the hospital and nurse, he was ignorant that improper anesthetization may have caused the deterioration of his eye.

Reversed and remanded for further proceedings.

Justice RILEY, joined by Justices BRICKLEY and GRIFFIN, dissenting, stated that, absent allegations of a duty to disclose or acts of fraudulent concealment, on balance, the policies behind the statute of limitations bear in favor of finding this claim stale because of the defendant's inability to adequately defend, thus making it inappropriate to impose the discovery rule.

LIMITATION OF ACTIONS — NEGLIGENCE — HOSPITALS — DISCOVERY RULE — ACCRUAL OF CAUSES OF ACTION.

In a cause of action for the negligent acts of a hospital and its agents, the discovery rule governs when the cause of action accrues.

Charfoos & Christensen, P.C. (by *David R. Parker*), for the plaintiff.

Bridges & Houghton (by *Caroline Bridges*) for the defendant.

CAVANAGH, C.J. In this appeal, we are asked to determine when a cause of action for the negligent

acts of a hospital and its agent[1] accrues for statute of limitations purposes.[2] We hold that the discovery rule governs when the cause of action accrues. Accordingly, we reverse the decision of the Court of Appeals.

I

The plaintiff, Durward Chase, Jr., underwent consecutive eye surgeries on April 12 and April 17, 1963, to remove cataracts, apparently caused by job-related welding flashes. Defendant, Dr. Fred C. Sabin, performed both surgeries while the plaintiff was a patient at the defendant hospital.

In 1963, the removal of cataracts required two procedures. During the first procedure, the surgeon broke up the lens of the eye, allowing the lens to dissolve so it could be washed out of the eye during the second procedure. While the first procedure was generally performed in a hospital, only a local anesthetic was used. Dr. Sabin administered the local anesthetic and completed the first procedure without incident.

[1] This opinion does not address whether the discovery rule governs the date of accrual for other negligence actions.

[2] The pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose. *Winfrey v Farhat,* 382 Mich 380, 389-390; 170 NW2d 34 (1969). We agree with the conclusion of the Court of Appeals that "[a] cause of action arises, for purposes of determining the applicable statute of limitations, when the alleged negligent act occurs, not when the plaintiff discovers or should have discovered that negligence or malpractice." *Wallisch v Fosnaugh,* 126 Mich App 418, 422-423; 336 NW2d 923 (1983). As a result, the statute of limitations effective in 1963 governs the disposition of this suit.

The liability of the hospital is premised upon the negligence of a certified registered nurse anesthetist. In 1963, any negligence by a nurse or a hospital was considered ordinary negligence, and not medical malpractice. *Kambas v St Joseph Hosp,* 389 Mich 249; 205 NW2d 431 (1973). While not controlling in this case, the Legislature has since characterized the negligence by a nurse or hospital as medical malpractice. 1975 PA 142, MCL 600.5838; MSA 27A.5838. See also *Adkins v Annapolis Hosp,* 420 Mich 87; 360 NW2d 150 (1984).

The second procedure required the cutting of the cornea to facilitate the irrigation of the previously broken up lens. The preferred anesthetic for the second procedure was general anesthesia because under general anesthesia, you have an immobile eyelid and patient. Unlike the first procedure, Dr. Sabin did not administer the anesthetic during the second procedure. Instead, Nurse Neff, a nurse anesthetist and employee of the defendant hospital, administered the general anesthesia.[3]

Despite Dr. Sabin's instructions that the anesthetist keep the plaintiff asleep, the plaintiff awoke soon after the operation began.[4] At this point, the plaintiff involuntarily squeezed the eye hard enough that some of the vitreous humor[5] came out of the eye and the cortex extruded. After this incident, Dr. Sabin completed the operation as best as he could.

After the operation, the doctor did not inform the nineteen-year-old plaintiff or his father about the loss of vitreous humor because such a loss was not necessarily incompatible with a successful result. The doctor never informed the plaintiff, who was treated by the doctor until 1988, of the loss despite the fact that the plaintiff's eye rapidly deteriorated, resulting in the removal of the eye one year after the procedures. Instead, Dr. Sabin informed the plaintiff that a detached retina, which he opined resulted from the plaintiff's fall

[3] While the hospital records fail to identify who administered the anesthesia during the plaintiff's second procedure, Dr. Sabin distinctly recalled Nurse Neff as the person who administered the anesthesia. Despite the numerous procedures that Dr. Sabin performed over his career, he recalled Nurse Neff's identity because of the unexpected incident that occurred during the second procedure.

[4] The plaintiff had not really awakened—he had simply advanced from a deep stage of anesthetization to a somewhat lighter stage. Consequently, he had no memory of the incident.

[5] Vitreous humor is a jelly-like material that maintains the shape of the eye.

off a horse a few weeks following surgery, caused the decline of the eye.

In 1988, during the pursuit of a worker's compensation claim, the plaintiff's attorney obtained a hospital record of the surgery that indicated that during the second procedure the plaintiff lifted his hand and squeezed his eye. In April 1989, the plaintiff commenced suit against Dr. Sabin and the defendant hospital.[6] The plaintiff alleged that the loss of anesthetic control led the partially conscious plaintiff to damage his eye and eventually lose his vision.

The trial court granted the defendant hospital's motion for summary disposition on the ground that the statute of limitations barred the plaintiff's negligence claim.[7] The Court of Appeals affirmed in a two to one unpublished per curiam opinion.[8] This Court granted plaintiff's application for leave to appeal.[9]

II

The statute governing the plaintiff's claim affords a plaintiff three years from the date the

[6] Nurse Neff died before the plaintiff filed suit.

[7] While the trial court refused to extend the discovery rule to the negligence action, it nevertheless made a determination concerning the discovery rule's effect in the present action:

> For review purposes only, I reject defendant hospital's claim that plaintiff should have discovered his claim in December of 1963 when he lost his eye; if a discovery rule were available, I would have no hesitancy in holding that plaintiff did not discover or have good cause to discover negligence on the part of the hospital until October of 1988, when his worker's compensation attorney obtained the medical records from the 1963 procedure.

[8] Judge MCDONALD dissenting.

[9] The trial court also granted Dr. Sabin's motion for summary disposition on the ground that there was no genuine issue of material fact in dispute. The plaintiff failed to pursue this issue on appeal. As a result, the opinion does not address this issue.

claim accrues to commence a negligence suit.[10] The corresponding accrual statute provided that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; MSA 27A.5827. Under limited circumstances, this Court has determined that the discovery rule governs the date certain claims accrue, despite identical statutory language. See *Moll v Abbott Laboratories,* 444 Mich 1, 12-13; 506 NW2d 816 (1993); *Larson v Johns-Manville Sales Corp,* 427 Mich 301, 308, 312; 399 NW2d 1 (1986); *Johnson v Caldwell,* 371 Mich 368, 379; 123 NW2d 785 (1963).[11]

The policy prompting the Court to utilize the discovery rule generally centers on our attempt to avoid the premature bar of a cause of action and to provide, instead, a reasonable time to bring suit.

A

A statute of limitation should provide plaintiffs with a reasonable opportunity to commence suit. For over one hundred years, this Court has sought

[10] The statute in effect in 1963 stated:

> No person may bring or maintain any action to recover damages for injuries to persons or property unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.
>
> * * *
>
> (7) The period of limitations is 3 years for all other actions to recover damages for injuries to persons and property. [1961 PA 236, MCL 600.5805; MSA 27A.5805.]

[11] *Johnson* was superseded by statute as stated in *Hawkins v Regional Medical Laboratories, PC,* 415 Mich 420, 428, n 2; 329 NW2d 729 (1982) ("*Dyke* [*v Richard,* 390 Mich 739; 213 NW2d 185 (1973)], entitled a plaintiff to a two-year extension on the limitations period from the time of discovery of malpractice. 1975 PA 142 has since reduced the extension to six months from the time of discovery or two years from last treatment, whichever is greater").

to fulfill this purpose, construing statutes accordingly. As Justice COOLEY explained:

> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. But the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away. . . . It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought . . . . [*Price v Hopkin,* 13 Mich 318, 324-325 (1865).]

Our adherence to this principle resulted in our holding that the term "wrong," as stated in the accrual statute, designated the date on which the plaintiff was harmed by the defendant's negligent act, as opposed to the date the defendant acted negligently. *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich 146; 200 NW2d 70 (1972). Necessity dictated such a conclusion because an opposite interpretation could potentially bar a plaintiff's legitimate cause of action before the plaintiff's injury.

Similarly, because statutes of limitation do not evidence a legislative intent to extinguish a cause of action before the plaintiff is aware of the possible cause of action, we have adopted the discovery rule in the appropriate instances. Last term, in *Moll, supra* at 13, we held that the discovery rule controls the date a pharmaceutical products liability action accrues. "If the three-year period of limitation began to run at the time of the defen-

dant's breach, most, if not all, claims would be barred before the plaintiff had reason to know of the injury and the cause of the injury. Such an interpretation seeks 'to declare the bread stale before it is baked.' " (Citation omitted.) The same reasoning compelled our application of the discovery rule to products liability actions premised on asbestos related injuries, *Larson, supra.* In *Southgate School Dist v West Side Construction Co,* 399 Mich 72, 82; 247 NW2d 884 (1976), we held that the discovery rule governs the date a breach of warranty claim accrues, providing plaintiffs with an adequate opportunity to bring suit. See also *Williams v Polgar,* 391 Mich 6; 215 NW2d 149 (1974) (the discovery rule governs the accrual of negligent misrepresentation cases), and *Dyke v Richard,* 390 Mich 739; 213 NW2d 185 (1973) (the discovery rule governs the accrual of medical malpractice cases).

B

While the plaintiff's claim lies in negligence, the essence of the hospital's alleged wrong is substantially similar to medical malpractice. In fact, under the current statutory scheme,[12] an action for the identical alleged wrong would be correctly characterized as a medical malpractice action. In light of the similarity, it is beneficial to review our resolution of analogous medical malpractice cases.

In *Johnson, supra,* the plaintiff, experiencing post partum complications, relied on her doctor's advice that nothing could be done for her condition. Despite a three-year lapse from the date of the doctor's alleged wrong to the date the plaintiff filed suit, the Court held that the two-year medical malpractice period of limitation did not bar the

[12] See MCL 600.5838; MSA 27A.5838.

plaintiff's suit.[13] The Court refused to impose on the plaintiff a duty of discovering the wrong, despite the obvious physical complication, before another physician's advice regarding the earlier breach. The Court refused to "punish the patient who relies upon his doctor's advice and place[ ] a premium on skepticism and distrust." *Id.* at 379. As a result we held:

> The limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act. [*Id.*]

In *Dyke, supra,* we examined whether the discovery rule, as applied to malpractice cases, continued to have effect in light of the Legislature's codification of the last treatment rule.[14] Because a

[13] At the time, the applicable statute read:

> "Actions . . . for malpractice of physicians . . . shall be brought within 2 years from the time the cause for action accrues and not afterwards." [*Johnson* at 371, quoting 1956 CL 609.13; Stat Ann 1959 Cum Supp § 27.605.]

[14] At the time we decided *Dyke,* MCL 600.5805(3); MSA 27A.5805(3) and MCL 600.5838; MSA 27A.5838 set forth the limitation period for malpractice cases.

Section 5805 provided:

> No person may bring or maintain any action to recover damages for injuries to persons . . . unless, after the claim first accrued . . . he commences the action within the periods of time prescribed by this section.
>
> * * *
>
> (3) The period of limitations is 2 years for actions charging malpractice.

Section 5838 provided:

> A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession

statute of limitation is not a statute designed to abrogate a common-law cause of action, we applied the discovery rule, refusing to infer a legislative intent to abolish the plaintiff's cause of action. "Since '[i]t is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought . . .,' a statute which extinguishes the right to bring suit cannot be enforced as a law of limitation." *Id.* at 746 (citation omitted).

C

We would be remiss if we examined the issue presented without considering the additional policies prompting the adoption of statutes of limitation. While one policy is to afford plaintiffs a reasonable opportunity to bring suit, statutes of limitation are also intended to " 'compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend'; 'to relieve a court system from dealing with "stale" claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured'; and to protect 'potential defendants from protracted fear of litigation.' " *Bigelow v Walraven,* 392 Mich 566, 576; 221 NW2d 328 (1974).

Admittedly, the plaintiff's twenty-six-year-old negligence claim is stale; however, we deem it inappropriate to prohibit a plaintiff's suit for circumstances beyond his control. The evidence that a plaintiff will generally rely on to pursue a negligence claim against a hospital is the hospital and

accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose. [Emphasis added.]

physician's records. Thus, any concerns that this class of plaintiffs will manufacture the evidence are tenuous. While it may be true that the defendant hospitals, because of the lapse in time, may encounter difficulty in defending the negligence action, the plaintiffs, who carry the burden of proof, are equally handicapped in their attempt to establish the hospital's negligence.

The statute of limitations furthers the sound public policy of establishing a time frame beyond which defendants will not be forced to defend. However, in our quest to fulfill this purpose, we will not allow questionable acts, of which patients are unaware and which are followed by silence, to combine with the passage of time to bar suit. Similar to the situation in a medical malpractice case, the hospital and its agent are in a superior position to recognize the occurrence of a negligent act. Furthermore, these defendants generally control the evidence, as well as the plaintiff's knowledge of the evidence.

This conclusion is readily supported by a review of the facts in this case. While plaintiff Chase was aware that he lost his eye, he, like the plaintiff in *Johnson,* was ignorant, because of representations by Dr. Sabin and the silence of the defendant hospital and Nurse Neff, that improper anesthetization may have caused the deterioration of the eye. The plaintiff was unconscious at the time and has never had any recollection of the committed negligence. The information was in the hands of the doctor, nurse, and hospital, noted in the records, yet the plaintiff was unaware of the possible wrongdoing. The plaintiff had no reason to be skeptical or distrustful of Dr. Sabin's explanation for his eye's deterioration.

Our sense of fair play in providing plaintiff with a reasonable opportunity to bring suit, along with

our conclusion regarding the additional policies underlying the statute of limitations, compels the holding that the discovery rule governs the accrual date for negligence claims, pursued against hospitals and their agents, which are similar to malpractice claims.[15]

III

For the foregoing reasons, we hold that the discovery rule governs the accrual date of the plaintiff's cause of action. Accordingly, the judgment of the Court of Appeals is reversed.[16] We

[15] The defendant claims that in all instances in which the Court has applied the discovery rule, it has done so because the plaintiff had yet to incur damages or become aware of the injury. The defendant's point, however, is misguided. While a plaintiff may be aware of a result—i.e., the loss of an eye, the plaintiff may nevertheless be unaware that this was "damage" in the legal sense—i.e., resulting from a wrongful act. Furthermore, in *Moll,* we stated that the discovery rule was a useful theory because an injured plaintiff is often unaware of damage *and* its cause:

> A cause of action for personal injuries accrues when a plaintiff can allege, in a complaint, each element of the asserted claim. Generally, a well-pleaded claim for personal injury must allege that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, (3) the defendant's breach was the proximate cause of the plaintiff's injuries, and (4) damage. *Connelly* at 150. However, in a pharmaceutical products liability action, as in other cases in which we have applied the discovery rule, *the defendant's duty and breach generally predate the plaintiff's awareness of an injury and of its cause.* Accordingly, under the discovery rule, the plaintiff's *claim accrues when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered, the two later occurring elements: (1) an injury, and (2) the causal connection between plaintiff's injury and the defendant's breach.* See, generally, *Caldwell, Polgar,* and *Larson, supra.* [*Moll* at 15-16. Emphasis added.]

[16] The defendant asserts that even if the discovery rule is applicable to the case at bar, the Court, in the alternative, should apply the current legislatively mandated cap on the discovery rule found in MCL 600.5838a; MSA 27A.5838(1). This statute of limitations, applicable to medical malpractice claims (which now includes claims for the

remand this case to the Court of Appeals for a determination regarding the plaintiff's unaddressed claim of error.[17]

LEVIN, BOYLE, and MALLETT, JJ., concurred with CAVANAGH, C.J.

RILEY, J. (*dissenting*). In this case, we must decide whether a discovery rule should be applied to the 1963 statute of limitations for negligence actions. Because I believe the instant claim is stale, so that it cannot be reasonably defended, I would decline to extend the discovery rule in the instant case. Therefore, I would affirm the Court of Appeals decision, albeit on different grounds.

I

The facts of this case reflect a rather unfortunate event—one certainly deserving of sympathy. Plaintiff lost the use of his eye, allegedly because of the negligence of a nurse anesthetist who improperly administered anesthesia during surgery

negligent acts of licensed health care facilities and their agents), includes a discovery provision, but caps the time frame for discovery at six years from the date of the act or omission that is the basis for the claim. As noted earlier, however, the applicable statute of limitations is the one in effect when the plaintiff's cause of action arose. See n 2. The plaintiff's claim is not governed by the current statutory scheme, but the statute in effect in 1963. We did not impose a cap on the discovery rule and its role in medical malpractice cases in 1963. Similarly, we discern no requirement to impose a cap on the plaintiff's cause of action.

[17] In addition to granting summary disposition on the basis of the statute of limitations, MCR 2.116(C)(7), the trial court also granted the defendant hospital's motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court determined that there was no genuine issue of material fact regarding Nurse Neff's negligence because the plaintiff failed to submit sufficient evidence regarding the standard of care. While the plaintiff raised and briefed the propriety of the trial court's action at the Court of Appeals, the majority of the panel did not address or resolve the issue. Accordingly, a remand to the Court of Appeals is appropriate.

on the eye. However, our sympathy for this unfortunate event should not dictate the rule of law or obviate the policies behind a statute of limitations. Indeed, "the statute of limitations is not a disfavored plea but a perfectly righteous defense, a meritorious defense . . . ." *Bigelow v Walraven,* 392 Mich 566, 570; 221 NW2d 328 (1974).

Accordingly, I believe the Court should conduct a two-step inquiry when deciding whether to impose the discovery rule in the instant action where the statute clearly does not impose such a rule. First, the Court should consider whether plaintiff had a reasonable time to file suit, a policy implicit in any statute of limitations.[1] To satisfy this requirement, courts have traditionally looked to whether the plaintiff could allege all the elements of his claim within the statute of limitations. See *Moll v Abbott Laboratories,* 444 Mich 1, 13; 506 NW2d 816 (1993). If the plaintiff could not allege all the elements of his claim, then the Court should balance the plaintiff's right to have a reasonable time to file suit against the remaining policies behind the statute of limitations to determine whether the discovery rule is appropriate for the instant case. *Id.* at 13-14. In the case at bar, I agree that plaintiff could not have discovered the causal connection between the injury and the alleged negligence within the three-year statute of limitations. However, I disagree with the majority's conclusion that the discovery rule would not offend the other policies behind this statute of limitations. Accordingly, it is on this basis that I dissent.

II

While one purpose of a statute of limitations is

[1] *Price v Hopkin,* 13 Mich 318, 324-325 (1865).

to provide a plaintiff a reasonable opportunity to bring suit, the primary purpose is

> one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when "*evidence has been lost, memories have faded, and witnesses have disappeared.*" [*Developments in the law—Statutes of limitations,* 63 Harv L R 1177, 1185 (1950). Emphasis added.]

Over the years, this Court has described the various policies in the following manner:

> They encourage the prompt recovery of damages, *Buzzn v Muncey Cartage Co,* 248 Mich 64, 67; 226 NW 836 (1929); they penalize plaintiffs who have not been industrious in pursuing their claims, *First National Bank of Ovid v Steel,* 146 Mich 308; 109 NW 423 (1906); they "afford security against stale demands when the circumstances would be unfavorable to a just examination and decision," *Jenny v Perkins,* 17 Mich 28, 33 (1868); they relieve defendants of the prolonged fear of litigation, *Bigelow, supra* [at] 576; they prevent fraudulent claims from being asserted, *Bailey v Glover,* 88 US (21 Wall) 342; 22 L Ed 636 (1875); and they " 'remedy . . . the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.' " *Lenawee County v Nutten,* 234 Mich 391, 396; 208 NW 613 (1926). [*Lothian v Detroit,* 414 Mich 160, 166-167; 324 NW2d 9 (1982).]

In the instant case, plaintiff brings this claim *twenty-six* years after the alleged negligence. As does the majority, I believe this renders the claim stale. However, unlike the majority, I believe the reasons for finding the claim stale and thereby

precluding plaintiff's claim are compelling and cannot be overcome by simply noting that plaintiff is equally handicapped. Indeed, there are serious evidentiary problems arising from the death of the nurse anesthetist (the alleged tortfeasor), the loss of memory of the ophthalmologist who performed the surgery, and plaintiff's lack of conscious memory of the procedure. The lack of primary evidence regarding the nurse's duty and breach, and her role in causing the injury, renders the instant action virtually impossible to reasonably defend. The only evidence regarding this operation would be the notation by Dr. Sabin indicating inadequate anesthesia, his deposition, and the testimony of various experts regarding anesthesia in 1963. In my view, these serious evidentiary problems unfairly infringe upon the defendant's ability to adequately defend and thereby run counter to one of the primary concerns of a statute of limitations—the fear of defending a claim on the basis of lost or inaccurate evidence of the alleged negligence, thereby presenting circumstances that "would be unfavorable to a just examination and decision." *Jenny, supra* at 33.

However, the majority attempts to minimize this concern by contending that plaintiff will primarily rely on documentary evidence in pursuing his claim, thereby lessening the need for testimonial evidence. *Ante* at 199-200. This same argument was made and accepted in *Moll, supra* at 14, a products liability suit. However, the instant action is substantially different from *Moll,* and thus the rationale employed therein is inapposite. Unlike a products liability action, the instant negligence action does not rely primarily on documentary evidence, especially where there is only one notation by Dr. Sabin indicating inadequate anesthesia. Instead, the more traditional and prudent approach to proving or defending the action is via testimony regarding the standard of care, breach,

and causation, all referring to what actually occurred in the operating room. However, there is no one alive, or at least no one with an actual memory of the event, to testify regarding what occurred in the operating room. Therefore, the only testimony would be from experts indicating the standard of care in 1963, with mere speculation regarding whether the facts of the case indicate a breach or whether this breach actually caused the injury.

Furthermore, unlike a products liability action, the passage of time will not increase the accuracy of the evidence, but instead reduce its accuracy. *Id.* The death of the primary tortfeasor and the loss of memory by Dr. Sabin clearly evidence this fact. Consequently, I believe the instant action implicates a problem with lost or inaccurate information, one of the primary purposes behind the statute of limitations.

Moreover, I cannot accept the majority's conclusion that defendant's primary control of the evidence renders it appropriate to apply the discovery rule. There are no allegations that the hospital or Dr. Sabin prevented plaintiff from discovering this information, and there certainly are no allegations supporting the theory that the hospital or Dr. Sabin had a duty to disclose possible negligence. Indeed, there is no duty to disclose one's negligence.

Furthermore, I do not accept the majority's contention that "plaintiff had no reason to be skeptical or distrustful of Dr. Sabin's explanation for his eye's deterioration." *Ante* at 200. This is not the test to be used in deciding whether to impose the discovery rule or for overcoming the policy justifications behind the statute of limitations. The test is whether (1) the plaintiff can allege all the elements of the offense, and (2) whether the discovery rule would offend the other

policies behind the statute of limitations. In my view, the majority's reasoning would only be relevant in the eventual application of the discovery rule, which would involve a question of fact, at least when the facts are controverted. *Moll, supra* at 27-28.

Moreover, the majority's reasoning leads to its implied conclusion that Dr. Sabin fraudulently concealed a known negligence by some affirmative representation. See, e.g., *Buchanan v Kull,* 323 Mich 381; 35 NW2d 351 (1949); *Eschenbacher v Hier,* 363 Mich 676; 110 NW2d 731 (1961). As previously indicated, the hospital or Dr. Sabin did not have a duty to disclose. Apparently realizing this fact, the majority couches the hospital's and Dr. Sabin's actions in terms of "questionable acts . . . followed by silence." *Ante* at 200. However, the majority misses an important distinction; the plaintiff never claimed fraudulent concealment. If plaintiff had alleged such an action, there would be no need to apply a discovery rule in this case because the Legislature already provided the discovery rule by statute:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations. [MCL 600.5855; MSA 27A.5855.][2]

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2 A claim of fraudulent concealment is the subject of a completely different body of law. Indeed, the majority in *Johnson v Caldwell,* 371 Mich 368, 379; 123 NW2d 785 (1963), recognized these distinct claims: The discovery "rule is not to be confused with the completely distinct concept of fraudulent concealment, which is the subject of an express

Accordingly, I reject the majority's characterization of this claim wherein it implies a claim of fraudulent concealment and implies that the hospital or Dr. Sabin had a duty to disclose possible negligence. In my view, this does nothing to overcome the policies behind the statute of limitations. Furthermore, the majority's characterization indicates its view of what the law should be without considering the fact that the Legislature already provided for its implied conclusion via the fraudulent concealment statute.[3]

III

Accordingly, absent allegations of a duty to disclose or acts of fraudulent concealment, I believe that on balance, the policies behind the statute of limitations bear in favor of finding the instant claim stale because of defendant's inability to adequately defend. On this basis, I deem it inappropriate to impose the discovery rule in this case.

BRICKLEY and GRIFFIN, JJ., concurred with RILEY, J.

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statute which has often been construed." In my view, the majority muddies the waters by implying both that the hospital or Dr. Sabin had a duty to disclose and that Dr. Sabin fraudulently concealed possible negligence. Plaintiff did not argue either theory, and, nevertheless, the majority's contentions are not appropriate in determining whether to apply the discovery rule in the instant case, where the statute specifically addresses the majority's characterization by express statute.

[3] "We have no other duty to perform than to construe the legislative will as we find it, without regard to our own views as to the wisdom or justice of the act." *McKibbin v Corp & Securities Comm*, 369 Mich 69, 81; 119 NW2d 557 (1963).

SILVERMAN v UNIVERSITY OF MICHIGAN
BOARD OF REGENTS

Docket No. 97292. Decided May 17, 1994. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave, reversed the judgment of the Court of Appeals and the order of the circuit court and remanded the case to the circuit court for further proceedings.

Robert S. Silverman brought an action in the Washtenaw Circuit Court against the University of Michigan Board of Regents, seeking a declaration that he was a Michigan resident for the purpose of calculating tuition at the university, and a refund of nonresident tuition paid during 1989 through 1991. The university moved for summary disposition on the ground that the circuit court lacked subject-matter jurisdiction and that exclusive jurisdiction lay in the Court of Claims. The court, Donald E. Shelton, J., denied the motion, noting that MCL 600.6419a; MSA 27A.6419(1) does not deprive the circuit court of jurisdiction over a claim for equitable relief against the state merely because there is an ancillary claim for money damages. The Court of Appeals, FITZGERALD, P.J., and WEAVER and MARILYN J. KELLY, JJ., affirmed in an unpublished opinion per curiam, finding that the relief sought was more in the nature of an equitable remedy than damages, because the plaintiff was not seeking money damages, but rather a determination of whether he was a resident of the state and a return of tuition improperly charged (Docket No. 143284). The university seeks leave to appeal.

In an opinion per curiam, signed by Chief Justice CAVANAGH, and Justices BRICKLEY, BOYLE, RILEY, GRIFFIN, and MALLETT, the Supreme Court *held:*

The case is within the exclusive jurisdiction of the Court of Claims.

A complaint seeking only money damages against the state is to be filed in the Court of Claims. A complaint seeking only equitable or declaratory relief is to be filed in the circuit court. A complaint seeking money damages against the state as well as equitable or declaratory relief against the state may only be filed in the Court of Claims, because that is the sole forum that is capable of deciding the whole case.

Reversed and remanded.

Justice LEVIN, dissenting, stated that peremptory disposition, without plenary consideration, full briefing, oral argument, and an opportunity for the profession to file briefs as amici curiae, should be reserved for cases in which the law is settled and factual assessment is not required. In this case legal assessment is required.

The real issue in this case is whether the circuit court had jurisdiction to enter a judgment declaring Silverman to be a resident of Michigan and thus entitled to a refund. 1984 PA 212 neither added to nor detracted from the powers of the circuit court, and has nothing to do with correct resolution of the issue.

The Court of Claims Act waives the state's sovereign immunity from suit, and speaks of claims ex contractu and ex delicto. The per curiam opinion does not address Silverman's claim that, in seeking a refund of money wrongfully exacted by the university, he is not seeking to maintain an action ex contractu or ex delicto, but rather is seeking a declaration of rights and the equitable remedy of restitution of money wrongfully exacted by the university as a precondition to his remaining a student at the university. The accuracy of the majority's assumption that the circuit court did not have power, before the enactment of the Court of Claims Act, to order the refund of money wrongfully exacted by a university as a precondition to attendance is to be questioned. MCL 600.4401(1); MSA 27A.4401(1), which authorizes actions for mandamus against state officers to be filed in the Court of Appeals, does not differ, insofar as specific reference to a power to enter a judgment directing the payment of money, from MCL 600.605; MSA 27A.605, establishing jurisdiction of the circuit court.

Helen V. Gallagher for the plaintiff.

Cindy M. Wilder, Maria G. Alfaro-Lopez, and *Debra A. Kowich* for the defendant.

Amici Curiae:

Mary Elizabeth Kurz for Michigan State University.

Richard C. Gould for Ferris State University.

Thomas Butcher for Grand Valley State University.

Richard Jones for Northern Michigan University.

James Kendall and *William C. Collins* for Saginaw Valley State University.

Daniel J. Bernard for Wayne State University.

PER CURIAM. The issue in this case concerns the jurisdiction of the Court of Claims. After the plaintiff filed a complaint in circuit court, the defendant moved for summary disposition on the ground that exclusive jurisdiction lies in the Court of Claims. The circuit court denied the motion and the Court of Appeals affirmed. We reverse the judgment of the Court of Appeals and the order of the circuit court, and we remand this case to the circuit court for entry of an order granting the defendant's motion for summary disposition.

I

In 1988, plaintiff Robert S. Silverman enrolled at the University of Michigan. Arriving from another state, he was charged the nonresident tuition rate.

In 1989, 1990, and 1991, the plaintiff asked the university to classify him as a Michigan resident for the purpose of calculating his tuition. These requests were denied.

A month after the 1991 denial, the plaintiff filed a complaint in circuit court. His complaint recited the many facts upon which he relied in his claim to be a Michigan resident. It then stated his demand for a declaratory judgment "that he is a Michigan Resident and entitled retroactively to a refund of the tuition difference he should have paid as a resident student if he had been correctly classified as a resident by the [university]." In a

separate count, the plaintiff alleged that the university's criteria for determining residency were vague and arbitrary, denying him equal protection and due process of law.

The concluding paragraph of the complaint contained the plaintiff's request for relief—he sought a declaratory judgment, a tuition refund, and attorney fees and costs.

The university moved for summary disposition on the ground that the circuit court lacked subject-matter jurisdiction. It argued that this case fell within the exclusive jurisdiction of the Court of Claims.

The university's motion was denied by the circuit court. The Court of Appeals affirmed.[1]

The university has applied to this Court for leave to appeal.[2]

II

The Legislature created the Court of Claims and established its jurisdiction. MCL 600.6401 *et seq.*; MSA 27A.6401 *et seq.* In general, the Court of Claims is the forum for claims in which money damages are sought from the State of Michigan or its constituent agencies.[3] In pertinent part, MCL 600.6419; MSA 27A.6419 provides:

(1) Except as provided in [MCL 600.6419a; MSA

[1] Unpublished opinion per curiam of the Court of Appeals, decided July 14, 1993 (Docket No. 143284).

[2] The university has filed a motion for immediate consideration, which we grant, and a motion for stay, which we deny as moot. Several other public universities have moved for permission to appear as amici curiae, and their motion is granted.

[3] The Court of Claims, which gathers in one forum money claims against the state, serves important purposes of public policy. For example, the Court of Claims is able to keep other branches of government informed with regard to the financial consequences of actions against the state. MCL 600.6458, 600.6461; MSA 27A.6458, 27A.6461.

27A.6419(1)] and [MCL 600.6440; MSA 27A.6440], the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. . . . The court has power and jurisdiction:

(a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.

(b) To hear and determine any claims or demands, liquidated or unliquidated, ex contractu or ex delicto, which may be pleaded by way of counterclaim on the part of the state or any department, commission, board, institution, arm, or agency of the state against any claimant who may bring an action in the court of claims. Any claim of the state or of any department, commission, board, institution, arm, or agency of the state may be pleaded by way of counterclaim in any action brought against the state, or any other department, commission, board, institution, arm, or agency of the state.

* * *

(4) This chapter shall not deprive the circuit court of this state of jurisdiction over actions brought by the taxpayer under the [General Sales Tax Act, MCL 205.51 to 205.78; MSA 7.521 to 7.549], or proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court, or proceedings to review findings as provided in the [Michigan Employment Security Act, MCL 421.1 to 421.72; MSA 17.501 to 17.569(22)], or any other similar proceedings expressly authorized by the statutes of this state in such case made and provided.

This quotation of MCL 600.6419; MSA 27A.6419 reflects amendments that were made by 1984 PA 212. Before 1984, Michigan appellate courts strug-

gled to resolve whether the Court of Claims could render a declaratory judgment or grant other relief that was ancillary to a claim against the state for money damages. See, e.g., *Taylor v Auditor General,* 360 Mich 146, 149-150; 103 NW2d 769 (1960); *Greenfield Construction Co, Inc v Dep't of State Hwys,* 402 Mich 172, 197-198, 226-227; 261 NW2d 718 (1978).

To end the uncertainty created by inconsistent decisions on that procedural point, the Legislature enacted 1984 PA 212, which also added MCL 600.6419a; MSA 27A.6419(1). The measure states:

> In addition to the powers and jurisdiction conferred upon the court of claims by [MCL 600.6419; MSA 27A.6419], the court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to [MCL 600.6419; MSA 27A.6419]. The jurisdiction conferred by this section is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by [MCL 600.605; MSA 27A.605].[4]

In denying the university's motion for summary disposition, the circuit court noted the 1984 enactment of MCL 600.6419a; MSA 27A.6419(1), but said that the statute "does not purport to deprive the circuit court of jurisdiction over a claim for equitable relief against the state merely because there is a money damage claim ancillary to the requested relief."

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[4] Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. [MCL 600.605; MSA 27A.605.]

In its opinion of affirmance, the Court of Appeals said that the relief sought by the plaintiff "is more in the nature of an equitable remedy than damages." It said that the plaintiff "is not seeking money damages, but rather a determination whether he was a resident of the state of Michigan and a return of tuition improperly charged." In support of its analysis, the Court of Appeals cited *Mooahesh v Dep't of Treasury,* 195 Mich App 551, 557-562; 492 NW2d 246 (1992).

III

There are few appellate decisions applying MCL 600.6419a; MSA 27A.6419(1). This Court has not decided a case in which the statute is at issue, and the Court of Appeals has issued a small number of decisions that do not shed significant light on the present dispute.[5]

In *Mooahesh,* however, the Court of Appeals was asked to apply the statute to resolve a similar controversy. Mr. Mooahesh was a 1987 Michigan lottery winner who brought a class action in circuit court, seeking relief from the Legislature's 1988 repeal of the statutory exemption of state lottery winnings from Michigan taxes.[6] Mr. Mooahesh and other members of the class had paid 1988 state income taxes under protest, so clearly he was seeking money damages from the State of Michigan.

[5] The Court of Appeals has held that a claim for money damages is within the exclusive jurisdiction of the Court of Claims. *Pomann, Callanan & Sofen, PC v Wayne Co Dep't of Social Services,* 166 Mich App 342, 346-347; 419 NW2d 787 (1988). Also, the Court of Claims lacks jurisdiction over a case that does not include a claim for money damages. *AuSable Manistee Action Council, Inc v Michigan,* 182 Mich App 596, 598-600; 452 NW2d 832 (1989), *77th District Judge v Michigan,* 175 Mich App 681, 698-700; 438 NW2d 333 (1989).

[6] The exemption, found in MCL 432.34; MSA 18.969(34), was repealed by 1988 PA 516.

The Court of Appeals examined the statutory language added by 1984 PA 212, and nevertheless concluded in *Mooahesh* that the circuit court had jurisdiction:

> The circuit court, upon due consideration, concluded that plaintiff was not seeking money damages, but rather a determination whether it was constitutional to take plaintiff's property and a return of property taken improperly. We believe that the circuit court's analysis was correct. The relief plaintiff seeks is more in the nature of an equitable remedy than damages. Plaintiff does not seek damages for an unrelated injury, but rather the return of money allegedly properly belonging to him. Thus, the Court of Claims did not have exclusive jurisdiction; the claims for equitable relief were properly brought in the circuit court. [195 Mich App 559.]

As explained in the next section of that opinion, we do not agree with the manner in which the *Mooahesh* panel analyzed MCL 600.6419a; MSA 27A.6419(1).

IV

The plaintiff in this case seeks money damages from a state board—he wants a partial refund of the tuition paid to the University of Michigan.[7] Plainly that claim, if it stood alone, would belong in the Court of Claims. MCL 600.6419a; MSA 27A.6419(1).

Before 1984, it was uncertain whether or how the jurisdiction of the Court of Claims would be affected by the presence in a case like this of other claims against the state for declaratory or equita-

[7] The plaintiff phrases his request for money damages as a request for a declaratory judgment that he is entitled to a refund. That does not alter the nature of the claim—a demand for money damages.

ble relief. By enacting 1984 PA 212, however, the Legislature authorized the Court of Claims to exercise jurisdiction over claims for declaratory and equitable relief against the state, provided that the plaintiff's suit also seeks money damages from the state or one of its agencies.

A complaint seeking only money damages against the state must be filed in the Court of Claims. A complaint seeking only equitable or declaratory relief must be filed in circuit court. A complaint seeking money damages from the state as well as equitable or declaratory relief against the state may only be filed in the Court of Claims, because that is the sole forum that is capable of deciding the whole case.[8] MCL 600.6419a; MSA 27A.6419(1).

As pleaded by the plaintiff, this case is within the exclusive jurisdiction of the Court of Claims.[9] We therefore reverse the judgment of the Court of Appeals and the order of the circuit court, and we remand this case to the circuit court for entry of an order granting the defendant's motion for summary disposition. MCR 7.302(F)(1).

CAVANAGH, C.J., and BRICKLEY, BOYLE, RILEY, GRIFFIN, and MALLETT, JJ., concurred.

LEVIN, J. (*dissenting*). I adhere to the view that

[8] Taken together, the language of MCL 600.605, 600.6419(4), and 600.6419a; MSA 27A.605, 27A.6419(4), and 27A.6419(1) would permit the interpretation that the money claim could be filed only in the Court of Claims, but that the claim for equitable or declaratory relief could be filed in either the Court of Claims or circuit court. We reject that interpretation as unsound and contrary to the intent of the Legislature, because it would mean splitting a single suit between two forums.

[9] Nothing in this opinion affects the right of a plaintiff to file separate actions in the Court of Claims and in the circuit court, where necessary to litigate claims against separate defendants. See MCL 600.6421; MSA 27A.6421. Neither does this opinion alter the rules governing joinder of claims arising from the same transaction. See MCR 2.203(A).

peremptory disposition, without plenary consideration, full briefing, oral argument, and an opportunity for the profession to file briefs as amici curiae, should be reserved for cases in which the law is settled and factual assessment is not required.[1] In the instant case, as indicated in the majority opinion, legal assessment is required. The majority acknowledges:

> This Court has not decided a case in which the

[1] *People v Wright,* 439 Mich 914, 914-915 (1992) (LEVIN, J., dissenting); *Roek v Chippewa Valley Bd of Ed,* 430 Mich 314, 322; 422 NW2d 680 (1988) (LEVIN, J., separate opinion); *Grames v Amerisure Ins Co,* 434 Mich 867, 868-875 (1990) (LEVIN, J., dissenting); *People v Little,* 434 Mich 752, 769-770; 456 NW2d 237 (1990) (LEVIN, J., dissenting); *People v Wrenn,* 434 Mich 885, 885-886 (1990) (LEVIN, J., dissenting); *Harkins v Northwest Activity Center, Inc,* 434 Mich 896, 899 (1990) (LEVIN, J., dissenting); *Dep't of Social Services v American Commercial Liability Ins Co,* 435 Mich 508, 515; 460 NW2d 194 (1990) (LEVIN, J., separate opinion); *Yahr v Garcia,* 436 Mich 872, 872-873 (1990) (LEVIN, J., dissenting); *Universal Underwriters Ins Co v Vallejo,* 436 Mich 873, 873-874 (1990) (LEVIN, J., dissenting); *People v Stephens,* 437 Mich 903, 903-910 (1991) (LEVIN, J., dissenting); *People v Berkey,* 437 Mich 40, 54; 467 NW2d 6 (1991) (LEVIN, J., dissenting); *Turner v Washtenaw Co Rd Comm,* 437 Mich 35, 38-39; 467 NW2d 4 (1991) (LEVIN, J., separate opinion); *Lepior v Venice Twp,* 437 Mich 955, 956-966 (1991) (LEVIN, J., dissenting); *Rochester Hills v Southeastern Oakland Co Resource Recovery Authority,* 440 Mich 852, 852-856 (1992) (LEVIN, J., dissenting); *In re Reinstatement of Eston (Grievance Administrator v Eston),* 440 Mich 1205, 1205-1207 (1992) (LEVIN, J., dissenting); *In re Reinstatement of Callanan,* 440 Mich 1207, 1207-1209 (1992) (LEVIN, J., dissenting); *McFadden v Monroe Civil Service Comm,* 440 Mich 890, 890-891 (1992) (LEVIN, J., dissenting); *Holly Twp v Dep't of Natural Resources (Holly Twp v Holly Disposal, Inc),* 440 Mich 891, 891-893 (1992) (LEVIN, J., dissenting); *Marzonie v ACIA,* 441 Mich 522, 535-539; 495 NW2d 788 (1992) (LEVIN, J., dissenting); *People v Waleed,* 441 Mich 902, 902-903 (1992) (LEVIN, J., dissenting); *People v Hardison,* 441 Mich 913, 914-916 (1993) (LEVIN, J., dissenting); *People v Justice,* 441 Mich 916, 917-919 (1993) (LEVIN, J., dissenting).

See *Schweiker v Hansen,* 450 US 785, 791; 101 S Ct 1468; 67 L Ed 2d 685 (1981) (Marshall, J., dissenting) ("A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error"); *Leis v Flynt,* 439 US 438, 457-458; 99 S Ct 698; 58 L Ed 2d 717 (1979) (Stevens, J., dissenting) ("Summary reversal 'should be reserved for palpably clear cases of . . . error.' *Eaton v Tulsa,* 415 US 697, 707 [94 S Ct 1228; 39 L Ed 2d 693 (1974)] [Rehnquist, J., dissenting]").

statute is at issue, and the Court of Appeals has issued a small number of decisions that do not shed significant light on the present dispute.[2]

I

The majority holds that a complaint seeking money damages from the state, as well as declaratory relief, may only be filed in the Court of Claims because that is the "sole forum that is capable of deciding the whole case."[3] The premise of the majority is thus that the circuit court does not have power to enter a declaratory judgment that a unit of state government is indebted to a citizen, and to order ancillary relief.

The majority ignores that the 1984 legislation,[4] granting concurrent jurisdiction to the Court of Claims of a demand for declaratory judgment, specifically provided that the jurisdiction then conferred "is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by section 605" of the Revised Judicature Act.[5]

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[2] *Ante,* p 215.

[3] *Ante,* p 217.

[4] 1984 PA 212, MCL 600.6419a; MSA 27A.6419(1).

[5] Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. [MCL 600.605; MSA 27A.605.]

Const 1963, art 6, § 13, provides:

The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior

II

The real issue in the instant case is whether the circuit court had jurisdiction to enter a judgment declaring Silverman to be a resident and entitled to a refund.

The 1984 amendments[6] neither added to nor detracted from the powers of the circuit court, and have nothing to do with the correct resolution of that issue.

The Court of Claims Act waives the state's sovereign immunity from suit, and speaks of claims ex contractu and ex delicto.

The per curiam opinion does not address Silverman's argument that in seeking a refund of money claimed to have been wrongfully exacted by the university, he is not seeking to maintain an action ex contractu or ex delicto, but rather is seeking a declaration of rights and the equitable remedy of restitution of money wrongfully exacted by the university as a precondition to his remaining a student at the university.

I question the accuracy of the majority's assumption that the circuit court did not have power, before the enactment of the Court of Claims Act, to order the refund of money wrong-

courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

[6] In addition to the powers and jurisdiction conferred upon the court of claims by section 6419, the court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to section 6419. *The jurisdiction conferred by this section is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by section 605.* [MCL 600.6419a; MSA 27A.6419(1). Emphasis added.]

fully exacted by a university as a precondition to attendance.

In *Kosa v State Treasurer,* 408 Mich 356; 292 NW2d 452 (1980), the plaintiff was permitted to maintain an action in the Court of Appeals seeking a writ of mandamus against the State Treasurer, the Legislature, and other state officials to compel the defendants to fund the Michigan Public School Employees' Retirement System.[7] The enabling legislation, authorizing such actions to be filed in the Court of Appeals,[8] does not differ, insofar as specific reference to a power to enter a judgment directing the payment of money, from RJA § 605 or the provision of the 1984 amendments stating that the jurisdiction conferred on the Court of Claims respecting declaratory judgments is not to be exclusive of the jurisdiction of the circuit court over demands therefor conferred by RJA § 605.

I would grant leave to appeal and dissent from the reversal of the judgment of the Court of Appeals.

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[7] Similarly, see *Musselman v Governor,* 200 Mich App 656; 505 NW2d 288 (1993), lv gtd 445 Mich 881 (1994).

[8] An action for mandamus against a state officer shall be commenced in the court of appeals, or in the circuit court in the county in which venue is proper or in Ingham county, at the option of the party commencing the action. [MCL 600.4401(1); MSA 27A.4401(1).]

An action for mandamus against a state officer may be brought in the Court of Appeals or the circuit court. [MCR 3.305(A)(1).]

BROWN v YOUSIF

Docket No. 96311. Argued April 5, 1994 (Calendar No. 4). Decided May 31, 1994.

James J. Brown brought an action in the Macomb Circuit Court against Fakhri J. Yousif, Julius Prang, and others, seeking, inter alia, to foreclose on a specially designated distributor liquor license against Yousif pursuant to a security agreement and reassignment clause. Brown had sold his business to Prang Enterprises, Incorporated, including specially designated distributor (SDD) and specially designated merchant (SDM) liquor licenses. Prang gave Brown a security agreement with regard to fixtures, furniture, and equipment, as well as a reassignment of these items, including the liquor licenses, subject to approval by the Liquor Control Commission. Brown filed a financing statement covering all the trade fixtures, furniture, and equipment, but did not mention the liquor licenses or a like term such as general intangibles. Prang then sold the SDD license to Yousif, who had actual knowledge of Brown's security interest before the sale, despite Brown's refusal to consent, and transferred the SDM license to David Marriot by way of a promissory note. When Marriot filed for bankruptcy and defaulted in his payments to Prang, Prang/Marriot stopped making payments to Brown, causing Brown to file suit against Yousif and others, with the instant appeal addressing only the suit against Yousif. The court, Robert Chrzanowski, J., granted summary disposition for Yousif on the basis of Rule 19 of the Liquor Control Commission, which prohibits the creation of a security interest in a liquor license. The Court of Appeals, SHEPHERD, P.J., and BRENNAN and L. P. BORRELLO, JJ., reversed, reasoning that the commission rule could not circumvent a validly perfected security interest under article 9 of the Uniform Commercial Code (Docket No. 135903). Yousif appeals.

In a unanimous opinion by Justice RILEY, the Supreme Court *held:*

Rule 19 of the Liquor Control Commission, which prohibits the creation of a security interest in a liquor license, is ineffec-

REFERENCES

Am Jur 2d, Secured Transactions § 113.

Security interests in liquor licenses. 56 ALR4th 1131.

tive with regard to a valid security interest under article 9 of the Uniform Commercial Code.

1. The security agreement between Prang and Brown created an effective security interest in the SDD license pursuant to MCL 440.9203(1); MSA 19.9203(1). While perfection is generally needed to enforce a security agreement covering general intangibles against other secured creditors, it is not needed against transferees who either did not give value or had knowledge of the security interest. In this case, Yousif admitted that the liquor license is a general intangible and that he is not a secured party. However, Yousif is a transferee who gave value for the license and had actual knowledge of the security interest. Therefore, in accordance with § 9301(1)(d) of the UCC, the plaintiff has an enforceable security interest against the defendant, despite his lack of proper perfection.

2. The Liquor Control Commission has exclusive authority to control liquor trafficking, but this authority does not allow it to invalidate by administrative rule a portion of a law of general applicability such as article 9 of the UCC. The exceptions to article 9 do not include a liquor license and do not exclude rules set by the commission or liquor trafficking in general. Thus, the plaintiff has an enforceable security interest in the SDD liquor license and may foreclose on this interest and seek reassignment in accordance with applicable law, subject to approval by the commission.

Affirmed in part, vacated in part, and remanded.

198 Mich App 667; 499 NW2d 446 (1993) affirmed in part and vacated in part.

Stegenga v Dep't of Treasury, 179 Mich App 307; 445 NW2d 495 (1989), overruled.

SECURED TRANSACTIONS — UNIFORM COMMERCIAL CODE — LIQUOR LICENSES — LIQUOR CONTROL COMMISSION RULES.

Rule 19 of the Liquor Control Commission, which prohibits the creation of a security interest in a liquor license, is ineffective with regard to a valid security interest under article 9 of the Uniform Commercial Code (MCL 440.9203[1]; MSA 19.9203[1], 1979 AC, R 436.1119[3], 1984 AACS, R 436.1119[3], 1987 AACS, R 436.1119[2]).

Stauch, Arabo, Dickow & Ward, P.C. (by *Mark B. Dickow*), for the plaintiff.

Norman C. Farhat & Associates, P.C. (by *Norman C. Farhat*), for the defendant.

RILEY, J. In this case, we must decide whether a person can have an enforceable security interest in a liquor license despite a Liquor Control Commission rule prohibiting the creation of a security interest in a liquor license. We hold the LCC rule ineffective with regard to a valid security interest under article 9 of the Uniform Commercial Code and therefore affirm the Court of Appeals decision.

I

In 1982, plaintiff James J. Brown sold his business, Lean and Tender Butcher Shop, to Prang Enterprise, Incorporated. Included in the sale was a specially designated distributor (SDD) and a specially designated merchant (SDM) liquor license. Prang paid part of the purchase price in cash and financed the remaining portion with a promissory note. However, in order to secure the payment of the note in the event of default, Prang gave plaintiff a security agreement with regard to fixtures, furniture, and equipment, as well as a reassignment of these items, including reassignment of the SDM and SDD liquor licenses, subject to approval by the LCC. Plaintiff then filed a financing statement in the appropriate offices covering "[a]ll the trade fixtures, furniture and equipment, . . . including all the after acquired goods and chattels, which replace existing equipment only." However, it did not mention the liquor licenses or a like term, i.e., "general intangibles."

Subsequently, in 1984, Prang entered into negotiations with defendant Fakhri J. Yousif for the sale of the SDD liquor license. During this time, defendant had actual knowledge of the security interest as illustrated by defendant's attempt to obtain plaintiff's consent to the transfer before the

sale.[1] Despite plaintiff's refusal to consent to the transfer, defendant purchased the license and transferred it to his store.

In 1986, Prang transferred the remaining license, the SDM, to a David Marriot by way of a promissory note. However, when Marriot filed for bankruptcy in 1987 and defaulted in his payments to Prang, Prang/Marriot stopped making payments to plaintiff. This gave rise to plaintiff's suit against Prang and defendant. With regard to Prang, plaintiff alleged six[2] theories of liability, most of which related to their contract. However, plaintiff eventually settled with Prang after accepting a mediated judgment for $25,000. On the other hand, plaintiff's suit against defendant sought to foreclose on the SDD liquor license pursuant to the security agreement and reassignment clause. In response, defendant moved for summary disposition relying on plaintiff's failure to comply with the statute of frauds, the statute of limitations, and, primarily, the LCC's rule (Rule 19) which stated:

> A security agreement between a buyer and a seller of a licensed retail business, or between a debtor and a secured party, *shall not include the license* or alcoholic liquor. [1979 AC, R 436.1119(3). Emphasis added.][3]

[1] Defendant did not plead or deny knowledge of the security interest.

[2] (1) breach of contract; (2) piercing the corporate veil; (3) fraudulent misrepresentation; (4) innocent misrepresentation; (5) silent fraud; and (6) conspiracy.

[3] Shortly after the above transfer between Prang and defendant, the rule was amended to state:

> A person shall not include a license in a security agreement and shall not list a license in a financing statement filed pursuant to Act No. 100 of the Public Acts of 1913, as amended, being § 440.1101 *et seq.* of the Michigan Compiled Laws [MSA 19.1101 *et seq.*], and being known as the uniform commercial code. [1984 AACS, R 436.1119(3).]

Relying on Rule 19, the trial judge granted defendant's motion for summary disposition. However, he rejected defendant's statute of frauds and statute of limitations arguments in addition to stating that the reassignment provision might have been enforceable between plaintiff and Prang, but not between plaintiff and defendant.

On appeal, the Court of Appeals reversed, reasoning that the LCC rule could not circumvent an article 9 security interest, that it held was validly perfected in the liquor license. Moreover, the Court relied on various bankruptcy court decisions in holding that the LCC does not have authority to circumvent the UCC. Alternatively, however, the Court held that plaintiff was entitled to relief by way of an equitable lien on the SDD license, which came directly from the reassignment clause of which defendant had knowledge. 198 Mich App 667; 499 NW2d 446 (1993).

We granted leave to appeal.[4]

II

Before turning to the enforceability of Rule 19, we find it necessary to clarify plaintiff's right and priority to the liquor license under article 9. We begin by noting that defendant only attacks the perfection of this interest, i.e., plaintiff did not

In 1987, however, the rule was changed again and now states:

> A retail licensee shall not include alcoholic liquor in a security agreement or in a financing statement filed pursuant to Act No. 174 of the Public Acts of 1962, as amended, being § 440.1101 *et seq.* of the Michigan Compiled Laws [MSA 19.1101 *et seq.*], and known as the uniform commercial code. [1987 AACS, R 436.1119(2).]

Regardless of these amendments, at the time of default, the rule prohibited security interests in liquor licenses.

[4] 444 Mich 913 (1994).

attach to the financing statement the reassignment agreement between plaintiff and Prang and the financing statement itself did not list the license or a general intangible as a collateral.[5] Defendant does not, nor did he below, contend that plaintiff did not have a valid security interest via the security agreement signed by Prang.[6] Nonetheless, we find that the security agreement created an effective security interest in the liquor license pursuant to MCL 440.9203(1); MSA 19.9203(1).[7]

Having found a valid security interest in the liquor license, we turn to whether plaintiff was required to properly file a financing statement that either listed the license as collateral or listed the term general intangibles in order to enforce this

[5] Plaintiff contends that defendant is raising this issue for the first time on appeal. Indeed, a review of the record may support this contention, except for one statement in oral argument in the lower court: "The UCC file indicates that the file is only for all the trade fixtures, furniture and equipment of Lean and Tender Butcher Shop. . . . [T]he prime allegation of the Plaintiff that he had a valid lien on the liquor license and the UCC filing indicates that that is not the case." In light of our ultimate resolution of this issue, we find it unnecessary to premise our ruling on the lack of preservation. Similarly, we find it unnecessary to rule on defendant's argument, made for the first time in oral argument before this Court, that plaintiff failed to file a continuation statement pursuant to MCL 440.9403; MSA 19.9403.

[6] Indeed, at oral argument, defense counsel admitted attacking only the validity of the UCC filing, i.e., that the UCC filing did not list the liquor license or the term general intangible. Therefore, he argued, Brown did not properly perfect his security interest and accordingly cannot enforce this security interest against Yousif.

[7] To satisfy § 9203(1), there must: (1) be a written agreement signed by the debtor; (2) that adequately describes the collateral; (3) the secured party must give value; and (4) the debtor must acquire rights in the collateral. The facts indicate that (1), (3), and (4) are satisfied. Moreover, the second requirement is satisfied by the security agreement's description of the license, albeit in the reassignment paragraph. Cf. *In re Boufsko, Inc,* 44 Bankr 98 (ED Mich, 1984). Indeed, we note that defendant does not plead that he was misled after reading it, or that he relied on this allegedly misleading agreement. 2 White & Summers, Uniform Commercial Code (3d ed), § 24-3, p 297. Instead, defendant contacted plaintiff regarding his consent to the transfer, knowing that plaintiff had a valid security interest in the license.

agreement against defendant. While perfection is generally needed to enforce a security agreement covering general intangibles against other secured creditors, it is not needed against transferees who either did not give value or had knowledge[8] of the security interest.[9] See Felsenfeld, *Knowledge as a factor in determining priorities under the Uniform Commercial Code,* 42 NYU L R 246 (1967). MCL 440.9301(1)(d); MSA 19.9301(1)(d) provides:

> Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . . [i]n the case of accounts and *general intangibles,* a person who is not a secured party and who is a transferee to the extent that the person gives value without knowledge of the security interest and before it is perfected. [Emphasis added.][10]

In the instant case, it is undisputed that a liquor

[8] MCL 440.1201(25); MSA 19.1201(25).

[9] Cf. *In re Komfo Products Corp,* 247 F Supp 229, 235 (ED Pa, 1965); *Resolution Trust Corp v Real Estate Investments, Inc,* 17 Kan App xxii; 831 P2d 1344; 1992 Kan App LEXIS 434 (1992) (decision without published opinion).

[10] The applicability of § 9301(1)(d) reflects a rather unique situation and, accordingly, is rarely interpreted by the courts. It determines the enforceability of a security interest on the basis of knowledge rather than perfection. As in the instant case, it is rather unusual that a person will have actual knowledge of a security interest, absent the filing of a financing statement. Further, it is even more unusual that this issue arises in a nonbankruptcy setting. Usually, the issue of knowledge arises when a person holding an unperfected security interest is attempting to defeat the bankruptcy trustee under § 9301(1)(b). However, in bankruptcy, courts have interpreted § 9301(1)(b) to require that *all* creditors must be without knowledge of the security interest. See *In re Komfo Products Corp,* n 9 *supra* at 234-236. In the instant case, neither party is in bankruptcy; therefore, it is unnecessary to determine whether all other creditors had knowledge. Instead, we apply § 9301(1)(d) in a nonbankruptcy setting, involving a transferee as opposed to a creditor, with the dispositive inquiry whether defendant had knowledge of the security interest. Accordingly, applying the plain and unambiguous language of § 9301(1)(d), we conclude that the requirements are met and that defendant had actual knowledge of the security interest.

license is a general intangible;[11] it certainly is personal property and something of value as evidenced by the sale of the license for $48,342.98. See, e.g., *Bundo v Walled Lake,* 395 Mich 679; 238 NW2d 154 (1976); *Paramount Finance Co v United States,* 379 F2d 543 (CA 6, 1967). Indeed, defense counsel admitted at oral argument that a liquor license is a general intangible. Moreover, defendant is not a secured party, but is a transferee because of the transfer from Prang (transferor) to defendant (transferee).[12] Further, despite the giving of value, defendant had actual knowledge of the security interest as evidenced by his contact with plaintiff before the transfer.[13] Therefore, in accordance with the plain and unambiguous terms of § 9301(1)(d), plaintiff has an enforceable security interest against defendant despite his lack of proper perfection.[14]

The question remains, however, whether a valid security interest under article 9 can be enforced in light of the LCC rule prohibiting a lien on a liquor license.

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[11] "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money.

[12] See, generally, *Petron Trading Co v Hydrocarbon Trading & Transport Co, Inc,* 663 F Supp 1153, 1161 (ED Pa, 1986).

[13] We note that defendant never challenged plaintiff's allegation that defendant took the license with knowledge of plaintiff's security interest, despite numerous opportunities to do so.

[14] This conclusion is consistent with the policy behind filing a financing statement—"The primary function of the description in 9-402 [financing statement] is to put third parties on notice" of a possible security interest. White & Summers, n 7 *supra,* § 24-4, pp 305-306. In the instant case, defendant already had notice of the security agreement, and therefore § 9301(1)(d) gives plaintiff priority over this defendant: "[T]he existence of knowledge as a factor is clearly interjected [in § 9301(1)(d)], and it seems appropriate as a matter of principle: If the transferees knew of the lien before they acquired the assets, it is reasonable that they be subject to it." Felsenfeld, *supra* at 257.

III

While several bankruptcy courts[15] in Michigan have addressed this issue, it is a question of first impression before this Court. Therefore, we begin by analyzing the LCC's authority which is derived from the Michigan Constitution and statute. Const 1963, art 4, § 40 provides in part:

> Except as prohibited by this section, (t)he legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including retail sales thereof. The legislature may provide for an excise tax on such sales. Neither the legislature nor the commission may authorize the manufacture or

[15] See, generally, 56 ALR4th 1131, § 11, pp 1143-1145. The first line of cases simply holds that an article 9 security interest may be taken in a liquor license. See *In re Ratcliff Enterprises,* 44 Bankr 778 (ED Mich, 1984) (the court refused to consider the validity of Rule 19 because the facts of the case did not necessitate such a ruling); *In re McCormick,* 26 Bankr 869 (ED Mich, 1983) (before formal adoption of Rule 19); *Underground Flint, Inc v Viro, Inc,* 80 Bankr 87 (ED Mich, 1982) (before formal adoption of Rule 19); *In re Matto's, Inc,* 9 Bankr 89 (ED Mich, 1981) (before formal adoption of Rule 19). See also *In re Boufsko,* n 7 *supra; In re Tittabawassee Investment Co v Hidden Hollow Golf Course, Inc,* 831 F2d 104 (CA 6, 1987); *In re American Way Food Service Corp v Kempf,* 48 Bankr 79 (WD Mich, 1985) (before formal adoption). At least one court has held that, in bankruptcy proceedings, Rule 19 must give way to the priority rules in the UCC. See *Andriacchi's, Inc v Pike,* 62 Bankr 765 (WD Mich, 1986). See also *In re Falbe,* 83 Bankr 436 (ED Mich, 1988) (a federal tax lien takes priority over unperfected security interest in liquor license). On the other hand, one bankruptcy court has held that Rule 19 is superior to article 9 and thereby precludes the taking of a security interest in a liquor license. *In re Rudy's Inc,* 23 Bankr 1 (ED Mich, 1981) (we note that the court erroneously referred to Rule 19 as a statute in reaching its result). Finally, some courts have avoided Rule 19's application by premising their rulings on their equitable powers in bankruptcy, or more specifically, an equitable lien theory: it would be unfair to deny this interest in light of Rule 19 which specifically prohibited an article 9 interest. See *In re Moisson,* 51 Bankr 227 (ED Mich, 1985); *In re Gullifor,* 47 Bankr 450 (ED Mich, 1985); *In re Bernie's, Inc,* 44 Bankr 296 (ED Mich, 1983); *In re Beefeaters, Inc,* 27 Bankr 848 (WD Mich, 1983) (before formal adoption of Rule 19).

> sale of alcoholic beverages in any county in which a majority of the electors voting thereon shall prohibit the same.

Moreover, MCL 436.1(2); MSA 18.971(2) provides in part:

> Except as otherwise provided in this act, the commission shall have the sole right, power, and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within this state, including the manufacture, importation, possession, transportation and sale thereof.

Clearly, these provisions give the LCC exclusive authority to control liquor trafficking. However, the question in this case is whether the LCC has the authority to prohibit the creation of a security interest governed by article 9 of the UCC. Despite the LCC's plenary authority to regulate liquor trafficking, we are persuaded that this authority does not allow the LCC to invalidate by *administrative rule* a portion of another duly enacted *law,* i.e., the UCC. Indeed, the UCC was intended as a law of general applicability that cannot be impliedly repealed by statute, let alone by administrative rule:

> This act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided. [MCL 440.1104; MSA 19.1104.]

Moreover, the clear language of article 9 indicates that the Legislature intended the law to be of general applicability, covering all forms of security interests in personal property, regardless of its form, except for those provided in MCL 440.9104;

MSA 19.9104.[16] Indeed, the exceptions to article 9 as set forth in § 9104 *do not include* a liquor license and *do not exclude* rules set by the LCC. Moreover, § 9203(2), addressing the enforceability of a security interest and the applicability of other laws, does not specifically subject article 9 to laws affecting the LCC or liquor trafficking in general. Therefore, we conclude that article 9 grants plaintiff an enforceable security interest in this liquor license and that Rule 19 must give way to these duly enacted provisions of article 9, a law of general applicability.[17] Accordingly, we hold that plaintiff has an enforceable security interest in this SDD liquor license and may foreclose on this interest and seek reassignment in accordance with applicable law, subject to approval by the LCC.[18]

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[16] MCL 440.9102; MSA 19.9102 provides:

> (1) Except as otherwise provided in section 9104 on excluded transactions, this article applies;
>
> (a) To any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also
>
> (b) To any sale of accounts or chattel paper.

[17] To the extent that *Stegenga v Dep't of Treasury*, 179 Mich App 307, 311; 445 NW2d 495 (1989), upheld that validity of Rule 19, we overrule that decision. In *Stegenga*, the Court did not fully consider the validity of Rule 19, primarily because of its conclusion that "the government is estopped from denying the validity of its own rule where to hold the rule invalid would work to the detriment of a private party." *Id.* at 312. While in the instant case we are dealing with two private parties, we have the opportunity to directly consider the validity of Rule 19, and after reviewing the LCC's powers along with the legislative intent behind the UCC, we conclude that Rule 19 is invalid in its attempt to circumvent the provisions of article 9.

[18] While the LCC has the ultimate power to approve the reassignment of this license to plaintiff, the parties have not argued or addressed the effect of a possible refusal to permit the reassignment of this license to plaintiff. Accordingly, we do not address the merits of any future LCC decision or whether this implicates any right to proceeds in the liquor license.

IV

In light of our holding that plaintiff has an enforceable security interest under article 9 and our conclusion that Rule 19 must give way to these provisions, we do not find it necessary to consider plaintiff's alternative, equitable lien theory. Accordingly, we vacate the Court of Appeals decision with regard to this equitable lien theory, but affirm its decision, albeit on different grounds, regarding plaintiff's enforceable security interest under article 9.[19]

V

We hold that § 9301(1)(d) gives plaintiff an enforceable security interest against this defendant because defendant purchased the collateral with knowledge of plaintiff's security interest. Moreover, we hold Rule 19 invalid to the extent that it conflicts with the provisions of article 9, a law of general applicability. Accordingly, we remand to the trial court for proceedings consistent with this opinion.

CAVANAGH, C.J., and LEVIN, BRICKLEY, BOYLE, GRIFFIN, and MALLETT, JJ., concurred with RILEY, J.

[19] Moreover, our decision renders defendant's statute of frauds argument moot because "a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors." MCL 440.9201; MSA 19.9201. See also § 9301(1)(d).

NEDERHOOD v CADILLAC MALLEABLE IRON COMPANY
ZIMMERMAN v CADILLAC MALLEABLE IRON COMPANY

Docket Nos. 94110, 94299. Argued October 5, 1993 (Calendar Nos. 3-4). Decided May 31, 1994. Rehearing denied in *Nederhood, post,* 1237.

Roger Nederhood and James Zimmerman separately sought worker's compensation benefits for disability that allegedly arose out of and in the course of their employment with Cadillac Malleable Iron Company. A hearing referee found the plaintiffs to have been partially disabled at the commencement of a strike between Malleable and their union, but denied them benefits during the period of their participation in the strike. The referee found, however, that wage loss benefits recommenced when an offer by the union to return to work terminated any unreasonable refusal by the plaintiffs to perform favored work. The referee additionally found that Zimmerman became totally disabled on February 4, 1982, as a result of a supervening heart condition unrelated to his favored work. In separate proceedings, the Worker's Compensation Appeal Board affirmed the referee's findings with respect to dates of injury and the cessation of benefits during the strike, but reversed with regard to the restoration of wage loss benefits after the union's offer, finding no showing that plaintiffs personally had offered to return to work. The Court of Appeals, HOOD, P.J., and CONNOR and RICHARD KAUFMAN, JJ., affirmed in an unpublished opinion per curiam. In *Zimmerman,* it held that the WCAB had not applied erroneous legal reasoning in determining that the plaintiff's refusal to perform favored work while on strike, and not the actions of the union in striking, provided a basis for denying benefits, and that such forfeiture continued for the duration of the plaintiff's unwillingness to return to work. It additionally found that Zimmerman's supervening heart attack did not render him eligible for benefits, because he failed to communicate his willingness to return to work before the heart attack (Docket No. 134288). In *Nederhood,* the Court held that the WCAB had correctly applied the law in determining that the plaintiff's participation in the strike precluded collection of work loss benefits during the pendency of the strike and that he had not personally offered

to return to favored work (Docket No. 134290). The plaintiffs appeal.

In separate opinions, the Supreme Court *held:*

A voluntary cessation of favored work per se does not result in a permanent forfeiture of wage loss benefits. In *Zimmerman,* the occurrence of the plaintiff's heart attack while on strike does not preclude the recovery of wage loss benefits.

Generally, a refusal of suitable work suspends benefits for the duration of the refusal. However, a permanent forfeiture of benefits is not in accord with a liberal construction of the Worker's Disability Compensation Act.

Nederhood reversed and remanded for further proceedings.

Zimmerman reversed.

Justice BRICKLEY additionally stated that a voluntary cessation of favored work by a striking employee should result in a suspension of wage loss benefits. Neither a conditional offer to return by a worker's union nor the hiring of permanent replacement workers by the employer should operate to automatically restore benefits to the striking employee. However, benefits should be restored once the employee expresses a good-faith willingness to return to favored work, provided such willingness is communicated to the employer within a reasonable period following the cessation of favored work. The resumption of such an employee's right to benefits upon the occasion of a supervening heart attack that renders the employee totally disabled should depend on the certainty and extent of the injury, the length of the refusal to perform favored work before the injury, and the lack of a causal nexus between the refusal of favored work and the resulting heart attack.

Justice BOYLE, joined by Chief Justice CAVANAGH and Justice MALLETT, concurring in part and dissenting in part, additionally stated that the hiring of permanent replacement workers, in fact and in law, may work to withdraw an employer's offer of favored work. An employee's right to benefits is suspended only as long as there is a voluntary withholding of services. If the employer has revoked the offer of favored work with the hiring of replacement workers, then the refusal to work is no longer due to the strike.

The issue of the adoption of a reasonable time limitation on an employee's ability to reestablish the right to favored work is not properly before the Court and its disposition is unwarranted. However, only because three members of the Court propose the adoption of such a limitation is it necessary to oppose this adoption. The reasonable time limitation would present employers with a windfall by relieving them of the

obligation to pay owed benefits or offer favored work without policy justification.

Justice RILEY, joined by Justice GRIFFIN, concurring in part and dissenting in part, additionally stated that a striking favored worker fully disabled by a supervening event is not entitled to a reinstatement of benefits without showing an intention to have returned to work but for the supervening event.

A favored worker who refuses to perform favored work because of participation in a strike forfeits the right to compensation. The worker only becomes eligible to have benefits restored when a good-faith willingness to resume favored work is tendered. Reasonableness must apply to both parties. A favored worker's unreasonable delay in accepting an offer of favored work relieves the employer of liability. In *Nederhood,* the plaintiff failed to present a prima facie case and appropriately was denied relief.

A supervening event causing cessation of an employee's favored work will not terminate the right to benefits as long as the event is not under the employee's control. While such an event does not preclude payment of compensation, the favored work doctrine does not require compensation to be automatically revived upon its happening. A claimant must show that favored work already was being performed and that a supervening independent event precluded its continuance. In *Zimmerman,* the plaintiff was not entitled to benefits. He was not performing favored work when he suffered the heart attack, but was voluntarily participating in a strike, and he failed to present evidence that he would have returned to work despite the strike and the decertification of the union. His disability is irrelevant to his ability to receive benefits because he would have been ineligible for such benefits if he had not had the heart attack.

Justice LEVIN, writing separately, joined in reversal in *Zimmerman,* and would remand with the direction that benefits should be awarded to Nederhood, but joined in remand to provide a fourth vote for a disposition that may result in the award of compensation.

MCL 418.301(5)(a); MSA 17.237(301)(5)(a), effective January 1, 1982, providing that a disabled employee who refuses a bona fide offer of reasonable employment from a previous employer, another employer, or through the Employment Security Commission without good and reasonable cause is no longer entitled to any wage loss benefits during the period of such refusal, is

inconsistent with the view that such a refusal results in permanent forfeiture of worker's compensation benefits.

That statutory provision is also inconsistent with the view that because it would be unreasonable to expect the employer to keep such positions open beyond the point that it announced the jobs would be filled by permanent replacements, Nederhood may not recover benefits. While the needs of the employer may justify the employer in not keeping an offer open beyond a reasonable time, the need of the employee to participate in a strike may justify a refusal to work during a strike. The disabled worker is nevertheless disabled and can properly be denied benefits only during the period of a refusal, without good and reasonable cause, of a bona fide offer of reasonable employment from a previous employer, another employer, or through the MESC. The period of such a refusal is a question of fact, and the burden of showing refusal of work should be borne by the employer because the offer of favored work is in mitigation of damages.

Bott & Spencer, P.C. (by *Timothy J. Bott*), for the plaintiff.

Russell & Carowitz (by *Fanny L. Vail*) for the defendant.

BRICKLEY, J. We granted leave in these cases to determine whether the Worker's Compensation Appeal Board and the Court of Appeals erred in concluding that the plaintiffs-appellants were disqualified from receiving worker's compensation benefits because they left favored work to participate in a strike that resulted in the use of permanent replacements. In deciding this issue, we must determine whether the hiring of permanent replacement workers obligates an employer to renew its offer of favored work to its injured employees, or whether the employee must take action to reinstate benefits. In the case of plaintiff-appellant James Zimmerman, who became fully disabled after the strike had begun, we must determine whether such total disability operates to revive his right to benefits.

We conclude that where a striking favored worker has voluntarily ceased performance of favored work, benefits should be restored once the favored worker expresses a good-faith willingness to return to favored work, provided this willingness is communicated to the employer within a reasonable time after the cessation of favored work. Such benefits should not automatically be restored upon the hiring of permanent replacement workers by the employer. Additionally, we would hold that plaintiff Zimmerman's supervening heart attack, which rendered him totally disabled, revived his right to benefits.

I

A

This dispute arose out of a labor strike between defendant-appellee Cadillac Malleable Iron Company and Local 784 of the UAW, of which plaintiffs-appellants, James Zimmerman and Roger Nederhood, were members. On September 30, 1981, the collective bargaining agreement between Cadillac and the union expired, and the union struck on October 1, 1981, when it became apparent that a new agreement was not forthcoming. At this time, approximately thirty-five proposals for a new contract were unresolved. Cadillac was demanding twenty-four additional language changes in the contract and the union was demanding a $2 per month increase in the employer's pension contribution for current retirees.

On October 7, 1981, Cadillac modified its September 30 proposal and submitted it to the union. These modifications included an extension of seniority retention during layoff to thirty-six

months.[1] This offer was rejected by the union and was withdrawn by Cadillac by October 22, 1981.

On January 12, 1982, Cadillac officially informed the union that it would be hiring permanent replacement workers. At a January 18, 1982, bargaining session, the union attempted to accept the October 7, 1981, proposal, and offered to accept a dollar an hour cut in wages. Cadillac informed the union representative that the October 7 proposal had been withdrawn, and insisted on limiting wages to $6 per hour with no cost-of-living adjustment, and on limiting the number of plant classifications. The union representative terminated this meeting.

As of March, 1983, forty-one or forty-two replacement workers had been hired. At the time of the strike, approximately eighty workers had been employed by Cadillac. The record is silent with regard to whether plaintiffs' favored work positions had been given to permanent replacements.

B

A hearing referee found both Zimmerman and Nederhood to have been partially disabled at the commencement of the strike, but determined that plaintiffs were not entitled to wage loss benefits for the period between October 1, 1981, and January 18, 1982, because of their participation in a strike.[2] The referee found, however, that wage loss benefits recommenced on January 18, 1982, determining that the union's "offer to return" to

[1] The September 30, 1981, proposal contained a provision allowing seniority retention during layoff for only twenty-four months. The provision in the expired collective bargaining agreement had provided for retention of seniority during layoff for a period of time equal to the length of employment with the company.

[2] Although these cases were not consolidated below, both cases were heard by the same referee and were reviewed by the same panel of the Court of Appeals.

work on this date terminated any unreasonable refusal by plaintiffs to perform favored work.

Additionally, the hearing referee found that on February 4, 1982, plaintiff Zimmerman became totally disabled as a result of his supervening, non-work-related heart condition.

The WCAB affirmed the hearing referee's findings with respect to injury dates and the cessation of benefits during the strike, but reversed the referee's determination that plaintiffs were entitled to restoration of wage loss benefits as of January 18, 1982, finding instead that there was no showing that plaintiffs themselves had offered to return to work at any time before the WCAB hearing.[3]

Plaintiffs' applications for leave to appeal to the Court of Appeals were denied for lack of merit, and we remanded for consideration as on leave granted. The Court of Appeals affirmed the decisions of the WCAB. In *Zimmerman,* it held that the WCAB had not applied erroneous legal reasoning in determining that plaintiff's *individual* refusal to perform favored work while his union was on strike, and *not* the actions of the union in striking, provided a basis for denying benefits, and that such forfeiture continued for the duration of plaintiff's unwillingness to return to work. In *Nederhood,* it held that the WCAB had correctly applied the law in determining that Nederhood's participation in the strike precluded him from collecting wage loss benefits during the pendency of the strike. The Court of Appeals also found that the record adequately supported the board's holding that plaintiffs had not personally offered to return to favored work, and that the union's January 18, 1982, "offer" was merely another proposal in a series of negotiations.

[3] 1989 WCABO 239; 1989 WCABO 471.

Additionally, in *Zimmerman,* it found that plaintiff's supervening heart attack did not render him eligible for benefits because he had failed to communicate his willingness to return to work before his supervening heart attack, thus failing to meet his burden of establishing his entitlement to benefits.

On March 16, 1993, we granted leave to appeal, ordering that *Zimmerman* and *Nederhood* be submitted and argued together. 442 Mich 867.

II

As a preliminary matter, we note that the parties do not dispute that the plaintiffs were performing favored work at the time of the strike.[4]

Additionally, the parties do not contest that before the union's offer to return to work on December 4, 1981, under a contract incorporating prestrike terms, plaintiffs were disqualified from receiving benefits on the basis of their voluntary cessation of favored work stemming from their participation in a strike.[5] We must now decide the duration of this disqualification.

---

[4] Favored work has been defined as

> work offered by the employer to a disabled worker that was limited or restricted so as to be within the worker's capacity to perform. [Welch, *Worker's Compensation in Michigan: Law & Practice* (rev ed), § 10.11, p 10-13.]

Cadillac accommodated Zimmerman's limitations by providing him work in the core room, where the maximum weight to be lifted was five pounds. Nederhood's limitations were accommodated by assigning him unskilled common labor to perform.

[5] See, e.g., *Bower v Whitehall Leather Co,* 412 Mich 172, 188; 312 NW2d 640 (1981) ("interruptions of work caused by voluntary actions of the employee, such as abandonment of work to participate in a strike . . . result[ ] in a forfeiture of benefits"); *Pigue v General Motors Corp,* 317 Mich 311; 26 NW2d 900 (1947) (an employee forfeits the right to benefits for the period in which he refused favored work that he could perform).

Although *Bower* focused on the actions of the employee, we see no

The general rule is that a refusal of suitable work suspends benefits for the duration of the refusal.[6] Although this Court has never expressly decided the question,[7] in *Bower v Whitehall Leather Co,* 412 Mich 172; 312 NW2d 640 (1981), we utilized a case that supports this rule, and our decision in *Pigue v General Motors Corp,* 317 Mich 311; 26 NW2d 900 (1947), seems also to imply a suspension of benefits instead of a permanent forfeiture.

A

The *Bower* Court's citation, with apparent approval, of *PPG Industries, Inc v Aites,* 7 Pa Commw Ct 588; 300 A2d 902 (1973), supports the conclusion that *Bower* envisioned only a temporary loss of benefits. In *PPG Industries, Inc,* the

reason to distinguish between the actions of the union and those of the employees because plaintiffs' unwillingness to work is evidenced irrespective of whether we focus our analysis on the actions of the employee or those of the union.

[6] See 1C Larson, Workmen's Compensation, § 57.66(c), pp 10-492.75 to 10-492.76.

[7] Note that in the area of discharges based on moral turpitude, this Court has spoken, seemingly concluding that a permanent forfeiture results. In *Todd v Hudson Motor Car Co,* 328 Mich 283; 43 NW2d 854 (1950), the partially disabled employee had been terminated for engaging in criminal activity while on favored work. The Court reversed an award of benefits, holding that where an employee

> engages in criminal gambling activities while at work and is discharged for that cause, he will not be entitled to compensation for the resultant loss of earnings. His favored employment has ceased through his own volition and turpitude and not by reason of his accidental injury. . . .
>
> It was not through physical inability to perform the work, arbitrary caprice of the employer, or some ordinary cause for dismissal that this employment was terminated. [*Id.* at 289.]

See also *Garrett v Chrysler Corp,* 337 Mich 192; 59 NW2d 259 (1953), where a permanent forfeiture resulted when the plaintiff was discharged for coming to work under the influence of alcohol. However, in neither case did the Court expressly state that the forfeiture was permanent; it was only implicit in the holding.

employee left his favored work to become a minister. Once it became evident that he was unable to earn a living as a minister, he attempted to find other light work. The court held that he had not permanently forfeited his benefits by leaving favored work. The combination of the claimant's attempt to find employment other than as a minister and the unavailability of his old favored position triggered his eligibility for benefits.

B

The *Pigue* Court did not expressly address this issue because the claimant had returned to favored work upon settlement of the strike. In framing the issue, however, the Court stated that the pivotal question was whether the plaintiff was entitled to compensation "*during the period of a strike* . . . ." *Id.* at 315. While the weight to be accorded this is minimal, it lends credence to the view that suspension is the sanction implicit in *Pigue.* Noteworthy, also, is that the *Pigue* Court neither stated nor intimated that a permanent forfeiture results.

C

Larson, in his treatise on worker's compensation, opines that a temporary forfeiture of benefits is the preferred sanction. Although discussed within the context of employee misconduct, the reasons underlying his conclusions apply with equal force to the striking employee. Larson states that an injured employee discharged for misconduct should not suffer a permanent loss of benefits. He draws an analogy to the unemployment context, in which misconduct-based discharges and voluntary quitting are handled by imposing a

penalty of a limited number of weeks. Likewise, he concludes that in the worker's compensation arena, the penalty for a voluntary cessation of favored work should also be limited to a loss of benefits for a period of weeks.[8]

D

The Minnesota Supreme Court has grappled with this issue and determined that only a temporary forfeiture of benefits should result. *Marsolek v George A Hormel Co,* 438 NW2d 922, 923 (Minn, 1989). In this case, a partially disabled employee, Marsolek, was terminated for misconduct during a strike against the employer. Marsolek had threatened to damage cars and injure employees attempting to cross the picket line. When the plant was reopened five months after the strike began, Marsolek was not invited to return. Except for a three-month period following the strike, he was unable to find employment, and filed a claim for worker's compensation benefits, including a claim for lost wages. The court held that

> a justifiable discharge for misconduct *suspends* an injured employee's right to wage loss benefits; but the suspension of entitlement to wage loss benefits will be lifted once it has become demonstrable that the employee's work-related disability is the cause of the employee's inability to find or hold new employment. Such a determination should be made upon consideration of the totality of the circumstances including the usual work search "requirements." [*Id.* at 924. Emphasis added.]

In reaching this conclusion, the court noted that the purpose of the Worker's Compensation Act

[8] 1C Larson, *supra,* § 57.64(a), p 10-492.27. But see, *Todd v Hudson Motor Car Co,* n 7 *supra,* and *Garrett v Chrysler Corp,* n 7 *supra* (seemingly contemplating permanent forfeiture).

was to compensate injured employees for a wage loss attributable to a work injury. On this basis, compensation has been denied where the record established only a discharge for misconduct;[9] but benefits have been awarded where the record evidenced misconduct, yet showed that the employee's injury was the cause of his inability to find other work.[10]

E

The Court of Appeals has, on several occasions, spoken on the issue of permanent forfeiture. In *Hartsell v Richmond Lumber Co,* 154 Mich App 523; 398 NW2d 456 (1986), the employee left his favored work as a night watchman and began working elsewhere. Hartsell was given compensation for total disability during the period between his injury and his employment as a night watchman, and was given compensation for partial disability for the period up until his hearing, but was denied compensation for lost wages during the period following his cessation of favored work. In February, 1978, Richmond Lumber closed its plant, and in May, 1978, Hartsell filed a petition for compensation. The Court of Appeals affirmed an award of benefits from the time of the plant closing, holding that the plant closure was a tacit withdrawal of the offer of favored work, rendering Hartsell eligible for benefits.

The Court of Appeals reached a similar result in *Steward v Westran Corp,* 130 Mich App 68; 343 NW2d 7 (1983). In this case, the plaintiff initially

[9] See, e.g., *Rodge v United Van Bus Delivery,* 330 NW2d 715 (Minn, 1983) (compensation was denied where a truck driver lost his license because of a DWI conviction).

[10] See, e.g., *Kurowski v Kittson Memorial Hosp,* 396 NW2d 827 (Minn, 1986) (an employee was determined to be eligible for rehabilitation benefits, despite being fired for fraudulent use of sick leave).

accepted Westran's offer of favored work, but upon completion of his first favored work assignment, he rejected Westran's offer of additional favored work. Later, while his claim for compensation was pending, the plaintiff requested reassignment to favored work. The Court held that the plaintiff forfeited his benefits during the period of his refusal of favored work, but that such forfeiture terminated upon the plaintiff's request for reassignment.

A different result was reached by the Court of Appeals in *Russell v General Motors Corp,* 172 Mich App 627; 432 NW2d 738 (1988). In this case, General Motors offered Russell favored work on April 18, 1980. Russell failed to respond. On April 8, 1981, a hearing referee concluded that benefits could be terminated because of Russell's failure to accept favored work. Following this decision, General Motors fired Russell, and on October 27, 1981, Russell attempted to accept the offer of favored work. When General Motors refused, Russell filed a claim for worker's compensation benefits. The Court held that the offer of favored work need only be kept open for a reasonable time, after which the employee *permanently forfeits* any right to benefits.[11] It should be noted that the permanent forfeiture did not stem from the employee's *initial* rejection of favored work; rather, it was triggered by the employee's refusal to accept favored work within a reasonable time after the offer was made.

[11] Pursuant to Administrative Order No. 1984-2, the *Russell* panel certified that its decision conflicted with the Court of Appeals decision in *Hartsell. Russell* rejected the blanket rule laid down in *Hartsell* that the employee's right to benefits is suspended only for the duration of *the employee's unreasonable refusal of favored work. Russell* holds that the employer need only keep open an offer of favored work for a reasonable time. This holding was premised on the idea that the employee's unreasonable refusal triggered the forfeiture and that, after a period of time, it becomes unreasonable to assume that the employee might accept the offer he once rejected.

F

In formulating our decision on this issue, we must also be mindful of the policies underlying the Worker's Disability Compensation Act. MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.* As a preliminary matter, it must be remembered that the act was designed to be remedial and must not be unnecessarily construed so as to favor a denial of benefits. The *Bower* Court opined:

> The Workers' Disability Compensation Act was designed to help relieve the social and economic difficulties faced by injured workers. As remedial legislation, it is liberally construed to grant rather than deny benefits. [*Id.* at 191.]

It would seem that a permanent forfeiture of benefits is not in accord with a liberal construction of the Worker's Disability Compensation Act.

G

Finally, support for the concept of a temporary suspension of benefits can be drawn from an amendment of the worker's compensation legislation that contains the first statutory reference to the favored work doctrine and was implemented while this case was progressing.[12] Despite the inapplicability of this legislation to the case at bar, it cannot be ignored in formulating a policy to be applied in future cases. The statute provides:

> If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and

[12] MCL 418.301(5)(a); MSA 17.237(301)(5)(a).

> reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act *during the period of such refusal.* [MCL 418.301(5)(a); MSA 17.237(301)(5)(a). Emphasis added.]

The only plausible interpretation of this statute is that benefits will be suspended for the duration of the employee's unreasonable refusal to accept employment. If permanent forfeiture were the intended consequence, the phrase, "during the period of such refusal," would be rendered meaningless.

In view of the above, we would hold that a voluntary cessation of favored work per se does not result in a permanent forfeiture of wage loss benefits. We note that this holding is in accord with the views espoused by Larson and most of the cases cited,[13] and represents what we believe to be the better approach as a matter of policy, given the worker's compensation legislation in general, and more specifically, the recently enacted amendments implemented following the commencement of this case. A temporary suspension of benefits, in contrast to a permanent forfeiture, comports with the dual aims of worker's compensation, namely, mitigation and rehabilitation, without enabling the employer to enjoy a windfall.

III

Our conclusion that an unreasonable refusal or cessation of favored work does not necessarily cause permanent forfeiture of benefits compels a

[13] The decision in *Russell, supra,* is also in accord with this conclusion, if it is read as holding that a permanent forfeiture does not stem from the initial refusal of favored work, but, instead, follows from the failure of the employee to accept the favored work within a reasonable period.

determination of what act or acts operate to reinstate those benefits.

A

This issue was addressed by the Court of Appeals in *Chilcote v Cadillac Malleable Iron Co,* 198 Mich App 166; 497 NW2d 211 (1993),[14] in which the Court held that a voluntary participant in an ongoing strike must inform his employer of his willingness to return to work *for that employer* before he can be entitled to compensation benefits. The Court stated:

> [P]laintiff, in order to be entitled to compensation benefits while a strike is ongoing and in which he is a voluntary participant, must show that he informed his strikebound employer of his willingness to return to work for that employer. Working for other employers is not evidence that plaintiff is willing to return to work for his strikebound employer. [*Id.* at 171.]

In essence, the Court assumed the existence of an offer of favored work and, in this context, held that the employee had the burden of showing that he had informed his employer of his willingness to return to favored work.

The Court of Appeals also addressed this issue in *Russell v General Motors, supra* at 632, when it held that

> [t]here comes a point after which it is *unreasonable* to think that such employee might someday accept the offer that was originally spurned. It is at that point that a company should be permitted to withdraw its offer with no fear of disadvantage. [Emphasis added.]

[14] This case arose out of the same strike as in the case at bar.

We believe that the rules announced in *Chilcote* and *Russell* strike the best balance between the interests of the injured striking employee and the employer whose offer of favored work has been rejected. Fairness, as well as ease of administration, dictates that the party refusing favored work bears the burden of proving a willingness to perform such work, and that such willingness must be expressed within a reasonable period. An employer should not have to continuously bear the burden of initiating a renewal of favored work, nor should the employer be forced to hold favored positions open indefinitely.

We conclude then that an employee who has ceased to perform existing favored work should establish a good-faith willingness to accept or resume favored work that remains available in order to restore eligibility for benefits. Additionally, this willingness should be expressed within a reasonable period in order to be effective.

B

Plaintiffs advance two theories in support of their argument that, even under the above-mentioned rule, they are entitled to a resumption of benefits. Initially, plaintiffs argue that they expressed the requisite willingness to return on January 18, 1982, when the union representative attempted to accept Cadillac's October 7, 1981, offer, an offer that had already been withdrawn. Plaintiffs assert that this purported "offer to return" operated to transform them into involuntary strikers.

Because it was the union that "offered to return," we must first determine whether this "offer" can be attributed to the plaintiffs. Plaintiffs

argue that the concept of "concerted action" supports this conclusion, and that 29 USC 159(a) mandates it.

> Exclusive representatives; employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, *shall be the exclusive representatives of all the employees* in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . . [Emphasis added.]

This provision directs the employer to bargain only with the majority representative; he cannot bargain with individual employees. In essence, it forbids separation of the union and its members at the bargaining table.

Applying this to the case at bar, we conclude that the union's "offer to return" should be attributed to the individual employees.[15] In the absence of any evidence indicating plaintiffs' desire to separate themselves from the union's position, the union's offer should be deemed an offer by each member.

Accordingly, we must now determine whether the "offer" established plaintiffs' willingness to return to work, so that a rejection by the employer would transform plaintiffs into involuntary strikers.

In order to establish that plaintiffs were willing to return, they must show that they would have accepted any reasonable offer of favored work put

[15] This is supported by the fact that, in applying for reinstatement, a striking worker need not make an individual request. The request may come from the union on behalf of a group of employees. *Trinity Valley Iron & Steel Co v NLRB,* 410 F2d 1161 (CA 5, 1969).

forth by Cadillac.[16] A conditional "offer" to return does not operate to transform strikers into involuntary strikers; rather, it represents a repositioning of the union with regard to its demands and concessions.[17] An analogy to employer liability for backpay to a striking worker is instructive on this issue.

In general, an employer is not obligated to a

[16] See *Pigue, supra* (an injured employee who refuses an offer of favored work that the employee is physically capable of performing is not entitled to wage loss benefits).

[17] Plaintiffs have advanced a similar argument with respect to their December 4, 1981, proposal, in which the union offered to return to work under the same terms that existed in the expired contract. Plaintiffs argue that in light of *Pigue,* this proposal compels a resumption of benefits. The *Pigue* Court reasoned:

> In the case at bar *plaintiff could have continued his employment under the same terms and conditions as existed prior to going out on strike.* The incapacity of plaintiff to earn wages during this period was not occasioned by his previous injury, but by the intervention of a labor union of which he was a member. Employment for plaintiff was available under conditions existing prior to the strike. Plaintiff is thus in the position of having refused employment until those conditions were modified. Plaintiffs' employment did not cease by reason of any overt act upon the part of his employer or because of his inability to work by reason of his accidental injury. [*Id.* at 318. Emphasis added.]

We are not persuaded by plaintiffs' argument.

There is no support for plaintiffs' implicit contention that "terms and conditions" as used in *Pigue* refers to wages, hours, and conditions of employment, which are essentially the mandatory subjects of collective bargaining. *Pigue* failed to define what it meant by such "terms and conditions." Thus, its meaning must be determined from the context in which the case arose, namely, a labor dispute.

To hold that it refers to wages, hours, and conditions of employment existing at the time of the strike would be tantamount to imposing worker's compensation liability on any employer whose expired collective bargaining contract resulted in a strike, where the employer refused to agree to a contract with the same "terms and conditions." In essence, it would preclude the employer from negotiating a more favorable contract without having to compensate striking workers.

We conclude that "terms and conditions" refers to the nature of the work, namely, the clerical work at issue in *Pigue* or the favored work at issue in the case at bar.

striking employee for backpay. The exception to this rule arises when the striking worker submits an unconditional application for reinstatement to his job that the employer rejects. The employer's refusal to reinstate the worker triggers the accrual of backpay, beginning after the denial of the striking employee's request for reinstatement.[18]

Applying this to the case at bar, it is clear that an unconditional offer would have demonstrated plaintiffs' willingness to return to work. An offer conditioned upon the employer's acceptance of certain terms does not.

The WCAB concluded that the January 18, 1982, "offer to return" was nothing more than "another proposal in a very lengthy series of negotiations."[19] Support for this conclusion was found in the facts that this "offer" attempted to accept an offer that had been expressly withdrawn, the union's "offer" was not in writing, as had been the practice, and the union members had not voted to ratify such a proposal.

We agree with the WCAB's analysis of the "offer" and conclude that plaintiffs' "offer to return" was merely another proposal in the negotiation process. The "offer" did not rise to the level of the unconditional offer necessary to establish the requisite willingness to return, thereby transforming plaintiffs into involuntary strikers. Hence, it should not serve to terminate the suspension of benefits.

C

Additionally, plaintiffs argue that Cadillac's announcement of its intention to hire permanent replacement workers had the effect of withdrawing

[18] See Gorman, Labor Law, ch 17, § 6, p 348.

[19] 1989 WCABO 239, 256.

its offer of favored work from its striking employees, thus entitling the plaintiffs to a resumption of benefits. We disagree.

The announcement by management of the use of permanent replacements has considerable effect on the dynamics of a labor dispute, particularly in view of the fact that to a striking worker, it represents a threat not only to the benefits sought by the union, but also introduces the possibility of permanent job loss. The effect on a favored-work striker, however, is quite different. Such an employee, at most, sees a loss of favored work, which, in turn, may result in a resumption of work loss benefits without the need to perform favored work.[20] While favored-work strikers certainly should not be disadvantaged by the outcome of the use of permanent replacements, they also should not improve their position as a result of the use of replacement workers.

Therefore, in view of the divergent effects of the use of permanent replacements on injured versus noninjured striking employees, we think that the rules for placing the burden of establishing a readiness to offer or accept favored work should be the same as would obtain had there been a voluntary cessation of favored work outside a labor dispute;[21] we do not believe the hiring of replacement workers during a labor dispute should operate to shift this burden.[22]

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[20] See *Kolenko v United States Rubber Products, Inc,* 285 Mich 159; 280 NW 148 (1938) (an employer must prove that it offered the injured employee work that the employee could perform; the employer's inability to meet this burden results in an award of benefits to the employee).

[21] The rule, as stated above, is that the party refusing favored work bears the burden of proving the expression of a willingness to perform such work. Such willingness must be expressed within a reasonable period of time.

[22] Furthermore, it would be a rare occasion when there would be a sufficient number of favored-work striking employees as a percentage

Accordingly, we reject plaintiffs' argument that Cadillac's announcement of its intention to hire permanent replacement workers operated to withdraw its offer of favored work and trigger the resumption of benefits.[23] The announcement of permanent replacements was preceded by plaintiffs' refusal to accept favored work; the permanent replacements were not the cause of the cessation of favored work.[24] Furthermore, because the employees did not offer to return to work at anytime before the commencement of this action, we need not undertake a determination of what other circumstances could serve to restore benefits following an offer to return.[25]

We conclude that plaintiffs failed to indicate individually or collectively an unconditional offer to return to their favored work either during the strike or when it was announced that their jobs would be filled by permanent replacements.[26] Ac-

of the total number of striking employees to affect the dynamics of a labor dispute.

[23] In her opinion, Justice BOYLE characterizes the majority's conclusion as being that "as a matter of law, the hiring of permanent replacement workers cannot serve as a withdrawal of favored work." *Post* at 259. Our holding, however, is that the hiring of replacement workers, *without more,* cannot serve as a withdrawal of favored work. As we attempt to make clear in the following footnote, the hiring of permanent replacement workers *in conjunction with* an employer's refusal of an employee's offer to return to work *may* operate as a withdrawal of favored work, thereby triggering the resumption of benefits.

[24] The opinion of Justice BOYLE states that "the striking workers in this case may well have viewed permanent replacement workers as eliminating their positions . . . ." *Post* at 262. The workers did not, nor do we, have to speculate; they needed only to make known that they wished to return to their favored work positions. If this offer were declined, it would then be possible to determine whether the employer had kept the positions open for a reasonable period.

[25] Specifically, we need not address the question whether the employees' offer to return was expressed within a reasonable time, in light of our determination that the employees never offered to return to work at anytime before the commencement of this action.

[26] Nor is there any indication that they have subsequently requested reinstatement.

cordingly, at least plaintiff Nederhood was without recourse to collect work loss benefits.

IV

In *Zimmerman,* we must address the additional issue whether a supervening, non-work-related heart attack operates to reinstate plaintiff's right to benefits. We conclude that it does.

As we have previously stated, the general rule is that an injured employee who refuses an offer of favored work that the employee is physically capable of performing is not entitled to worker's compensation benefits. See *Pigue, supra* at 318-319. A corollary to this rule is the supervening events rule, which states that a supervening event causing cessation of favored work will terminate an employee's right to benefits if the supervening event either is within the employee's control or is attributable to him. *Bower, supra* at 188. Applying these rules to plaintiff Zimmerman, it is undisputed that after his heart attack, he was no longer physically capable of performing his favored work. Under the physically capable rule, Zimmerman would be entitled to benefits.[27] But the supervening events rule is also applicable to Zimmerman because the strike was a voluntary action on his part. Under that rule, Zimmerman would not be entitled to benefits. Because a different result is reached under each rule, they must be reconciled.

As a preliminary matter, we note that in *Powell v Casco Nelmor Corp,* 406 Mich 332; 279 NW2d 769 (1979), this Court held that the inability of a worker to continue favored work does not preclude

[27] We think the dissent misreads our opinion when it states that we misconstrue the supervening events doctrine in granting Zimmerman a windfall. *Post* at 273-274. As our opinion makes clear, we are not granting Zimmerman relief on the basis of the supervening events doctrine.

the payment of benefits where that inability was occasioned by a supervening non-work-related injury beyond the employee's control. However, we note that in *Powell,* unlike the facts in this case, the injured employee was performing favored work at the time of the supervening, non-work-related injury.

In deciding this issue, we again must bear in mind the remedial nature of the Worker's Disability Compensation Act. It should be construed liberally so as not to unnecessarily deny benefits. When we are dealing with an issue of benefits, we must favor an interpretation that awards, rather than denies, benefits.

We must also consider the extent and circumstances of the disability. Zimmerman's heart attack has rendered him totally disabled. We are not presented with a case of partial disability that may have little or no effect on the future employment prospects of an employee. We are faced with a situation in which the employee's injury may prevent him from obtaining any further employment. A denial of benefits in this case would work an unquestionable hardship.

Consideration should also be given to the extent of the refusal to perform favored work. In general, a refusal to perform favored work predicated upon participation in a strike is not viewed as a permanent refusal. In contrast, we can envisage other cases where the original refusal will be of a more permanent nature.[28] The fact that this refusal was not intended to be of a permanent nature counsels against a denial of benefits where there is a subsequent non-work-related disability.

[28] For example, we can conceive of a situation in which an injured employee refuses favored work and then moves to another state or country. The permanent nature of this refusal would weigh heavily against a plaintiff seeking benefits upon the occurrence of a supervening, non-work-related injury.

Finally, we note that the heart attack did not arise out of the refusal to perform favored work. This is not the case where a striking employee suffered injuries while picketing. The heart attack here was unrelated both to the work and to the strike and did not stem from the refusal to perform favored work.

On the basis of these considerations, we would hold that the occurrence of plaintiff's heart attack while on strike does not preclude the recovery of wage loss benefits. In reaching this conclusion, we have considered the remedial nature of worker's compensation, the certainty and extent of the total disability, the length of the refusal to perform favored work at the time of the heart attack,[29] and the fact that Zimmerman's heart attack did not arise out of his refusal to perform favored work; it was a supervening event neither within his control nor attributable to him. We note that a contrary result would require a permanent forfeiture of benefits on the basis of his original cessation of favored work, a consequence we have rejected today. For the foregoing reasons, we would hold that Zimmerman is entitled to wage loss benefits as of February 4, 1982, the date upon which his heart attack rendered him physically unable to perform favored work.[30]

CONCLUSION

We would hold that a voluntary cessation of favored work by a striking employee results in a

[29] We caution that in a case presenting a longstanding refusal of favored work, and an injury less certain or pronounced, we would place more weight on the refusal of favored work and less weight on the physical inability to perform work.

[30] While the dissent's position on the effects of Zimmerman's heart attack is certainly defensible in view of the lack of authority on point, we remain convinced that Zimmerman should receive benefits in light of the reasons stated above and the remedial nature of the act.

suspension of wage loss benefits. Neither a conditional offer to return by a worker's union nor the hiring of permanent replacement workers by the employer operates to automatically restore benefits to the striking employee. However, benefits will be restored once the employee expresses a good-faith willingness to return to favored work, provided such willingness is communicated to the employer within a reasonable period following the cessation of favored work. Additionally, we would hold that the resumption of such an employee's right to benefits upon the occasion of a supervening heart attack that renders such employee totally disabled depends on the certainty and extent of the injury, the length of the refusal to perform favored work before the injury, and the lack of a causal nexus between the refusal of favored work and the resulting heart attack.

Accordingly, we would affirm the decisions of the WCAB and the Court of Appeals with respect to their findings that the plaintiffs have not established the requisite willingness to perform favored work and are therefore not entitled to wage loss benefits from the commencement of the strike. We would reverse the decisions with respect to Zimmerman, who is entitled to work loss benefits from the time of his totally disabling heart attack.

BOYLE, J. (*concurring in part and dissenting in part*). I concur in the reasoning and result of parts I and II of the lead opinion and in the result in part IV. I write separately for two reasons.

I disagree with the conclusion of the lead opinion that, as a matter of law, the hiring of permanent replacement workers cannot serve as a withdrawal of favored work. I would hold that the hiring of permanent replacement workers may in fact and in law work to withdraw an employer's

offer of favored work. Therefore, I would remand for further proceedings consistent with this opinion. I disagree with reaching and disposing of an issue not properly before this Court, namely, the adoption of a reasonable time limitation on an employee's ability to reestablish his right to favored work. The reach is unwarranted, and, in my view, the rule suggested is unjustified. If there is a justification for a rule that appears to provide an incentive to employers either to delay the settlement of a strike or to hire permanent replacement workers, it has not here been made by the employer, and the lead opinion should not provide it.

I

In March 1982, four months after the strike began, Cadillac Malleable acknowledged that the replacement workers it had been hiring were permanent. The employees who had been on favored work before the strike may have viewed Cadillac's announcement as a revocation of favored work positions. If a revocation could be proven to have occurred, the employees would be entitled to resumption of benefits because the justification for the suspension (voluntary cessation from available favored work) would cease to exist. *Ante* at 254; *Kolenko v United States Rubber Products, Inc,* 285 Mich 159; 280 NW 148 (1938). Nonfavored-worker strikers are presumed to be unemployed following the employment of permanent replacements. *Plymouth Stamping v Lipshu,* 436 Mich 1; 461 NW2d 859 (1990). The lead opinion distinguishes favored-worker strikers from other strikers because the employer either must pay benefits or employ the worker within restrictions. From this distinction the lead opinion concludes that "the rules for placing the burden of establishing a

readiness to offer or accept favored work should be the same as would obtain had there been a voluntary cessation of favored work outside a labor dispute . . . ." *Ante* at 254. Put plainly, the lead opinion would hold that the burden is on the employee to offer to return to work.

While the lead opinion is correct in its assertion that the effect on favored-worker strikers and nonfavored-worker strikers of hiring permanent replacements is not identical, I do not agree with its conclusion that, as a matter of law, the hiring of such workers can never serve as a de facto withdrawal of the employer's offer of favored work. It is true that the threat to the latter worker is to the benefits sought by the union and to the possibility of permanent job loss. The threat to the favored worker, however, as this case illustrates, is the elimination of both the worker's job and benefits until such time as it is definitively determined that the strike is over or a reasonable time has passed.[1] Where, as here, there is a relatively high concentration of favored workers in the work force and the labor dispute is protracted, the proposed holding of the lead opinion, when combined with the reasonable time limitation, would improve the employers' bargaining leverage or encourage extension of the labor dispute and strikebreaking.

In *Plymouth Stamping v Lipshu,* the question was whether the labor disqualification provision of the Michigan Employment Security Act, MCL 421.29(8); MSA 17.531(8), applied to striking workers who had been permanently replaced. In a plurality opinion, four members of the Court held "that any striker who is permanently replaced is thereby entitled to benefits from that time forward

[1] See part II.

unless and until some succeeding event again renders the labor dispute a substantial contributing cause of the unemployment." *Id.* at 42 (opinion of BOYLE and CAVANAGH, JJ., concurring). My own view was that

> [t]he fundamental assumption of the labor dispute disqualification provision is that there exists a job from which the striking employee has voluntarily absented himself because of a labor dispute and to which he will return at the end of that dispute. When, however, the striking employee is notified that his position has been filled—that he has been permanently replaced by another employee—that assumption no longer obtains. In the language of the statute, once the striker has been permanently replaced, his unemployment ceases to be "due to" the strike. At that juncture, the *only* "substantial contributing cause" [citations omitted] of the striker's unemployment is his permanent replacement. [*Id.* at 38.]

Like the workers in *Lipshu,* the striking workers in this case may well have viewed permanent replacement workers as eliminating their positions, and the cause of the injured employees' failure to perform favored work might have been not a voluntary refusal, but a corporate revocation. While the nature of a favored work position might make this supposition more or less tenable,[2] the fact that some favored workers could reasonably view the hiring of permanent replacements as the end of their employment counsels against adoption of the rule suggested by the lead opinion, which would require these employees to attempt to return to jobs they believe are no longer available.

[2] For instance, odd-lot jobs would seem to be less likely to be filled by permanent replacements. Conversely, jobs that happen to fall within a favored worker's restrictions, but would exist absent that particular favored worker, seem more likely to be filled by a permanent replacement.

Mere reliance on the possible availability of benefits if the offer of favored work is eliminated does not justify placing a burden on the plaintiff to return to the employer asking for favored work. In my view, it is reasonable to conclude that, if the employer can be shown to have revoked its offer of favored work with the hiring of permanent replacements, then, as in *Lipshu,* the cause of a worker's unemployment is no longer due to the strike.[3]

What is not clear in this case is whether Cadillac's act of hiring permanent replacement workers served to withdraw its offer of favored work. The WCAB held that the hiring of replacement workers was not a de facto withdrawal of favored work. However, it did not have the benefit of the *Lipshu* analysis.[4] Moreover, it is not obvious from the opinion whether the board understood that the hiring of permanent replacements *could* serve to withdraw an offer of favored work. Although the board may have considered the possibility and rejected it, such a decision is not explicit in the WCAB's opinion. The WCAB also seemed to place the

[3] See *Liberty Mutual Ins Co v Neal,* 140 Ga App 585; 231 SE2d 574 (1976), and *Coats & Clark, Inc v Thompson,* 166 Ga App 669; 305 SE2d 415 (1983), for the proposition "that the fact of the job's becoming unavailable has the effect in itself of stopping the suspension, on the theory that the reason for claimant's unemployment from that point on is no longer his refusal of the job but its unavailability." 1C Larson, Workmen's Compensation, § 57.66(c), p 10-492.76.

[4] The WCAB held:

> We do not find the hiring of replacement workers to constitute a *de facto* withdrawal of the offer of favored work. Mr. Weikel testified that there were approximately 80 members of the bargaining unit in the plant when the strike was called. Only 41 or 42 of those employees had been replaced by replacement workers as of the hearing in this matter, held in March 1983. There was no showing that plaintiff's job had been filled by a replacement worker or that it was unavailable to him for any other reason, such as relocation of the plant . . . . [1989 WCABO 471, 487.]

burden of coming forward and the burden of proof on the plaintiff. It is likewise unclear where the burden would have been placed had it been understood that this Court would recognize application of the *Lipshu* analysis to the striking favored-work employee.

In the absence of a full evaluation by the administrative agency charged with implementing worker's compensation law,[5] it is inappropriate to resolve the question whether the hiring of permanent replacement workers ended plaintiff's voluntary refusal to perform favored work. While I acknowledge again that the analogy between worker's compensation benefits and unemployment benefits is not perfect, the permanent replacement issue is so important that the Court should not act without a full record development and discussion of the rationale and effect of the holding of *Lipshu* on favored workers on strike.

I would vacate the decision of the Worker's Compensation Appeal Board and remand this case to the Worker's Compensation Appellate Commission to assign the case to a magistrate for further consideration consistent with this opinion. On remand, the magistrate should be directed to consider the existing record and be authorized, with-

[5] This Court accords "deference to the ' "construction placed upon statutory provisions by any particular department of government for a long period of time . . . ." ' " *Ludington Service Corp v Acting Comm'r of Ins,* 444 Mich 481, 491; 511 NW2d 661 (1994). See also *Owosso Union School Dist Bd of Ed v Goodrich,* 208 Mich 646, 652; 175 NW 1009 (1920):

> While not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws, and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature.

out limitation, to consider any motions by the parties concerning the possible submission of additional proofs.

II

The lead opinion observes that an employee's willingness to return to work "should be expressed within a reasonable period in order to be effective." *Ante* at 250. Because it does not decide whether a reasonable time has passed in this case, *ante* at 255, n 25,[6] the discussion of a reasonable time limitation is dicta. While it is unnecessary to address this question in today's opinion,[7] because it is discussed, I state my opposition to the adoption of the reasonable time limitation formulated by the lead opinion.

Favored work is a judicially created doctrine, "[t]he primary purpose" of which is to allow an employer the opportunity to reduce work-loss damages by putting a partially disabled employee back to work. *Bower v Whitehall Leather Co,* 412 Mich 172, 182; 312 NW2d 640 (1981). The favored work doctrine also "encourages the employee to return to productive employment rather than to remain idle, thus also serving a rehabilitative function." *Id.* However, the rehabilitative function is merely incidental, with each employer deciding whether to offer an individual employee favored work. Whether an employee will have the opportunity to rehabilitate is a decision left to his employer. In any event, the employer owes an employee the same minimum level of compensation whether he performs favored work or remains at home.

[6] The WCAB held that "[p]laintiff's refusal of favored work continued through the date of hearing, thus no benefits are ordered." 1989 WCABO 471, 488.

[7] This issue was not addressed in the grant order in either case.

It is therefore surprising that the lead opinion would determine that "fairness," *ante* at 250, requires the adoption of the reasonable time limitation. Fairness is not offended when the employee takes away an employer's ability to reduce worker's compensation losses that do not exist. While the worker refuses favored work, the employer is relieved of its obligation to pay that employee. There are no damages to mitigate. Fairness is also not offended by the employee's loss of an opportunity to rehabilitate. With rehabilitation existing at the discretion of an employer who is under no obligation to offer favored work, it can hardly be argued that the desire to rehabilitate injured workers justifies cutting off future rights to worker's compensation benefits or favored work.

The only remaining justification is a generalized concern that it is somehow unfair to require employers "to hold favored positions open indefinitely." *Ante* at 250. However, the nature of favored work itself, as described by Cadillac Malleable's attorney at oral argument, provides the clearest rejoinder to this argument:

—By its very nature, favored work is work outside or different from the work that is offered to the general work force. It is work created or established by the employer to accommodate an injured employee's limitation. It can be an ordinary job that has been assigned the employee to accommodate his limitations.

—The question here is not whether plaintiffs' favored work was replaced, because preferred favored work could not have been replaced. It was especially established to accommodate the injured worker.[8]

Under the current system, an employer is re-

[8] See Welch, Worker's Compensation in Michigan: Law & Practice (rev ed), § 10.11, p 10-14.

quired to pay an injured employee worker's compensation if it does not offer a favored work position within the employee's limitations. *Bower, supra* at 182. If such an offer is made, the employee is required to accept it or face discontinuation of benefits. Consequently, when an employee fails to avail himself of favored work, the employer gains because it is relieved of the obligation either to pay that employee his worker's compensation benefits or to offer him favored work. For instance, when an injured employee does not present himself to his employer for ten years, the employer gains because he was relieved of an obligation to pay owed benefits or offer favored work for that period. The "reasonable time" limitation would present employers with a windfall by turning a judicially created doctrine of mitigation into a judicially created doctrine of benefit elimination.[9]

CAVANAGH, C.J., and MALLETT, J., concurred with BOYLE, J.

RILEY, J. (*concurring in part and dissenting in part*). I join in the reasoning and holdings of parts I-III of the lead opinion. However, because I find that a striking favored worker fully disabled by a supervening event is not entitled to a reinstatement of benefits unless he shows that he would have returned to work but for the supervening event, I write separately.

I

The purpose of the worker's compensation act

[9] Although I disagree with the reasonable time limitation rule suggested by the lead opinion, I would not foreclose consideration of appropriate circumstances in which it might be found that an employee had forfeited his right to reapply for favored work or benefits. This issue is not before us.

"is to provide compensation for disability resulting from an occupational injury." *Lynch v Briggs Mfg Co,* 329 Mich 168, 171; 45 NW2d 20 (1950). In furtherance of this basic policy, this Court crafted the favored work doctrine, which permits an employer to offer a partially disabled employee work that he is physically capable of performing (at equal or greater preinjury wages) in lieu of providing worker's compensation benefits. *Hood v Wyandotte Oil & Fat Co,* 272 Mich 190, 193; 261 NW 295 (1935); *Bower v Whitehall Leather Co,* 412 Mich 172, 182; 312 NW2d 640 (1981).[1]

> The primary purpose of the doctrine is that of mitigation. It allows an employer to reduce or completely eliminate compensation payments by providing work within the injured employee's physical capacity. At the same time, it encourages the employee to return to productive employment rather than to remain idle, thus also serving a rehabilitative function.[2]

In accordance with the principles of mitigation, "if physically able to perform the favored work"

[1] The favored-work doctrine is a purely judicial creation. Favored, or light, work can be loosely defined as less strenuous post-injury work. Wages from favored-work may be used as a setoff against an employer's compensation liability, MCL 418.361(1); MSA 17.237(361)(1), but favored-work wages do not establish an earning capacity, and when such wages cease, they neither suspend nor bar compensation. *Powell v Casco Nelmor Corp,* 406 Mich 332; 279 NW2d 769 (1979).

[2] The rehabilitation function of the favored work doctrine should not be forgotten, for "[i]n many instances from the highest motives of desire to rehabilitate the employee and restore him as a wage-earning member of society, some employers have retained injured employees in new jobs within their capacity to perform." *Pulley v Detroit Engineering & Machine Co,* 378 Mich 418, 423; 145 NW2d 40 (1966). Even without such high motives, favored work fosters rehabilitation by encouraging partially disabled persons to reintegrate into the workplace.

an employee may not refuse such work and still be awarded compensation. *Lynch, supra* at 172.[3]

Thus, a favored work employee who refuses to perform favored work because of his participation in a strike forfeits his right to compensation. *Pigue v General Motors Corp,* 317 Mich 311; 26 NW2d 900 (1947). The *Pigue* Court explained:

> In the case at bar plaintiff could have continued his employment under the same terms and condi-

[3] The favored work doctrine is nothing more than the logical application of the axiomatic principle of mitigation to the worker's compensation scheme. As Justice CAMPBELL noted, "[i]t has always been considered incumbent upon any person subjected to injury to use such means as are reasonably in his power to make the evil consequences as light as possible." *Chandler v Allison,* 10 Mich 460, 474-475 (1862). See also *Cubit v O'Dett,* 51 Mich 347, 350; 16 NW 679 (1883). A failure to mitigate by the injured party bars recovery, therefore, " 'for any item of damage which could thus have been avoided.' " *Shiffer v Gibralter School Dist Bd of Ed,* 393 Mich 190, 197; 224 NW2d 255 (1974), quoting McCormick, Damages, § 33, p 127 (emphasis omitted).

> The principle of mitigation is a thread permeating the entire jurisprudence. It is not solely a "breach of contract" or "commercial" doctrine; it is part of the much broader principle of "avoidable consequences." [*Shiffer, supra* at 197.]

> The rights protected by the mitigation doctrine are not just those of contracting parties, commercial litigants, tort victims or tortfeasors but, rather, the rights of all society: "Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community." [*Id.* at 198, quoting McCormick, *supra.*]

Hence, mitigation is fully applicable in the employment context. See, e.g., *McClelland v Climax Hosiery Mills,* 252 NY 347, 358; 169 NE 605 (1930) (Cardozo, C.J., concurring) ("The obligation of the master is merely to pay whatever damages have actually been suffered, and these exclude damages that a servant, acting reasonably, would have diminished or avoided"). In the favored worker context, therefore, "interruptions of work caused by voluntary actions of the employee, such as abandonment of work to participate in a strike, failure to return without explanation at the end of a leave of absence, failure to notify the employer of medical restrictions, or discharge because of gambling or drunkenness, results in a forfeiture of benefits." *Bower, supra* at 188 (citations omitted).

> tions as existed prior to going out on strike. The incapacity of plaintiff to earn wages during this period was not occasioned by his previous injury, but by the intervention of a labor union of which he was a member. Employment for plaintiff was available under conditions existing prior to the strike. Plaintiff is thus in the position of having refused employment until those conditions were modified. Plaintiff's employment did not cease by reason of any overt act upon the part of his employer or because of his inability to work by reason of his accidental injury.
>
> Decision in this case is based upon the fact that work was available to plaintiff by his employer; that plaintiff was physically able to perform such work, but declined to do so because of a strike called by a labor union of which he was a member. [*Id.* at 318-319.]

The lead opinion would hold that this forfeiture of benefits during a strike is only a "temporary suspension of benefits" during the refusal to work. *Ante* at 248. It also would find that if a worker fails to request or accept an offer of favored work within a reasonable time, the forfeiture of benefits becomes permanent. *Ante* at 250, 255. This is so because "[a]n employer should not have to continuously bear the burden of initiating a renewal of favored work, nor should the employer be forced to hold favored positions open indefinitely." *Ante* at 250. Hence, the lead opinion correctly concludes "that an employee who has ceased to perform existing favored work should establish a good-faith willingness to accept or resume favored work that remains available in order to restore eligibility for benefits. Additionally, this willingness should be expressed within a reasonable period in order to be effective." *Ante* at 250. I agree.

Furthermore, as recognized by the lead opinion, the reasonableness standard must apply to both

parties to maintain the integrity of the favored work doctrine. *Ante* at 248-250, 254. See also *Bower, supra* at 182-185; *Russell v General Motors Corp,* 172 Mich App 627, 632; 432 NW2d 738 (1988).[4] Hence, a favored employee's unreasonable delay in accepting an offer of employment relieves an employer of liability. See, e.g., *Russell, supra* at 632.[5]

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[4] A reasonableness test is applied to the actions of employees when determining whether they are entitled to worker's compensation benefits. *Bower, supra* at 182. Originally, this Court adopted the reasonableness doctrine to protect workers from unjust results in the context of the favored work doctrine:

> Forfeiture is a drastic remedy. If the statute specifically requires that reasonableness not be taken into account, the courts must obey, no matter how unjust the result. But in the instant case, the doctrine to be applied, even though developed in a statutory context, is a judicially created one. Therefore, consistent with our approach to the common law, we refuse to consider application of the harsh forfeiture penalty without an assessment of the parties' reasonableness. [*Id.* at 184.]

The Court of Appeals has divided over whether the reasonableness standard applies to the actions of employers. See, e.g., *Hartsell v Richmond Lumber Co,* 154 Mich App 523, 535-536; 398 NW2d 456 (1986) (holding that the reasonableness standard is inapplicable); *id.* (MACKENZIE, P.J., dissenting) (approving of reasonableness standard for an employer's conduct); *Russell, supra* at 632, and *Derr v Murphy Motor Freight Lines,* 195 Mich App 333, 335; 489 NW2d 183 (1992) (holding that the reasonableness of an employer's actions should be evaluated).

The better view is to apply the reasonableness standard to the actions of employers:

> It must be remembered that it is the employee's unreasonable refusal which triggers the initial forfeiture of benefits. There comes a point after which it is unreasonable to think that such employee might someday accept the offer that was originally spurned. It is at that point that a company should be permitted to withdraw its offer with no fear of disadvantage. [*Russell, supra* at 632.]

[5] The obvious [corollary] to [*Bower*] is that the reasonableness of an employer's withdrawal of an offer of favored work must also be considered in determining whether benefits should be awarded. I fail to see how the mitigation or rehabilitation purposes underlying the favored work doctrine are served by

In the instant case, the application of these principles denies Nederhood relief. Although this Court may examine the WCAB's findings of law, absent fraud its findings of fact are conclusive if any competent evidence on the record supports those findings. Const 1963, art 6, § 28; MCL 418.861; MSA 17.237(861).[6] The WCAB found that Nederhood was performing favored work and voluntarily left that work to participate in the strike. The WCAB also found that defendant's hiring of permanent replacement workers did not constitute a de facto withdrawal of its offer of favored work, and that the union's proposals to return to work were merely negotiating tactics, not bona fide offers to return. Similarly, Nederhood failed to show that a replacement worker had taken his job, or that he could not find employment as a replacement worker. To the contrary, the record reveals that several former union members became replacement workers.[7] Moveover, most important, the WCAB found that Nederhood never approached defendant to regain his job—in other words, he failed to tender an offer to accept a favored posi-

deciding, as the majority does, that an offer of favored work must be left open without limit even though, as here, the worker has clearly demonstrated utter disinterest in returning to his employer's workplace. [*Hartsell,* n 4 *supra* at 535-536 (MACKENZIE, J., dissenting).]

[6] " 'We do not weigh the evidence. The weighing scale is in other hands and, even if we think it out of balance, we cannot re-weigh.' " *Pulley, supra* at 424, quoting *Hood, supra* at 194. See also *Holden v Ford Motor Co,* 439 Mich 257, 262-263; 484 NW2d 227 (1992); *Thornton v Luria-Dumes Co-Venture,* 347 Mich 160, 162; 79 NW2d 457 (1956).

[7] Furthermore, because many different positions may constitute favored work, see, e.g., *Markey v SS Peter & Paul's Parish,* 281 Mich 292, 299-300; 274 NW 797 (1937) (noting that odd-lot work may be favored work); *Evans v United States Rubber Co,* 379 Mich 457, 465-466; 152 NW2d 641 (1967) (noting that an ordinary job regularly performed by healthy individuals may be favored work), an alteration in job classifications may not have affected his ability to obtain favored work.

tion once he voluntarily left favored work. In short, Nederhood failed to present a prima facie case. Thus, the lead opinion would appropriately deny Nederhood relief.

II

Like Nederhood, Zimmerman forfeited his entitlement to benefits when he participated in the strike. Zimmerman failed to show any evidence that he or the union ever offered to return to favored work. Again, like Nederhood, Zimmerman also failed to present any evidence showing that his position was taken by a replacement worker, or that he would have been unable to obtain another comparable position. Hence, Zimmerman is not entitled to benefits.

Nevertheless, considering the "remedial nature of worker's compensation, the certainty and extent of the total disability, the length of the refusal to perform favored work at the time of the heart attack, and the fact that Zimmerman's heart attack did not arise out of his refusal to perform favored work [and] that a contrary result would require a permanent forfeiture of benefits on the basis of his original cessation of favored work," without providing him a reasonable time within which to express his willingness to return, the lead opinion would hold that he is "entitled to wage loss benefits as of February 4, 1982, the date upon which his heart attack rendered him physically unable to perform favored work." *Ante* at 258.

The lead opinion's holding misconstrues the supervening event doctrine and the worker's compensation act by granting Zimmerman a windfall. It correctly notes that the "basic rule of law . . . is that a supervening event causing cessation of an employee's favored work will not

terminate his right to benefits as long as the event is not under the employee's control or attributable to him." *Bower, supra* at 187. This is so because " '[a]n independent, intervening event, which follows a personal injury arising out of and in the course of employment, does not alone justify the denial, suspension, reduction, or *increase* of disability benefits for a continuing work related injury.' " *Powell v Casco Nelmor Corp,* 406 Mich 332, 354-355; 279 NW2d 769 (1979) (citation omitted; emphasis added). Hence, the favored work doctrine does "not require compensation benefits to be *automatically* revived upon the happening of an intervening nonindustrial event which disables a favored-work employee . . . . Rather, . . . such an event [does] not *preclude* the payment of compensation for a prior injury." *Flynn v General Motors Corp,* 162 Mich App 511, 517; 413 NW2d 444 (1987). Thus, to obtain benefits under the supervening act doctrine, a claimant must show that he "was already performing favored work for his original employer and a supervening independent event rendered him unable to continue." *Bower, supra* at 187.[8]

Zimmerman, however, was not performing favored work when he suffered the heart attack, but was voluntarily participating in a strike. There is no evidence that Zimmerman would have crossed the picket line had he been healthy, and a legal bar denied Zimmerman benefits at the time of his disability. This Court, therefore, must assume that even without the heart attack he would not have worked for defendant while the strike continued. Furthermore, he has failed to present any evidence that he would have returned to his position

[8] In other words, "the employee was already performing favored work for his original employer and a supervening independent event rendered him unable to continue." *Id.* See also *Lynch, supra* at 172.

after the decertification of the union. Thus, Zimmerman's disability is irrelevant to his ability to receive benefits because he would have been ineligible for such benefits if he had not had the heart attack. Because the burden is upon Zimmerman to show that he is entitled to benefits in such circumstances, and he failed to produce any evidence that he would have returned to work despite the strike and consequent decertification of the union, Zimmerman is not entitled to benefits. *Pulley v Detroit Engineering & Machine Co,* 378 Mich 418, 425-426; 145 NW2d 40 (1966); *Flynn, supra* at 517.

On the other hand, if his union had returned to work, the WCAB or the hearing referee could have fairly assumed he would have joined the union and he would be entitled to benefits. Because the union's actions could fairly have been impugned upon Zimmerman if it had returned to work, he would have been entitled to recover benefits beginning on the day the union returned to work, but no sooner.[9] Nevertheless, this was not the case

[9] 29 USC 159(a) mandates that representatives of collective bargaining units are "the exclusive representative of all the employees in such unit for the purposes of collective bargaining . . . ." Hence, bargaining outside the bona fide union representatives subverts federal labor standards:

> The [National Labor Relations Act] guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained . . . . [*Medo Photo Supply Corp v Nat'l Labor Relations Bd,* 321 US 678, 684; 64 S Ct 830; 88 L Ed 1007 (1944).]

Hence, the actions of plaintiffs' union are presumptively attributable to plaintiffs for their actions during a strike unless they in some fashion refute their union.

In the instant case, the union struck and was broken. The union never accepted a current offer of defendant, and eventually was decertified. Both Zimmerman and Nederhood were bound by their

with Zimmerman. In short, Zimmerman is not entitled to a windfall simply because of his unfortunate heart condition.

GRIFFIN, J., concurred with RILEY, J.

LEVIN, J. (*separate opinion*). I agree with the author of the lead opinion that 1981 PA 200,[1] codifying the favored work doctrine, should guide decision.[2] As set forth in that opinion, § 301(5)(a), added by the 1981 legislation, provides that if disability is established, and "an employee receives a bona fide offer of reasonable employment from a previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal."[3]

The last clause, "during the period of such refusal," is inconsistent with the view that refusal of work results in a permanent forfeiture of worker's compensation benefits. This clause is also inconsistent with the view that, because it would be unreasonable to expect the employer to keep those positions open beyond the point that it announced that the jobs would be filled by permanent replace-

union's decisions unless they chose to quit the union or cross the picket line. Neither did. Hence, they refused favored work and continue to do so. Of course, once the union was decertified, either plaintiff could have inquired regarding favored work, but failed to do so for an unreasonable length of time. Hence, they forfeited their benefits.

[1] Effective January 1, 1982.

[2] BRICKLEY, J., *ante*, p 247.

[3] MCL 418.301(5)(a); MSA 17.237(301)(5)(a).

ments,[4] Nederhood may not recover worker's compensation benefits.

While the needs of the employer may justify the employer in not keeping the offer open beyond a reasonable time, the need of the employee to participate in a strike may justify his refusal to work during a strike. The disabled worker is nevertheless disabled, and, as set forth in the 1981 legislation, can properly be denied benefits only "during the period of such refusal," without good and reasonable cause, of a bona fide offer of reasonable employment from a previous employer, another employer, or through the Michigan Employment Security Commission.

The "period of such refusal" is, of course, a question of fact. The burden of showing refusal of work should be borne by the employer because the offer of favored work is in mitigation of damages, in the form of worker's compensation benefits, otherwise payable by the employer.

When the union's representative offered to return the entire work force to work in January, 1982, that was in effect an offer on behalf of the favored workers to return to work. While the employer was not obliged to accept that offer, it should not be heard thereafter to assert that a particular injured worker, Nederhood, declined favored work unless it clarifies the situation by reoffering favored work to the injured worker, Nederhood, separately and apart from whatever was going on between the employer and the union, and other workers, at whatever wage the employer chooses to offer the particular injured worker. If the employer here had done so, and Nederhood had refused the offer, it would then be clear that, after the union's offer to return the entire work

[4] BRICKLEY, J., *ante,* p 255.

force to work in January, 1982, Nederhood had declined an offer of favored work at a definite wage.

In all events, the burden should be on the employer to show refusal of favored work from and after September 23, 1982, when Nederhood filed a petition for hearing before the Bureau of Worker's Disability Compensation. By filing that petition, Nederhood formally notified the employer that he was seeking a renewal of payment of worker's compensation benefits under the worker's compensation system. It was, or should have been, incumbent on this employer, claiming an offset in mitigation of damages on the basis of an offer, and the availability, of favored work, to show that it had, uncomplicated by the strike, the negotiations with the union, the interests of other workers (injured and uninjured), or other factors, made an offer of favored work to Nederhood after September 23, 1982, and that he had turned down the offer.

I join in reversal of the Court of Appeals in *Zimmerman.* I would also, for the reasons stated, reverse the Court of Appeals in *Nederhood* and remand to the WCAC for the entry of an award of compensation to Nederhood, who was found to have been partially disabled. Under the circumstances that three justices would affirm in *Nederhood* with the result that Nederhood would be denied compensation, and three would remand for further proceedings, and remand would provide Nederhood with an opportunity on remand to recover worker's compensation benefits, I join in remand to the WCAC.

In re FORFEITURE OF $256 AND ONE 1978 OLDSMOBILE

(PEOPLE v GUMAR)

Docket No. 95973. Argued April 5, 1994 (Calendar No. 2). Decided June 7, 1994.

The Wayne County Prosecuting Attorney sought forfeiture of $256 and a 1978 Oldsmobile owned by Mack Gumar after Detroit Police effected a traffic stop and seized the vehicle and the currency after finding what appeared to be controlled substances in the vehicle. The Wayne Circuit Court, Michael J. Talbot, J., ordered forfeiture. Almost nine months later, the defendant moved pro se to set aside the judgment. The court denied the motion, holding that it was without jurisdiction to grant the relief sought because the res had been disposed of, and, thus, there was no defendant over which it could exercise its power. The Court of Appeals, MURPHY, P.J., and D. E. HOLBROOK, JR., and WEAVER, JJ., denied leave to appeal (Docket No. 111321). The Michigan Supreme Court remanded the case to the Court of Appeals, 433 Mich 903 (1989). After remand, the Court, GRIBBS, P.J., and MICHAEL J. KELLY and REILLY, JJ., affirmed in an unpublished opinion per curiam, finding that because there had been a sale or other disposition of the forfeited property, there was no further jurisdiction over the subject matter of the action (Docket No. 123188). The defendant appeals.

In a unanimous memorandum opinion, the Supreme Court *held:*

An appellate court does not lose jurisdiction in a forfeiture case where there has been a disposition of the forfeited assets. The prior sale or disposition of the seized property will not bar entry of an order directing the return of the assets or the proceeds from their disposition.

Vacated and remanded.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Andrea L. Solak,* Chief, Special Operations, and *Mary Sue Czarnecki,* Assistant Prosecuting Attorney, for the people.

Prison Legal Services of Michigan, Inc. (by *Sandra Girard*), for Gumar.

MEMORANDUM OPINION. On July 6, 1986, Mack Gumar was driving a 1978 Oldsmobile in the City of Detroit. Two officers of the Detroit Police Department effected a traffic stop. Finding what appeared to be controlled substances in Mr. Gumar's automobile, they seized the vehicle, as well as $256 in currency.

The Wayne County prosecuting attorney filed and served upon Mr. Gumar a complaint for forfeiture.[1] Mr. Gumar did not file an answer.[2] The prosecutor then filed and served a motion for summary disposition, to which Mr. Gumar did not file a response.[3]

The motion was granted and the circuit court ordered forfeiture of the vehicle and the currency. It appears that the vehicle and the currency were disposed of in the customary manner.[4]

Almost nine months after the entry of the forfeiture order, Mr. Gumar filed a pro se motion to set aside the summary disposition. With regard to the forfeiture, he proposed several substantive defenses. He also attempted to explain why his opposition had been delayed.[5]

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[1] MCL 333.7521 *et seq.*; MSA 14.15(7521) *et seq.*

[2] From prison, Mr. Gumar wrote the circuit court, requesting an opportunity to appear and defend this matter pro se. There is no indication that the circuit court responded to Mr. Gumar's letter.

[3] His aunt appeared at the motion hearing to explain his inability to be present.

[4] MCL 333.7524(1); MSA 14.15(7524)(1). Mr. Gumar objects that the circuit court file does not contain confirmation that there has been a disposition of the forfeited assets. However, there is no indication that the assets remain in the control of the police or the circuit court.

[5] Mr. Gumar discussed his imprisonment for an unrelated offense, as well as a medical condition that rendered him legally blind for several months until an eye operation restored his vision. He also explained his early efforts to persuade the circuit court to allow him

The circuit court denied Mr. Gumar's motion to set aside the summary disposition. The court said that it was without jurisdiction to grant the relief "for the reason that the res in this matter has been disposed of and thus, there is no defendant over which this court can exercise its power were it disposed to do so." The circuit court added that, "even were this court to have jurisdiction, the basis of the present motion does not justify the granting of the relief sought."

Mr. Gumar appealed,[6] but the Court of Appeals affirmed.[7] The Court of Appeals agreed with the circuit court that, because there had been a sale or other disposition of the forfeited property, there was no further jurisdiction over the subject matter of the action. The court did not address Mr. Gumar's remaining issues, since the jurisdictional ruling was "determinative."[8]

We granted Mr. Gumar's delayed application for leave to appeal, "limited to whether the sale or other disposition of the seized property by the plaintiff meant that the lower courts could not grant relief to the appellant even if his arguments against forfeiture were meritorious." 444 Mich 925 (1994).[9]

Mr. Gumar argues that acceptance of the rule stated by the lower courts would render forfeiture

to participate in the forfeiture case, notwithstanding his imprisonment.

[6] Initially, the Court of Appeals denied an application for leave to appeal. This Court remanded the case for consideration as on leave granted. Unpublished order of the Court of Appeals, entered February 8, 1989 (Docket No. 111321), remanded 433 Mich 903 (1989).

[7] Unpublished opinion per curiam of the Court of Appeals, issued January 7, 1993 (Docket No. 123188).

[8] The Court of Appeals also characterized Mr. Gumar's other issues as "moot," citing *In re Forfeiture of $53,* 178 Mich App 480, 485; 444 NW2d 182 (1989).

[9] Later, the prosecuting attorney moved for permission to file a late brief. We grant that motion.

orders "appeal-proof," since prompt disposal of forfeited assets would deprive the courts of jurisdiction. In support of his argument, he cites *Republic Nat'l Bank of Miami v United States,* 506 US —; 113 S Ct 554; 121 L Ed 2d 474 (1992). There, the United States Supreme Court held that an appellate court does not lose jurisdiction when there is disposition of forfeited assets.

The prosecuting attorney does not dispute the correctness or the applicability of the *Republic Nat'l Bank* decision. The assistant prosecutor handling this matter has written to this Court to say, "Based upon the United States Supreme Court ruling in *Republic Nat'l Bank of Miami v United States, supra,* an appellate court is not divested of jurisdiction by a subsequent disposition of the 'res.' "

However, the prosecuting attorney argues that resolution of the jurisdictional question does not end the inquiry concerning whether relief may be granted. The prosecutor says that the disposition of the property renders this dispute moot. We disagree.

Employing a variety of analyses, the justices of the United States Supreme Court rejected a mootness argument in *Republic Nat'l Bank.* We likewise are persuaded that, in this context, the prosecutor offers a distinction without a difference. If there is merit to Mr. Gumar's arguments concerning the underlying forfeiture order, the prior disposition of the assets will not bar entry of an order directing the plaintiff to return the assets or the proceeds from the disposition of the assets.[10]

The issue on which we granted leave should be decided in accordance with *Republic Nat'l Bank.*

[10] Though we reject the prosecuting attorney's arguments concerning jurisdiction and mootness, we do not foreclose other arguments concerning the procedural history or the timing of this matter.

We therefore vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of Mr. Gumar's remaining issues.

CAVANAGH, C.J., and LEVIN, BRICKLEY, BOYLE, RILEY, GRIFFIN, and MALLETT, JJ., concurred.

PEOPLE v WESTRA

Docket No. 98725. Decided June 7, 1994. On application by the people for leave to appeal, the Supreme Court, in lieu of granting leave, reversed the judgment of the Court of Appeals, and reinstated the defendant's conviction.

Steven Westra pleaded guilty in the Kent Circuit Court, Michael R. Smolenski, J., of possession of marijuana with intent to deliver. The Court of Appeals, NEFF and C. C. SCHMUCKER, JJ. (WHITE, P.J., dissenting), reversed in an unpublished opinion per curiam, because the search warrant that led to the seizure of the critical evidence listed an incorrect address for the house in which the defendant's apartment was located (Docket No. 157258). The people seek leave to appeal.

In an opinion per curiam, signed by Chief Justice CAVANAGH, and Justices BRICKLEY, BOYLE, RILEY, GRIFFIN, and MALLETT, the Supreme Court *held:*

Because the warrant otherwise accurately described the place to be searched and because the police had made considerable efforts to ascertain the address, the defect in the warrant listing an incorrect address did not require suppression of the evidence.

The constitutionality of police conduct must be judged in light of the information available to them at the time they act. The police in this case made reasonable inquiry into the defendant's address before executing their search, and the search warrant, though technically defective, was not invalid.

Reversed.

Justice LEVIN, dissenting, would not reverse the judgment of the Court of Appeals by per curiam opinion, but would grant leave to appeal.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *William A. Forsyth,* Prosecuting Attorney, *Timothy K. McMorrow,* Chief Appellate Attorney, and *Melody R. Leavenworth,* Assistant Prosecuting Attorney, for the people.

PER CURIAM. The Court of Appeals reversed the defendant's conviction (based on a conditional guilty plea) of possession with intent to deliver marijuana because the search warrant that led to the seizure of the critical evidence listed an incorrect address for the house in which the defendant's apartment was located. Because the warrant otherwise accurately described the place to be searched and because the police had made considerable efforts to ascertain the address, this defect in the warrant did not require suppression of the evidence.

The evidence at the hearing on the motion to suppress indicated that the police had had defendant's residence under surveillance for over a month and that purchases of marijuana had been made by an informant several times. As a result, officers secured a search warrant that described the premises as follows:

> The entire apartment located at *242 National, N.W., Apt. No. 2,* City of Grand Rapids, County of Kent, State of Michigan further described as being a blue wooden framed 2 story multi-dwelling residence . . . . [Emphasis added.]

In fact, the defendant's apartment was Apartment No. 1 in 246 National, which was next door to 242 National. Both structures were painted blue, and from the copies of photographs admitted into evidence at the hearing, they are quite similar in appearance.

The building in which the defendant's apartment was located in fact had the numerals "246" beside the front door, but from the manner in which they were painted, they could not be read by the officers from the street, and they were reluctant to approach the house for fear of alert-

ing the suspect. They attempted to obtain the address by looking in a directory, and by going so far as to check with the Secretary of State's office regarding the defendant's address using his car registration. Defendant had previously lived at 242 National and had not informed the Secretary of State about his change of address in the two years that he had lived at 246 National.

We agree with the dissenting judge in the Court of Appeals that in the circumstances of this case, suppression of the evidence was not required:

> In [*People v Urban,* 228 Mich 30; 199 NW 701 (1924)], the warrant description, although inaccurate, when taken together with the affidavit and the knowledge of the police officers, was held adequate to define the premises to be searched. . . .
>
> In cases such as these, the constitutionality of police conduct must be judged in light of the information available to them at the time they acted. *Maryland v Garrison,* 480 US 79, 85; 107 S Ct 1013; 94 L Ed 2d 72 (1987). I agree with the lower court that the police made reasonable inquiry into defendant's address before executing their search, and that the search warrant, though technically defective, was not invalid.

Accordingly, we reverse the judgment of the Court of Appeals and reinstate the defendant's conviction.

CAVANAGH, C.J., and BRICKLEY, BOYLE, RILEY, GRIFFIN, and MALLETT, JJ., concurred.

LEVIN, J. (*dissenting*). I would not reverse the Court of Appeals judgment by per curiam opinion, but, rather, would grant leave to appeal.

PEOPLE v JAFFRAY

Docket No. 95144. Argued October 7, 1993 (Calendar No. 12). Decided June 7, 1994.

Thomas Jaffray, Jr., and a codefendant, were convicted following a bench trial in the Detroit Recorder's Court, Michael L. Stacey, J., of kidnapping by secret confinement. The Court of Appeals, MURPHY, P.J., and SHEPHERD and T. S. EVELAND, JJ., reversed in an unpublished opinion per curiam, determining that because third parties were aware of the victim's detention, the evidence was insufficient to sustain the conviction of secret confinement kidnapping (Docket No. 116792). The people appeal.

In an opinion by Justice GRIFFIN, joined by Chief Justice CAVANAGH, and Justices BRICKLEY and MALLETT, the Supreme Court *held:*

There was sufficient evidence to justify a finding beyond a reasonable doubt by a rational trier of fact that the defendant was guilty either of kidnapping by forcible confinement with intent to secretly confine or of kidnapping by secret confinement.

1. A kidnapping conviction may be premised on a showing of confinement that in fact is secret or on a showing of forcible seizure or confinement with intent to secretly confine, regardless of whether the confinement remains a secret. To convict an accused of forcible confinement with intent to secretly confine, the prosecution must prove a forcible seizure, confinement, inveigling or kidnapping of another done wilfully, maliciously, and without lawful authority with the intent to cause the person to be secretly confined or imprisoned involuntarily. In this case, the evidence produced was sufficient to support a finding by a rational trier of fact beyond a reasonable doubt that the defendant forcibly seized or confined the victim with the intent to secretly confine him.

2. To be guilty of secret confinement kidnapping, an accused

REFERENCES

Am Jur 2d, Abduction and Kidnapping §§ 21-27.

Necessity and sufficiency of showing, in kidnapping prosecution, that detention was with intent to "secretly" confine victim. 98 ALR3d 733.

must wilfully, maliciously, and without legal authority, secretly confine or imprison another person by force without the person's consent. The essence of secret confinement is the deprivation of the assistance of others by virtue of the victim's inability to communicate the predicament. It is not predicated solely on the existence of a single factor; rather, consideration of the totality of the circumstances is required. That others may be suspicious or aware of the confinement is relevant to the determination, but is not always dispositive. In this case, under the circumstances, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt of secret confinement kidnapping. That a disinterested person learned of the confinement is not dispositive, and while the duration of the confinement is relevant, it is but one factor to be considered. There is no doubt that the victim, throughout the period of confinement, was precluded from effectively communicating his plight or location to others.

Justice BOYLE, joined by Justice RILEY, concurring, stated that the only issue raised on appeal is the sufficiency of the evidence of secret confinement. It is not an appropriate case to address in dicta unraised issues regarding the length of confinement.

Reversed and remanded.

Justice LEVIN, writing separately, stated that it is questionable whether the Legislature intended to make secret confinement a capital offense where, as in this case, although the manner or length of confinement was not insignificant, there was evidence only of an intent to confine, and no evidence of an intent to harm, the victim or to hold the victim as a hostage for ransom or other felonious purpose. The secret confinement provision of the kidnapping statute ought to be construed to require some significant manner or length of detention, otherwise, *defendants might be convicted of true kidnapping* when they merely have committed false imprisonment.

An accused cannot be convicted of secret confinement kidnapping no matter how strong the desire to secretly confine the victim if the confinement in fact was not secret. In this case, Jaffray's participation in a concerted effort to maintain the secrecy of Williams' confinement is not pertinent to a determination whether Williams in fact was secretly confined. Nor did Jaffray commit secret confinement kidnapping by carrying Williams to the basement, because by the time he was carried to the basement, he had already communicated his plight to the outside world. Further, Jaffray had no intent to harm Williams.

1. KIDNAPPING — FORCIBLE CONFINEMENT — SECRET CONFINEMENT

To convict an accused of forcible confinement with intent to secretly confine, the prosecution must prove a forcible seizure, confinement, inveigling or kidnapping of another done wilfully, maliciously, and without lawful authority with the intent to cause the person to be secretly confined or imprisoned involuntarily (MCL 750.349; MSA 28.581).

2. KIDNAPPING — SECRET CONFINEMENT — DEPRIVATION OF ASSISTANCE — INABILITY TO COMMUNICATE.

To be guilty of secret confinement kidnapping, an accused must wilfully, maliciously, and without legal authority, secretly confine or imprison another person by force without the person's consent; the essence of secret confinement is the deprivation of the assistance of others by virtue of the victim's inability to communicate the predicament; it is not predicated solely on the existence of a single factor; rather consideration of the totality of the circumstances is required (MCL 750.349; MSA 28.581).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Research, Training and Appeals, and *Don W. Atkins* and *Karen D. Woodside,* Assistant Attorneys General, for the people.

Suzanne Carol Schuelke for the defendant.

GRIFFIN, J. Following a bench trial, this defendant was found guilty of kidnapping by secret confinement.[1] Because third parties became aware of the victim's detention, the Court of Appeals determined that the evidence was insufficient to sustain the conviction. We disagree and reverse.

I

Defendant Thomas Jaffray, Jr., and two codefendants, brothers Ronald and Martin Normandin,

[1] MCL 750.349; MSA 28.581.

were charged and tried jointly for kidnapping[2] as a result of acts committed before the fatal beating of Bruce Williams on August 13, 1987, in the basement of a house that Williams, the victim, shared with the codefendants.[3] Another resident of the home, Francis Hamilton, was accused of beating the victim with a nail-studded baseball bat, which resulted in Williams' death. Hamilton was tried separately for first-degree murder.[4]

At the bench trial of Jaffray and his two codefendants, the prosecution called six witnesses and presented three statements that had been given to the police, one by each of the three codefendants. References in each statement to either of the other two codefendants were blocked out,[5] and the three redacted statements were placed in evidence by stipulation. None of the codefendants testified and they called no witnesses.

The record reflects little dispute concerning the sequence of events that preceded the killing of Williams. On August 13, 1987, Ronald Normandin arrived home at about 3:30 A.M. and noticed that his dog, a pit bull terrier, was missing. Later that

[2] Specifically, the information charged that the defendants "wilfully, maliciously and without lawful authority forcibly or secretly confined the above-named complainant within the State of Michigan, against complainant's will, contrary to sec. 750.349, M.C.L.A."

[3] Mrs. Lois Normandin, mother of the Normandin brothers, owned and also resided in the house located at 16814 Strathmoor in the City of Detroit.

[4] MCL 750.316; MSA 28.548. After a jury trial, Francis Hamilton was convicted of second-degree murder. MCL 750.317; MSA 28.549. On appeal, which was consolidated with the appeal by Thomas Jaffray, Jr., the Court of Appeals reversed Hamilton's conviction in an unpublished opinion per curiam and ordered a new trial on the ground that the prosecutor failed to correct erroneous testimony elicited from a principal witness to the effect that nothing had been promised in return for the witness' testimony. Decided July 28, 1992 (Docket No. 110051).

[5] See *Bruton v United States,* 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). See also *People v Banks,* 438 Mich 408; 475 NW2d 769 (1991).

morning in the living room of the home, codefendants Ronald and Jaffray confronted and accused Williams of taking the dog. Initially, Williams claimed the dog had been stolen. However, after Jaffray threatened him with the nail-studded bat, Williams admitted that he had sold the dog for $20 to buy crack cocaine.

Upon further questioning, Williams indicated that the dog could be located at a house on Puritan Street several blocks away. After securing this information, handcuffs were placed on Williams' wrists, which were shackled behind his back. Jaffray then tied Williams' feet with rope and attached the rope to the handcuffs.[6]

Williams offered to participate in an initial search for the dog, but Jaffray refused. Instead, Jaffray stayed behind to guard Williams while one of the other codefendants set out in Jaffray's car to locate and retrieve the pit bull.[7] However, the codefendant soon returned after an unsuccessful search. Williams then provided additional information concerning the dog's location. Again, Jaffray

[6] In Jaffray's redacted statement, he said:

> _____ handcuffed Bruce, with his hands behind his back. I asked _____ if he had something that I could tie [the victim's] feet with, and _____ brought me some rope. Bruce was lying on the couch, on his stomach. I told Bruce what I was going to do. Tie up his feet. I asked Bruce to lift up his feet. So, he did, and I tied his feet up with the rope. Then, I tied the rope up to the handcuffs. Then I laid him on the floor, by the couch.

[7] In his statement to the police, Jaffray recalled:

> _____ had the information about the dog. Bruce wanted to go with us. But, I didn't want to take him in my car. So, I told _____ to take my car. _____ left. While _____ was gone, I was talking to Bruce. I told Bruce, that when _____ comes back with the dog, that I was going to let him go.

refused to allow Williams to help search for the dog. This time, Jaffray and a codefendant departed while, at Jaffray's suggestion, the other codefendant stayed behind to guard the victim for the duration of the search, which lasted approximately fifteen minutes.[8]

Although the specific time frame of this episode is unclear from the record, it is fixed in part by the testimony of Curtis Kennedy, a friend of Williams who lived across the street. Kennedy testified that, when he attempted to visit Williams between 8:00 A.M. and 9:00 A.M.,[9] he met Ronald Normandin outside the Normandin home, where Ronald indicated that Williams was "dog-tied" upstairs because he had sold the pit bull for crack cocaine. Kennedy further testified that he heard Williams' cries for help coming from the upstairs portion of the house.[10] Kennedy then ran home

[8] In his statement, Jaffray stated:

> Well, then _____ came back. _____ said, that he could' [sic] not find the house. We was asking him about where the house was. So, Bruce was saying that there was a white Audi next to the house. So, I asked _____ to watch Bruce, while me and _____ went and looked for the house. . . . It took us about five minutes, and we found the house. I sat in the car, while _____ went up to the door. _____ was knocking on the door for about ten minutes. Nobody answered, so _____ came back to the car. _____ stated to me, that he had heard his dog, braking [sic] in there. So, we went back to the house.

[9] Kennedy testified as follows:

> *Q.* (By Mr. Burke, continuing): Mr. Kennedy, the approximate time when you went across the street to talk to Bruce was about nine o'clock—did you indicate?
>
> *A.* No, it was earlier than that. I'd say around between eight and nine. I don't know exactly which time it was.

[10] Specifically, Kennedy testified as follows:

> *A.* As I got over there, I am going to the side of the house, I met Ronnie coming outside of the house.

and informed his mother, Minnie Collins, of his discovery.

After this disclosure, Mrs. Lois Normandin, mother of the Normandin brothers, warned the codefendants that Williams had been "making a lot of noise" while they were out searching for the dog.[11] Unbeknown to anyone outside the home, Jaffray and a codefendant then took Williams to the basement,[12] where Jaffray placed a "gag" in

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* * *

Q. What did Ronnie tell you?

* * *

A. He said, "Did you hear about what happened?" I said, "No." Ronnie said, "Yes, Bruce sold my dog—I mean crack for $20—crack."

* * *

A. . . . Ronnie mentioned that he had sold the dog for a crack, so I asked Ronnie where was Bruce and Ronnie told me they had Bruce upstairs dog-tied.

Q. When you heard they had him dog-tied, what did you do?

* * *

A. I went to leave. I could hear my friend's voice upstairs like he was begging for help.

* * *

Q. That's a three level home? There's a basement, first floor and second floor?

A. Yes, sir.

Q. When you say upstairs, do you mean on the first level?

A. No, upstairs.

Q. In the bedroom?

A. Yes, sir.

Q. No question in your mind about that?

A. No, sir.

[11] Jaffray recalled in his redacted statement:

> So, we went back to the house. _____'s mother said, you better get into the living room with _____, Bruce is yelling. He's making a lot of noise. . . . That's what _____'s mother was saying.

[12] In its opinion pertaining to the consolidated appeals of Jaffray and Hamilton, the Court of Appeals stated that Jaffray and Ronald

Williams' mouth and tied him to a pole with an extension cord.[13] Later, while Williams remained confined in the basement,[14] Hamilton allegedly bludgeoned Williams to death with the nail-studded bat.[15]

Minnie Collins called the police at approximately 10:20 A.M. When the officers arrived at 11:25 A.M., Collins told them that Williams was in

returned to the home at approximately 9:20 A.M., whereupon Martin and Jaffray moved Williams to the basement. Although Jaffray, who did not testify in his own trial, testified one week later in Hamilton's murder trial that these events occurred at approximately 9:20 A.M., this evidence is not part of the record in the appeal before us and we do not rely upon it.

[13] Jaffray acknowledged in his redacted statement:

> So, me and _____ we carried Bruce downstairs. Then we tied him to an "I" beam in the work shop. Then, me and _____ went back upstairs.
>
> * * *
>
> *Q.* Did you tie the cord and towel around Bruce's neck?
>
> *A.* When he was frist [sic] put downstairs, I tied it around his mouth to gag him.

[14] The record does not indicate the specific time when Williams was moved to the basement. However, it appears the beating occurred at approximately 10:00 A.M., on the basis of the testimony of Audrey Diefenbach, a friend of Jaffray who slept at the Normandin home the night before:

> *Q.* Now, after [Frank Hamilton] goes downstairs, you got the uneasy feeling in your stomach. . . .
>
> *A.* I heard some noises downstairs also. I looked at the clock. . . . It was around right before ten o'clock or something like that. [Also, see n 38.]

[15] Although no one outside the Normandin home had knowledge of these events, the record indicates that others, including Lois Normandin, Audrey Diefenbach, and David Chubb, were present inside the home at some point during the victim's detention and subsequent beating. Although these individuals apparently had knowledge of such events, but were not criminally charged, we decline to exonerate Jaffray for secret confinement kidnapping on account of an exercise of prosecutorial discretion not to prosecute potential accomplices. Thus, except where otherwise noted, our reference herein to "third persons" pertains only to those individuals who were outside the home when the victim was moved to the basement and beaten to death.

the Normandin house "bound and gagged." The police then attempted to search the Normandin home, but were denied entrance for approximately twenty minutes.[16] They eventually entered the home, but did not find Williams after a brief inspection.

Thereafter, at approximately 12:55 P.M., the police were again summoned to the Normandin home. After talking with the victim's mother, Ruth McClinton, the officers attempted to reenter the home, but again met resistance. Eventually, the officers gained access to the home and found Williams' plastic-wrapped body in the basement.

Following a bench trial, the trial judge acquitted Martin Normandin, but found Jaffray and Ronald Normandin guilty of kidnapping as charged. With respect to Jaffray and Ronald, the court specifically found "beyond a reasonable doubt that the victim Bruce Williams was forcibly confined or imprisoned . . . that during the course of said confinement the Defendants [Jaffray and Ronald Normandin] kept the location of the victim secret . . . [and] that the two Defendants . . . intended the confinement to be secret."

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[16] Detroit Police Officer David Mitchell testified:

Q. You knocked on the door. Did Mr. Normandin answer the door?

A. Him and a few other people came from the back of the house. There were several people outside at the time.

* * *

Q. . . . What did Mr. Martin Normandin tell you at the door?

A. They denied us entry in the home, stated his mother was sick and he doesn't want us to disturb her coming into the house.

* * *

A. We stood by for another say 15, 20 minutes making sure no one left the house, and we gained access to the house.

In his appeal in the Court of Appeals, defendant Jaffray argued, inter alia, that the evidence was insufficient to support a conviction of secret confinement kidnapping. The panel agreed and reversed his conviction. We then granted the prosecutor's application for leave to appeal. 442 Mich 935 (1993).

II

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton,* 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980). See also *Jackson v Virginia,* 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979), and *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992).

The elements of the offense of "kidnapping" are not easily set forth in a short, simple statement. As Justice BOYLE, writing for this Court, explained in *People v Wesley,* 421 Mich 375; 365 NW2d 692 (1984), Michigan's kidnapping statute[17] encompas-

[17] MCL 750.349; MSA 28.581 provides:

> Any person who wilfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or shall inveigle or kidnap any other person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

ses six forms of conduct, each of which constitutes the crime of kidnapping. There the Court said,

> [A] person can be convicted of kidnapping if it is proven beyond a reasonable doubt that he or she wilfully, maliciously, and without lawful authority,
>
> (a) forcibly or secretly confined or imprisoned any other person within this state against his will, or
>
> (b) forcibly carried or sent such person out of this state, or
>
> (c) forcibly seized or confined, or inveigled or kidnapped any other person
>
> (1) with intent to extort money or other valuable thing thereby, or
>
> (2) with intent either
>
> (A) to cause such person to be secretly confined or imprisoned in this state against his will, or
>
> (B) [to cause such person to be] in any way held to service against his will. [*Wesley, supra,* p 383.]

Although this articulation may appear to enumerate only five forms of kidnapping, the Court further explained:

> The portion of the statute contained in (a) above actually contains two separate descriptions of punishable conduct: forcible confinement or imprisonment and secret confinement or imprisonment. [*Id.,* p 384.]

At issue in *Wesley* was whether the specific intent portion of the statute "applies to *all* of the forms of conduct which precede it or applies only to the form of conduct which immediately precedes it, i.e., 'forcibly seize or confine, . . . or inveigle or kidnap.' " *Id.,* p 383 (emphasis in original). The *Wesley* Court concluded that "the 'intent section' of the statute applies only to the form of conduct

which immediately precedes it,"[18] and, therefore, does not apply to that portion of the statute which prohibits any person from "forcibly or secretly confin[ing] or imprison[ing] any other person within this state against his will. . . ."[19] In other words, three of the six formulations of kidnapping within the Michigan statute do not require a showing of specific intent:

(1) forcible confinement or imprisonment of another within this state;

(2) secret confinement or imprisonment of another within this state; or

(3) forcible carrying or sending of another out of this state.

This important distinction in the statutory framework comports with the judicial purpose of deterring prosecutorial overcharging in connection with the kidnapping statute. *People v Otis Adams,* 34 Mich App 546; 192 NW2d 19 (1971) (opinion of LEVIN, J.). Although "asportation" is not mentioned in the statute, asportation of the victim is a judicially required element of the crime of "kidnapping by forcible confinement or imprisonment," having been read into the statute to sustain its constitutionality by distinguishing true kidnapping from common-law false imprisonment and other lesser crimes. *People v Adams,* 389 Mich 222; 205 NW2d 415 (1973).[20]

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[18] *Wesley, supra,* p 383.

[19] MCL 750.349; MSA 28.581.

[20] See *Wesley, supra,* pp 384-385. See also *People v Otis Adams, supra,* p 560 wherein Justice LEVIN wrote: "It is obvious that virtually any assault, any battery, any rape, or any robbery involves some 'intentional confinement' of the person of the victim. To read the kidnapping statute literally is to convert a misdemeanor, for example, assault and battery, into a capital offense. A literal reading of the kidnapping statute would permit a prosecutor to aggravate the

However, a showing of asportation is not required where the accused is charged with either secret confinement of the victim or forcible confinement with intent to secretly confine the victim. As this Court explained in *Wesley,* "no movement is required *where the victim was secretly confined,* Perkins [Criminal Law (2d ed)], p 178." *Wesley, supra,* p 388 (emphasis added).[21] Alternatively, where "forcible confinement with intent to secretly confine" is the crime, the

> specific intent requirement obviates the need to read an asportation element into the statute. The intent to cause the victim to be secretly confined substitutes for the requirement of asportation. See Perkins, Criminal Law (2d ed), p 178. [*Wesley, supra,* p 390.]

In the case before us, we note that although the trial court specifically found that the location of the confinement was kept secret and that defendant Jaffray intended the confinement to be secret, the trial judge made no finding concerning the element of asportation.[22] Thus, we draw from the

charges against any assailant, robber, or rapist by charging the literal violation of the kidnapping statute which must inevitably accompany each of those offenses."

[21] See also *People v Phillips,* 112 Mich App 98, 109; 315 NW2d 868 (1982) ("It would appear that 'secret confinement' can be the alternative to 'asportation' ").

[22] While the trial court made no finding with respect to asportation, a review of the record suggests that a rational trier of fact could have found beyond a reasonable doubt the existence of the element of asportation. Defendant Jaffray admitted his participation in the forcible confinement of Williams, the victim, against his will, and that he, Jaffray, sought to confine the victim until Ronald's dog could be recovered. Jaffray also admitted that he participated in forcibly moving the victim from the living room into the basement where he tied the victim to a pole. In light of the surrounding circumstances, we believe this movement of the victim constituted asportation. Moreover, because the purpose of the victim's confinement was to recover the missing dog, this asportation was "incidental to the commission of the kidnapping," not "incidental to the commission of a lesser underlying crime . . . ." See *Adams,* 389 Mich 236.

Wesley analysis two formulations of proscribed conduct that have possible application in this case. We refer to conduct

> (1) where the perpetrator confines or imprisons the victim secretly against his will (secret confinement kidnapping);[23] and
>
> (2) where the perpetrator forcibly seizes or confines the victim against his will with the intent to cause the victim to be secretly confined (forcible confinement with intent to secretly confine).[24]

Despite the clear dichotomy between these two formulations of kidnapping, the Court of Appeals in the case at bar misinterpreted *Wesley* as requiring a showing of secret confinement *and* a showing of specific intent to secretly confine the victim in every case in which kidnapping by secret confinement is alleged.[25] This is contrary to the *Wesley* explanation that a kidnapping conviction may be premised on a showing of confinement that in fact is secret *or* upon a showing of forcible seizure or

[23] *Wesley, supra,* pp 384-388.

[24] *Id.,* pp 389-391.

[25] Specifically, the Court of Appeals stated:

> In *People v Wesley,* 421 Mich 375, 383; 365 NW2d 692 (1984), sets [sic] forth the elements of this statute:
>
> "[A] person can be convicted of kidnapping if it is proven beyond a reasonable doubt that he or she wilfully, maliciously, and without lawful authority,
>
> "(a) forcibly or secretly confined or imprisoned any other person within this state against his will . . .
>
> * * *
>
> "(2) with intent either
>
> "(A) to cause such person to be secretly confined or imprisoned in this state against his will . . . ." [Note 4 *supra,* slip op, p 2. Alteration in original.]

confinement with intent to secretly confine, whether or not the confinement remains a secret.

With that clarification in mind, we turn to the task of determining whether sufficient evidence was produced in this case to support a finding of defendant's guilt of either of these two types of kidnapping. To this end, we shall first consider whether there was sufficient evidence of "forcible confinement with intent to secretly confine," and then we shall examine the evidence tending to establish guilt of "secret confinement kidnapping." Because we find sufficient evidence of either, and both, types of kidnapping, we conclude that the Court of Appeals erred, and that reversal is required.[26]

III

A

To convict an accused of "forcible confinement

[26] Our decision is consistent with *People v Bergevin,* 406 Mich 307, 311-312; 279 NW2d 528 (1979), in which this Court held that each statutory formulation of kidnapping does not constitute a separate and distinct crime for purposes of trial, conviction, and sentencing. Rather, "the intent of the Legislature [was] to delineate within the statute the possible alternative ways in which the crime of kidnapping could be committed." *Id.,* p 311. Thus,

> [t]he fact that a defendant abducts a victim under circumstances which satisfy more than one of the alternative definitions of [kidnapping] does not preclude a prosecutor from listing in an information the alternative circumstantial bases in a kidnapping charge or from arguing all of the alternative circumstantial bases upon which a jury can return a verdict of guilty or not guilty, but it may give rise to only one criminal charge for purposes of trial, conviction, and sentencing. [*Id.,* p 312.]

Likewise, although Jaffray's abduction of Williams may give rise to only one criminal kidnapping conviction, we believe his conviction could be supported by the factual existence of the alternative formulations of kidnapping by secret confinement or kidnapping by forcible confinement with intent to secretly confine.

with intent to secretly confine," the prosecution must prove:

> (1) a forcible seizure, confinement, inveigling or kidnapping of another,
>
> (2) done wilfully, maliciously and without lawful authority,
>
> (3) with the intent to cause such person to be secretly confined or imprisoned within the state against his will. [*Wesley, supra,* p 389.][27]

---

[27] We recognize that the information charged that defendant Jaffray "forcibly or secretly confined" the victim contrary to the kidnapping statute and did not specifically allege "with intent to secretly confine." However, on the authority of *People v Adams, supra,* we conclude that the information sufficiently encompassed the charge of "forcible confinement with intent to secretly confine." In *Adams,* which addressed the sufficiency of an information in a kidnapping case, this Court quoted with approval from *People v Weiss,* 252 AD 463, 467-468; 300 NYS 249 (1937), rev'd on other grounds 276 NY 384 (1938):

> "In determining the sufficiency of an indictment the test is: Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case? In applying this test courts should be liberal, not technical." [*Adams,* 389 Mich 243. Emphasis deleted; citations omitted.]

In *Weiss,* the highest New York appellate court considered a challenge to an indictment for kidnapping that did not allege specific intent even though the New York statute defined kidnapping as the wilful and unlawful seizing of a person against his will "with the intent to cause him to be confined." The court found the indictment to be sufficient and explained:

> The statute requires seizure with intent to confine. Seizure alone is not sufficient. But where seizure and actual confinement against the victim's will and without authority of law are alleged, the unlawful intent appears, it is implicit in the indictment, and the crime defined by the statute is sufficiently pleaded . . . . [*Weiss,* 252 AD 467.]

In *Adams,* the information charged forcible confinement, but did not allege asportation. Applying the *Weiss* test, the *Adams* Court found the information sufficient and reasoned, "Defendant knew of

Defendant Jaffray does not dispute the existence of the first two elements,[28] but asserts that he "did not hide what was going on." However, our review of the record indicates that a rational trier of fact could find beyond a reasonable doubt that Jaffray intended to secretly confine the victim.

Proof of Jaffray's intent can be established inferentially on the basis of his conduct during the morning in question. *People v Love,* 127 Mich App 596; 339 NW2d 493 (1983). As already noted, Jaffray provided a detailed account of his involvement in Williams' confinement in a statement to police, which was admitted in evidence.

In his statement, Jaffray acknowledged that he actively participated in the initial confinement of Williams, binding his hand-cuffed wrists and feet with a cord. Although Williams offered to help in the first search for the dog, Jaffray denied his request and guarded Williams while a codefendant set out to recover the missing dog in Jaffray's car. A reasonable inference can be drawn that the purpose of Jaffray's decision to guard the shackled victim in the living room of the home was to deny Williams the opportunity to alert others of his predicament.

The manifestation of Jaffray's intent is further evidenced by his response to the first unsuccessful search by a codefendant. Again, in lieu of allowing

the nature and character of the crime he was charged with. If the Court of Appeals' reversal of conviction is affirmed by this Court, he will not be able to be again charged with this crime of kidnapping." *Id.,* p 244.

In the case before us, Jaffray affirmatively argued that he lacked the intent to secretly confine the victim. In light of *Adams,* we are satisfied that the notice provided in the information was adequate to sustain a conviction of forcible confinement with intent to secretly confine, and that Jaffray's conviction or acquittal would bar any subsequent kidnapping charge based upon the same transaction.

[28] Indeed, Jaffray acknowledges in his brief to this Court that "it can be said that there was an involuntary confinement in this matter, and that the motives of the confinement were improper . . . ."

Williams to help in the second search for the dog, Jaffray and a codefendant departed while, at Jaffray's suggestion, the other codefendant stayed behind to guard Williams. It could be reasonably inferred that Jaffray would not allow Williams, the only person who knew the precise location of the dog, to assist in the search because he wanted to maintain the secrecy of Williams' confinement.

The strongest evidence of Jaffray's intent to secretly confine the victim was provided by the action he took when he learned of efforts by Williams to alert others. As Jaffray admitted in his statement, upon returning to the home after the second unsuccessful effort to retrieve the dog, Mrs. Lois Normandin informed the codefendants that Williams had been "making a lot of noise." Jaffray's response was to join a codefendant in moving Williams to the basement, where Jaffray tied the victim to a pole and "gagged" his mouth. Clearly, this action was taken by Jaffray to prevent Williams from communicating his plight to others, in an effort to preserve the secrecy of the confinement.

Defendant Jaffray points to Ronald Normandin's disclosure to Kennedy as evidence that there was a lack of secrecy. However, that action by Ronald is not material to the issue of Jaffray's intent in the absence of knowledge by Jaffray that such a disclosure had been made. In his statement to police, Jaffray made clear that he was unaware of the fact that Ronald had informed Kennedy of Williams' plight.[29] Even if one were to conclude that

[29] Jaffray acknowledged in his statement to the police:

> _____ told the lady across the street two sons, Steve and Carl, Minnie's boy. [sic] That we had Bruce in the house tied up. That we were trying to get information from him about the dog. I guess _____ thought that he could trust them or something, I don't know. . . . *I didn't know that* _____ *had told them that.* [Emphasis added.]

Ronald did not intend to secretly confine Williams, the same could not be said of Jaffray.

We find that the evidence produced was sufficient to support a finding beyond a reasonable doubt by a rational factfinder that defendant Jaffray forcibly seized or confined Williams with the intent to secretly confine him.

B

To be guilty of secret confinement kidnapping, an accused must:

> 1. Willfully, maliciously, and without legal authority[,]
> 2. Secretly confine or imprison another person[,]
> 3. By force/without consent. [12 Michigan Practice, Criminal Law, § 9.16, p 283.][30]

Given the facts of this case, our analysis of the application of this form of kidnapping necessarily focuses on the knowledge of third persons regarding the victim's plight and its effect on the element of secret confinement. Defendant asserts that secret confinement kidnapping cannot be established unless the victim is placed in a situation in which his location will not be discovered within a reasonable period of time, citing *People v Johnson,* 171 Mich App 801; 430 NW2d 828 (1988), *People v McNeal,* 152 Mich App 404; 393 NW2d 907 (1986),

30 Professor Saltzman notes that "[w]here the victim is isolated from others, by physical force or threat of physical harm, courts have easily found sufficient evidence to sustain a finding of secret confinement." 12 Michigan Practice, p 284. As noted above, this type of kidnapping does not require a specific intent to secretly confine under the authority of *Wesley.* See also *People v Nodine,* 36 Mich App 80, 84; 193 NW2d 172 (1971).

Thus, the critical factor peculiar to this form of the statutorily proscribed behavior is the degree of the victim's isolation as a result of the accused's conduct, not the specific intent of the accused.

and *People v Lucille Walker,* 135 Mich App 311, 325-326; 355 NW2d 385 (1984).

Defendant Jaffray contends that the element of secret confinement was not established in this case because others outside the group living at the Normandin house learned from one of the perpetrators that Williams, the victim, was being detained in the upstairs portion of the house. We disagree.

As we read the kidnapping statute in the light of *Wesley* and its progeny, mere awareness by a third party of the victim's plight is not dispositive. In some situations, other factors must be taken into account in determining whether the conduct of an accused constitutes secret confinement kidnapping. In *People v Lucille Walker, supra,* our Court of Appeals quoted with approval the Missouri Supreme Court, which construed a similar kidnapping statute and stated:

> "Secret confinement, within the meaning of § 559.240, does not require proof of total concealment and complete isolation whereby the victim is rendered invisible to the entire world. It is sufficient to show that the person kidnapped has been effectively confined against his will in such a manner that he is prevented from communicating his situation to others and accused's intention to keep the victim's predicament secret is made manifest." *State v Weir,* 506 SW2d 437, 440 (Mo, 1974). [*Id.,* pp 325-326.]

The *Lucille Walker* panel considered the plight of a number of elderly women allegedly held secretly against their will,[31] and stated:

[31] In *Lucille Walker,* the defendants allegedly engaged in a scheme of manipulating elderly women through the operation of an " 'adult congregate living facility' " in Miami, Florida. After the women moved into the facility and paid rent, the defendants allegedly ex-

> These women were not forcibly seized and removed to a hiding place for the purpose of extortion. They were transported openly in tourist class seats on a Delta Airlines flight which was filled to capacity from Miami via Ft. Lauderdale to Detroit Metropolitan Airport. They exited through a public terminal. . . . The ladies admitted that while at the house [in Michigan] they saw, but did not complain to, an attorney, a bank clerk, two plumbers, a gas company meter man, and two handymen. . . . *There were many windows to the world open to* [*the victims*]. [*Id.,* pp 324-325. Emphasis added.]

As the final sentence suggests, in cases dealing with secret confinement kidnapping, a proper focus is on the channels of communication available to the victim. Although a third person may have suspicions or even knowledge concerning a confinement, unless he is aware of the specific location of the victim, the victim may be deprived of the ability to communicate his plight to others.[32] In other words, absolute, prolonged secrecy is not always required to sustain the charge; it is enough that secrecy, or the attempt to maintain secrecy, denied the victim the opportunity to avail himself of outside help.

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ploited their infirmity by transferring them to another home owned by the defendants in Oak Park, Michigan. *Id.,* p 313.

While acknowledging that the defendants may have been guilty of other crimes, the Court reversed their kidnapping convictions, "declin[ing] to construe secret confinement so broadly as to include an occurance [sic] *in the presence and in the view of so many witnesses* as were present and testified in this case." *Id.,* p 326 (emphasis added). Thus, the *Lucille Walker* panel refused to expand the concept of secret confinement to include a situation in which the victims could have easily communicated the existence of their nonconsensual detention to others. We find *Lucille Walker* easily distinguishable from the case now before us.

[32] In *Johnson, supra,* pp 806-807, relied upon by defendant, the Court of Appeals acknowledged that "a person is being secretly confined if he is being held against his will at a location and there are no third persons who are aware of the confinement or, *even if aware, who know the location of the confinement* . . . ." (Emphasis added.)

In *McNeal, supra,* p 412, the Court of Appeals stated:

> There is very little case law in Michigan to indicate what constitutes "secret confinement." . . . One thing is obvious. "Secret" confinement is to be distinguished from confinement in a public place such as a jail or a mental institution. . . . In general, we believe that secret confinement is confinement in a place or manner which makes it unlikely that members of the public will know or learn of the victim's unwilling confinement within a reasonable period of time. Moreover, in order to establish secret "confinement" or "imprisonment," some significant type or amount of detention may be required.

Although this explanation by the *McNeal* panel is instructive, we find it too narrow to be useful as a standard for all cases in which secret confinement is charged. For example, we disagree with the *McNeal* articulation to the extent it can be read to limit secret confinement kidnapping to those situations in which it is unlikely that members of the public will learn of the victim's unwilling confinement within a reasonable period of time. There are other factual scenarios that constitute secret confinement which fall outside the *McNeal* parameters, as where the *confinement* is known by third parties but the *location* of confinement is unknown to others. See *Johnson, supra,* pp 806-807.

Other jurisdictions have adopted the concept that secret confinement does not require a showing of complete isolation of the victim, free from any knowledge by others of the detention.[33] For example, in *People v Mulcahey,* 72 Ill 2d 282; 381 NE2d

[33] See also Perkins & Boyce, Criminal Law (3d ed), p 233 ("Total concealment is not required").

254 (1978), the Illinois Supreme Court concluded that "the secret confinement contemplated by the statute may be shown by proof of the secrecy of both the confinement and place of confinement, *or of either.*" *Id.*, p 285 (emphasis added).[34]

As we read Michigan's kidnapping statute in light of the authorities, we conclude that the essence of "secret confinement" as contemplated by the statute is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament. "Secret confinement" is not predicated solely on the existence or nonexistence of a single factor. Rather, consideration of the totality of the circumstances is required when determining whether the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others. That others may be suspicious or aware of the confinement is relevant to the determination, but is not always dispositive.

Applying these principles to the evidence adduced at trial, we are convinced that a rational

[34] See also *Wilkes v State,* 182 So 2d 480, 482 (Fla App, 1966) ("Defendant contends that the verbiage 'secretly confined' as set out in the statute must be construed to mean that no one else knows where the person abducted is to be carried, and since one of these boys knew where these girls had been taken, such fact dissipates the accusation. We conclude that such a construction would be contrary to the intent of the cited statute. It may well be that the boy knew that these two girls were located in a deserted fishing camp and were being held against their will in some isolated area, but such knowledge does not conform with the conclusion that they were not secretly confined"); *State v Randall,* 137 Mont 534, 539; 353 P2d 1054 (1960) ("To 'secretly' confine within the meaning of our statute means confinement against the will of the person confined which deprives him of the friendly assistance of the law to redeem himself from captivity"); *People v Ehinger,* 152 AD2d 97, 101; 547 NYS2d 302 (1989) ("Surely, this jury was free to find that the isolation of a Japanese music student, with few local friends or acquaintances, could be most effectively accomplished by imprisonment in his own home in the very manner carried out by defendants. Indeed, defendants were successful in fobbing off the police on their first visit to the door of the apartment when the officers were summoned to the premises by an alarmed neighbor").

trier of fact could have found defendant guilty beyond a reasonable doubt of secret confinement kidnapping. After Williams confessed to selling the dog and informed the codefendants of its location, Jaffray bound Williams with handcuffs and a rope, rendering the victim immobile. Jaffray then refused to allow Williams to participate in two subsequent searches for the dog, where Williams would have been visible to the outside world. Instead, Williams remained shackled on the living room floor, while either Jaffray or a codefendant kept guard. Throughout the duration of this episode, the victim's confinement was a secret to everyone outside the Normandin home.

When Ronald Normandin disclosed to Curtis Kennedy that Williams was "dog-tied" upstairs, and Kennedy allegedly heard Williams upstairs screaming for help, the veil of secrecy was temporarily fractured, but it was not completely destroyed. After Kennedy returned to his home, he received no further information regarding Williams' plight or location.[35] Further, unbeknown to Kennedy or anyone else outside the Normandin home, Jaffray and a codefendant subsequently

[35] Kennedy further testified:

Q. Did you go back over to see them?
A. No, I didn't.
Q. Did you hear your friend any more when you were by your mother's house?
A. No, I didn't.

The record indicates that Minnie Collins, Kennedy's mother, was the only person to receive further information regarding the whereabouts of Williams. She testified that after her son informed her of his discovery, she saw Martin Normandin on the street, and she warned him to release Williams or she would call the police. Collins testified that Martin went back into the Normandin home, then returned outside and stated that Williams had gone to a neighbor's house, about a block away. Other than Ronald Normandin's disclosure to Kennedy, no one outside the home received any information regarding Williams' confinement in the Normandin residence while the victim was still alive.

moved the victim to the basement, clearly an area of greater isolation. Jaffray then "gagged" Williams to prevent him from screaming for help.

After Williams was moved to the basement and gagged, the occupants of the Normandin home engaged in a concerted effort to maintain the secrecy of Williams' location.[36] In the light of this conduct on the part of Jaffray and the fact that the occupants of the home, including Jaffray, refused to divulge the location of the decedent after he was moved to the basement, a rational trier of fact could conclude that Williams' confinement in the basement was secret.

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[36] Minnie Collins testified as follows:

Q. Who answered the door?
A. Lois [Normandin] answered the door.
Q. And you are telling us she wouldn't let the police in?
A. At first she told them that he wasn't there. That he had left. And they asked could they come in. They went in and they came right out and said they didn't see anything. [Emphasis added.]

Officer David Mitchell of the Detroit Police Department testified as follows:

Q. Now, did you look around that home at that time?
A. Yes, I checked the upstairs rooms of the home.
Q. Did you see anybody upstairs?
A. There were a few people in the bedroom asleep laying in the bed, but we didn't find what we were looking for upstairs. [Emphasis added.]

Further, Officer Richard Hudson of the Detroit Police Department testified as follows:

Q. (By Mr. Less, continuing): Did you go down the basement yourself, or were you with someone the first time?
A. I was with someone the first time, Marty [Normandin].

* * *

Q. Did he say anything when you went down the basement to you?
A. Idle chitchat, nothing important.

As noted in *Johnson, supra,* p 807:

> [W]e believe that one could be secretly confined in the perpetrator's own home even though, once suspicion fell upon the perpetrator, one of the first logical places to look would be his home.

Like the *Johnson* Court, we believe Williams could be, and was, secretly confined in the perpetrators' home[37] even though, once suspicion fell upon the defendants, Minnie Collins summoned the police to the defendants' home. Despite the fact that Kennedy and his mother were aware that Williams was being held against his will, they were not aware of the location of his confinement in the basement. Indeed, Kennedy believed that Williams was confined in the top floor of the three-level home. If Jaffray and a codefendant had not moved Williams to the basement, he might have been able to summon outside help before being bludgeoned with the nail-studded bat.

We also reject Jaffray's argument that, on the basis of *McNeal, supra,* a secret confinement did not occur here because a disinterested person learned of the confinement within a reasonable period of time. Essentially, he asserts that the duration of the confinement was insufficient to establish the element of secrecy. We disagree.

While the duration of the confinement is certainly relevant, as already indicated, we reiterate that "secret confinement" is not predicated upon a single factor. In this case, there is no doubt that the victim, throughout the period of his confine-

[37] The fact that Williams also lived in the home with the defendants is of no significance in assessing defendant's guilt; a victim can be a "prisoner in his own castle" for purposes of the kidnapping statute. See also *People v Mulcahey, supra,* p 285 ("The victim in this case was 'secretly confined' as effectively in her own home as if defendant had asported her to some remote isolated place of confinement").

ment in the basement, was effectively precluded from communicating his plight or location to others.

Although the duration of Williams' confinement in the basement before his death is not precisely fixed by the evidence, the record makes clear beyond doubt that the fatal beating did not occur immediately following his removal to the basement.[38] Under the circumstances, we are satisfied

[38] In Ronald Normandin's redacted statement, he recalled:

> So, then we all went upstairs, and left Bruce in the basement. So, _____ wanted to clean up, before we went back over there to get the dog. So, that's when Audry [sic] [Diefenbach] woke up. Audrey was coming downstairs. _____ was in the bathroom. I was upstairs, and I believe that _____ was in the livingroom. [sic] My mom had woken up, and she and Audrey were sitting in the kitchen. . . . So, I came down and I was telling them what was going on. . . . Frank [Hamilton] and David Chubb, came in the side door. They had gone to the store, to get some wine. . . . They came in, and started to drink the wine . . . . Frank was asking where Bruce was. I told him, that Bruce was in the basement. Frank got a few drinks in him. Then, Frank started pointing to the scar on his head. He said, you see this. He started mumbling something like, he was going to kill him. . . . He kept mumbling about what Bruce had done to him in the past. So, I told Frank, just leave Bruce alone . . . . And, Frank didn't say nothing. He just walked away, and I went back upstair[s] . . . . That's when we both heard Audrey yelling for _____ . . . . So, _____ ran down the basement . . . and I was . . . right behind him. . . . It was already to [sic] late. Frank had already smacked Bruce in the head . . . .

Further evidence that Williams was not beaten immediately after his removal to the basement can be gleaned from the testimony of Audrey Diefenbach. Diefenbach did not recall seeing or hearing the victim on the morning in question. However, she further testified that after waking that morning, she went to the kitchen, which apparently adjoined the basement stairs. While in the kitchen, Diefenbach began preparing breakfast. Jaffray and Ronald then arrived in an automobile and entered the kitchen through a side door. After engaging in a brief conversation with Jaffray, Diefenbach began eating breakfast, which apparently consisted of eggs.

Diefenbach testified that while she was eating, Hamilton came into the kitchen with a baseball bat on his shoulder and continued into the basement. After having an "uneasy feeling" and hearing "some

that a rational trier of fact could find beyond a reasonable doubt that Williams was secretly confined in the basement.

IV

We conclude that there was sufficient evidence to justify a finding beyond a reasonable doubt by a rational trier of fact that defendant was guilty either of kidnapping by forcible confinement with intent to secretly confine or of kidnapping by secret confinement. Therefore, we reverse the decision of the Court of Appeals and remand this case to that Court for consideration of defendant Jaffray's remaining arguments on appeal.

CAVANAGH, C.J., and BRICKLEY and MALLETT, JJ., concurred with GRIFFIN, J.

BOYLE, J. (*concurring*). I agree with Justice GRIFFIN's result and much of his rationale. I write separately first to observe that I do not agree with Justice LEVIN's description of the majority opinion. Specifically, I do not agree that the majority "concedes" that the veil of secrecy was fractured. Cf. separate opinion of LEVIN, J., p 322, n 16. Justice LEVIN's characterization implies that the majority and separate opinions diverge because the majority finds a partial fracture as a matter of law.

This appeal raises only an issue regarding sufficiency of the evidence of secret confinement. The defendant did not challenge the sufficiency of the evidence on the basis of the duration of the confinement for obvious reasons; the confinement oc-

noises downstairs," Diefenbach went upstairs to the bedroom. Thus, although Diefenbach never saw the victim that morning, Williams apparently had been moved to the basement before Diefenbach awoke, where he remained bound and gagged while she prepared and ate breakfast.

curred over the course of several hours. I read the majority opinion to hold that the evidence of secret confinement was sufficient, not to agree that there are artificial parsing points in the continuity of activity, past which secret confinement must be reestablished.

For the same reason, this is not an appropriate vehicle for either the majority or the separate opinion to address in dicta unraised issues regarding length of confinement.[1] The defendant did not argue before the trial court or in his brief to this Court that evidence of the length of confinement in the basement was insufficient.

Further, although the separate opinion does not indicate how this case should be decided, to the extent that it implies that the incident was no more than a relatively "minor confinement," I strongly disagree.[2] The defendant aided and abetted in a course of conduct so extreme in relation to its provocation that common sense suggests that it was likely to end, as it did, in someone's death. Indeed, it would appear that the Model Penal Code would permit a conviction of the most serious degree of kidnapping on the evidence presented. Model Penal Code, § 212.1(c) (quoted *post* at 324, n 20).

Finally, as the trial judge observed, there was no evidence that defendant Jaffray said anything to anybody about where the victim was, nor was there a "[b]illboard saying who is being held . . . ." If, as defendant Jaffray himself observed, the victim's screams are heard by those whom the captor can trust not to call the police, is

[1] The fact that the focus of the trial and appeal was on the entire length of confinement in the house accounts for the fact that the record does not reflect the length of time the victim was confined in the basement.

[2] The prosecutor has not "conceded" that the defendant did not intend to cause physical harm to the victim.

the confinement still secret? Such observations simply underscore the fact that speculation regarding the "absurd results" of "relatively minor confinements" is without empirical support in this record or the thousands of cases this Court has reviewed in the decade since the decision in *People v Wesley,* 421 Mich 375; 365 NW2d 692 (1984). *Post* at 324.

RILEY, J., concurred with BOYLE, J.

LEVIN, J. (*separate opinion*). Jaffray was convicted of kidnapping for "forcibly or secretly confin[ing]" Bruce Williams and for "forcibly seiz[ing] or confin[ing]" him with intent to cause Williams "to be secretly confined or imprisoned."[1]

The penalty for kidnapping is imprisonment in the state prison for life or for any term of years.

The prosecutor asserts that the crime of kidnapping was committed at the moment Bruce Williams was seized, handcuffed and his feet were tied.

The prosecutor has, in effect, conceded that there is no evidence that Jaffray intended to cause physical harm to Williams.[2]

I question whether the Legislature intended to

[1] Kidnapping is proscribed and defined in § 349 of the Penal Code:

> Any person who wilfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or shall inveigle or kidnap any other person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. [MCL 750.349; MSA 28.581.]

[2] See part V(B).

make secret confinement a capital offense where, although the manner or length of confinement may not have been insignificant, there was evidence only of an intent *to confine* and *no* evidence of an intent to harm the victim or hold the victim as a hostage for ransom or other felonious purpose. In the instant case, the purpose of the confinement was to recover a dog that had been stolen by the victim.

I

I am concerned that the majority opinion in the instant case, and this Court's opinion in *People v Wesley,* 421 Mich 375; 365 NW2d 692 (1984), may be read to permit charging a defendant with kidnapping *and* an underlying felony whenever the underlying felony involves an element of confinement, and to permit transforming a simple assault or false imprisonment into kidnapping.

Because the majority adopts the *Wesley* view that " 'no movement is required where the victim was secretly confined,' "[3] an offender might be charged with *both* kidnapping and another underlying crime that involves an element of confinement in any situation in which the underlying crime was committed in a private or secret place. Thus, a stairwell robbery in which the victim was confined might now be kidnapping *and* robbery as long as the victim was unable to communicate his plight to the outside world during the duration of the robbery. Similarly, a nighttime sexual assault in which the victim is wrestled to the ground and rendered unable to call for help might be both kidnapping and sexual assault.

The majority's approach might facilitate the avoidance of the strictures of *People v Adams,* 389

[3] *Ante,* p 299.

Mich 222; 205 NW2d 415 (1973), aff'g 34 Mich App 546, 550; 192 NW2d 19 (1971),[4] simply by substituting a charge of secret confinement kidnapping, rather than forcible confinement kidnapping, along with the underlying felony.

The majority opinion could be read to allow a trier of fact to convict a defendant of secret confinement kidnapping where the offender's actions are closer to the common-law offense of simple assault than to the capital offense of kidnapping.

The majority does not construe the kidnapping statute as requiring a "significant type or amount of detention," as did the Court of Appeals in *People v McNeal,* 152 Mich App 404, 412; 393 NW2d 907 (1986). Thus, any detention in which the victim is unable to communicate his plight to the outside world might now constitute kidnapping. Under the majority's approach, a frustrated worker might be said to have committed secret confinement kidnapping if he blocks the door of the office restroom and says to another employee who had already entered something like "let's settle our disagreement once and for all. We're not going anywhere until we work this thing out." Clearly, there is a distinction between the behavior of the frustrated worker and a criminal who, after forcibly seizing his victim, secretly binds and gags that person. Yet, it appears that under the majority's approach both the frustrated worker and the criminal have each committed the same offense.[5]

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[4] Our kidnapping statute, like most, is so all-encompassing in its literal breadth that unless its operative effect is confined by objective standards it would be void for overbreadth.

Where a kidnapping statute does not in terms require a "carrying away" of the victim, an asportation requirement or, as a substitute, the element of secrecy, has been judicially read into and made a part of the definition of the crime.

[5] The majority states that "consideration of the totality of the

I believe that, just as this and other courts have read an asportation requirement into the forcible confinement portion of the kidnapping statute to remedy that provision's potential overbreadth, it might be necessary to construe the secret confinement provision of the kidnapping statute as requiring some significant manner or length of detention. Otherwise, defendants might be convicted of "true kidnapping" when they have merely committed false imprisonment.[6]

II

When the Penal Code was enacted in 1931,[7] a sentence of life imprisonment or for any term of years[8] could only be imposed where an *assault* was

circumstances is required when determining whether the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others," *ante,* p 309, and it states that " 'secret confinement' is not predicated upon a single factor." *Ante,* p 312. While the majority takes a flexible approach to the question whether the confinement was in fact secret, it does not seem willing to take into account the totality of the circumstances when considering whether a given confinement, even if secret, can truly be said to constitute the capital offense of secret confinement kidnapping.

[6] For the same reason, it might be necessary to construe the "seizure or confinement with the intent to secretly confine" provision of the kidnapping statute as requiring an intent to confine for a significant time or in a significant manner. Such a construction of the statute would prevent convictions for kidnapping where a defendant seized or confined his victim with the intent to secretly confine the victim for a very short period of time or in a relatively nonthreatening or harmful manner.

[7] Years before, laws were enacted providing for lengthy mandatory sentences, including life imprisonment without possibility of parole for certain drug offenses.

The Penal Code, when enacted in 1931, similarly provided a maximum penalty of ten years for an assault of a female with intent to commit the crime of rape. 1948 CL 750.85. That provision was repealed when the criminal sexual conduct provisions were added by 1974 PA 266.

[8] Sentences of thirty to sixty years and forty to eighty years have been imposed by some judges under the authority of the "any term of years" language. Such sentences are, in effect, life sentences without possibility of parole under this Court's decisions.

"with intent to commit the crime of murder"[9] or "with intent to rob and steal" by a person armed with a dangerous weapon,[10] or for an assault ("forcibly seiz[ing] or confin[ing]") with intent to cause the victim "to be secretly confined or imprisoned."

The maximum sentence that could be imposed for an assault with "intent to do great bodily harm, less than the crime of murder"[11] is ten years, for an assault with force and violence, and with intent to rob and steal (unarmed)[12] it is fifteen years, and for an assault with "intent to commit criminal sexual conduct involving sexual penetration"[13] it is ten years.

In light of the legislative judgment that a sentence for life or any term of years should be imposed where the assault involved an intent to commit murder or armed robbery, and that the maximum sentence for an assault with intent to do great bodily harm less than murder or with intent to commit unarmed robbery or with intent to commit rape should be a maximum of ten or fifteen years, I doubt that the Legislature intended that a person be subject to conviction of the capital offense of kidnapping, subjecting the offender to a life sentence or a box score sentence,[14] where the assault—"forcibly seiz[ing] or confin[ing]"—was committed only with the intent to "secretly confine" and without intent to cause physical harm or hold the victim for ransom or to facilitate the commission of another felony.

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[9] MCL 750.83; MSA 28.278.

[10] MCL 750.89; MSA 28.284.

[11] MCL 750.84; MSA 28.279.

[12] MCL 750.88; MSA 28.283.

[13] MCL 750.520g(1); MSA 28.788(7)(1).

[14] In effect, a life sentence without possibility of parole under this Court's decisions.

III

The majority holds that a rational trier of fact could have found that Jaffray in fact secretly confined Bruce Williams because:

> 1) From the time Jaffray initially bound Williams on the living room floor to the time that Curtis Kennedy learned that Williams was being held in the house and heard Williams' screams, nobody outside the house knew of Williams' confinement.
>
> 2) After Jaffray learned that Williams' screams may have been audible outside the house, he moved Williams to the basement, "clearly an area of greater isolation."
>
> 3) After moving Williams to the basement, Jaffray was part of a concerted effort to "maintain the secrecy of Williams' location." [*Ante,* pp 310-311.]

Taking the last factor first, an accused could not be convicted of secret confinement kidnapping however strong his desire to secretly confine the victim if the confinement was not in fact secret. Jaffray's participation in a concerted effort to maintain the secrecy of Williams' confinement is not pertinent to a determination whether Williams was *in fact* secretly confined. Indeed, the majority notes that a specific intent to confine is not an element of secret confinement kidnapping.[15]

Nor did Jaffray commit secret confinement kidnapping by carrying Williams to the basement. By the time Williams was carried to the basement, he had already communicated his plight to the outside world—and thereby foiled his captors' efforts to keep his confinement secret—by screaming

[15] *Ante,* p 298.

through the window of the upstairs bedroom where he was being held.[16]

The majority implies, however, that Jaffray's carrying Williams to the basement is relevant to whether Jaffray secretly confined Williams because transporting Williams to the basement reestablished the secrecy of Williams' confinement.

The majority stresses that, while the outside world may have known of Williams' confinement and of his need for help, nobody outside the house knew that Williams was being held in the basement, and his confinement there was thus secret.

Curtis Kennedy and his mother were aware that Williams was being held captive in the house and were aware that Williams needed help. While it is true that neither Kennedy nor his mother knew exactly where in the house Williams was being held, they had enough information—as a result of Williams' earlier communication of his plight—to summon help for Williams, and the officers who responded to their call *went into the basement*[17] and would probably have been able to rescue Williams from the basement if he had not been killed before their arrival.

Jaffray's movement of Williams to the basement did not reestablish the secrecy of his confinement. It did not disable Kennedy and his mother from sending assistance to Williams. The veil of secrecy that was broken by Williams' screams from the bedroom was not "temporarily" but, rather, "permanently" shattered by those screams. The loca-

[16] The majority concedes that the veil of secrecy was "temporarily fractured" when Curtis Kennedy heard Williams' screams. *Ante,* p 310. See part V(A).

[17] Officer Richard Hudson testified that when he and his partner David Mitchell first visited the Normandin home, he searched for Williams in the basement, but did not find him at that time.

tion of Williams' confinement was not secret after he was moved to the basement.[18]

The majority emphasizes that a reasonable fact-finder could find that Jaffray committed secret confinement kidnapping because nobody in the outside world knew of Williams' confinement between the time that Williams was initially bound in the living room and the time that Curtis Kennedy learned of his condition.[19] I agree with the majority that the confinement during this indeterminate period was secret.

It is again noteworthy that Jaffray had no intent to harm Williams. He sought to assure that Williams did not run away before the dog was found.

IV

I do not wish to be understood as suggesting that what occurred here should not be subject to more serious penalties than for an ordinary assault. Nor would I contend that this particular defendant is

[18] *State v Randall,* 137 Mont 534, 539; 353 P2d 1054 (1960), in which the Montana Supreme Court found secret confinement on the following facts:

> Cozzens [a prison guard] was seized by defendant and his associates, all of whom were armed with knives; that he was taken by a concealed route to an underground cell in another part of the prison from that where he was seized; that he and the other hostages were later moved from cell to cell and warned not to make their location known to persons outside the prison who desired to rescue them . . . .

In the instant case, unlike in *Randall,* individuals who wanted to rescue the victim knew with a high degree of specificity where the victim was being held captive. In *Randall,* the authorities apparently had to stage an armed assault on the prison and search through the entire prison in order to locate the victims. In this case, though, the information supplied by Williams' screams were sufficient to bring help to the exact location where he was being held captive: the basement. Again, had Williams been alive when the police arrived, the police almost surely would have found him tied to the pole in the middle of the basement.

[19] *Ante,* p 310.

guilty of nothing more than the common-law offense of false imprisonment.

The Model Penal Code establishes a carefully tiered offense and sentencing system to address the tendency of broadly worded kidnapping statutes to yield absurd results in many cases of relatively minor confinements.[20]

[20] The Model Penal Code provides:

> 212.1 Kidnapping
>
> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
>
> (a) to hold for ransom or reward, or as a shield or hostage; or
>
> (b) to facilitate commission of any felony or flight thereafter; or
>
> (c) to inflict bodily injury on or to terrorize the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function.
>
> Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.
>
> * * *
>
> 212.2 Felonious Restraint
>
> A person commits a felony of the third degree if he knowingly:
>
> (a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or
>
> (b) holds another in a condition of involuntary servitude.
>
> * * *
>
> 212.3 False Imprisonment
>
> A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.
>
> * * *
>
> 212.4 Interference with Custody
>
> (1) Custody of Children. A person commits an offense if he

knowingly or recklessly takes or entices any child under the age of 18 from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so. It is an affirmative defense that:

(a) the actor believed that his action was necessary to preserve the child from danger to its welfare; or

(b) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child.

Proof that the child was below the critical age gives rise to a presumption that the actor knew the child's age or acted in reckless disregard thereof. The offense is a misdemeanor unless the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the child's safety, or in reckless disregard of a likelihood of causing such alarm, in which case the offense is a felony of the third degree.

(2) Custody of Committed Persons. A person is guilty of a misdemeanor if he knowingly or recklessly takes or entices any committed person away from lawful custody when he is not privileged to do so. "Committed person" means, in addition to anyone committed under judicial warrant, any orphan, neglected or delinquent child, mentally defective or insane person, or other dependent or incompetent person entrusted to another's custody by or through a recognized social agency or otherwise by authority of law.

* * *

212.5 Criminal Coercion

(1) Offense Defined. A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:

(a) commit any criminal offense; or

(b) accuse anyone of a criminal offense; or

(c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(d) take or withhold action as an official, or cause an official to take or withhold action.

It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

(2) Grading. Criminal coercion is a misdemeanor unless the threat is to commit a felony or the actor's purpose is felonious,

In a recent case, one of the justices called upon the Legislature to address the problem of sentencing youthful offenders for capital offenses. In the same spirit, I call upon the Legislature to address the many problems created by our kidnapping statute. I respectfully suggest that the Legislature study the Model Penal Code provisions for kidnapping and the accompanying commentaries[21] with a

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in which cases the offense is a felony of the third degree. [ALI, Model Penal Code and Commentaries, part II, §§ 212.1 to 212.5, pp 209-210, 237, 244, 248, 262-263.]

[21] The commentary to § 212.1 of the Model Penal Code states, in part:

> 2. *Rationale.* The central problem in the law of kidnapping is to restrict the drastic sanctions authorized for this offense to instances of misbehavior warranting such punishment. The challenge, in other words, is to define the crime in terms that identify a distinct kind of wrongful act. This goal requires avoidance of two related dangers.
>
> First, the entire range of misconduct based on unlawful confinement of another must not be lumped together in one undifferentiated offense for purposes of grading. The person who physically restrains another on a public street in order to drive a point home is guilty of wrongful interference with the other's personal liberty, but a rational penal code must distinguish such conduct from prolonged confinement and isolation from the protection of the law. Even instances of more serious misbehavior, such as locking another in a closet for several hours, should be treated differently from abduction for ransom. Finally, the extreme gravity of sanctions authorized under existing law is related to the prospect that the victim will not emerge alive. This danger is precluded if the kidnapper voluntarily releases his captive, and the law should take some account of such action.
>
> The Model Code addresses these concerns by defining three progressively less serious offenses and distributing them across a wide range of felony and misdemeanor sanctions. The reasoning behind the definition of the lesser crimes of felonious restraint and false imprisonment is explained in the commentary to Sections 212.2 and 212.3, respectively. Grading within the kidnapping offense is discussed in Comments 4 and 5 below.
>
> The other potential danger which a rational penal code must avoid is that the definition of kidnapping will sweep within its scope conduct that is decidedly wrongful but that should be punished as some other crime. Thus, for example, the robber who forces his victim to move from one room to another in

view to reconstructing the kidnapping statute.

V

The concurring opinion makes a number of points to which I now respond.

A

The concurring opinion states "Specifically, I do not agree that the majority 'concedes' that the veil of secrecy was fractured."[22]

The referenced sentence in the majority opinion reads as follows: "When Ronald Normandin disclosed to Curtis Kennedy that Williams was 'dog tied' upstairs, and Kennedy allegedly heard Williams upstairs screaming for help, the veil of secrecy was temporarily fractured, but it was not completely destroyed."[23] Thus, the reference to the majority opinion is accurate.

B

The concurring opinion states:

> The prosecutor has not "conceded" that the

order to find a cashbox or open a safe technically may commit kidnapping as well as robbery. This reasoning raises the possibility of cumulative penalties or of higher sanctions for kidnapping, even though the "removal" of the victim to another place was part and parcel of the robbery and not an independent wrong. Similarly, many instances of forcible rape involve some coerced movement of the victim or unlawful restraint for enough time to complete the sex act. Again, the actor may be liable for both kidnapping and rape, even though such asportation or detention of the victim is a criminologically insignificant circumstance in a course of conduct constituting rape. Definition of kidnapping to exclude such cases is a task of special subtlety for, unless particular care is taken, trivial aspects of robbery, rape, or some other crime will end up classified as the most serious version of kidnapping.

[22] *Ante,* p 314.

[23] *Ante,* p 310.

defendant did not intend to cause physical harm to the victim.[24]

The following is an excerpt from the prosecutor's brief:

> What is truly remarkable about this case is that two "technically" separate offenses were committed by different defendants during the same criminal episode. The evidence adduced at the trial of Jaffray and the Normandin brothers showed that their only intent was to commit secret confinement kidnapping. They only intended to confine Bruce Williams in order to force him to reveal the location where he sold Ronald Normandin's dog for crack cocaine. Jaffray's written statement shows that they intended to release him after the dog was retrieved. Due both to a pre-existing grudge and to the fact that Williams had stolen his friend's dog, Francis Hamilton apparently took it upon himself to beat Williams to death with a baseball bat.[25]

While there is evidence that Jaffray bound and gagged Williams, there is no evidence that he beat Williams or encouraged others to do so. Nor would "common sense suggest" that, from the beginning, this incident "was likely to end, as it did, in someone's death."[26] When Jaffray and the Normandins initially bound Williams, they had no intention of harming him, and they had no reason to believe that Hamilton would, in the prosecutor's words, take "it upon himself" to kill Williams. When the incident began, there was no indication that Hamilton might become involved in the situation, much less kill Williams.

Because Jaffray did not intend to harm or terrorize Williams, it does not appear that the Model

[24] *Ante,* p 315, n 2.

[25] Prosecutor's brief, p 15.

[26] *Ante,* p 315.

Penal Code would permit a conviction of the most serious grade of kidnapping as the concurring opinion suggests.[27] Rather, under the Model Penal Code, the crime of false imprisonment appears to most appropriately apply to Jaffray's conduct, although Jaffray might also have committed felonious restraint.[28]

C

The concurring opinion asserts that in none of

[27] *Ante,* p 315.

The concurring opinion suggests that Jaffray could be guilty of kidnapping under § 212.1(c) of the Model Penal Code, which provides:

> 212.1 Kidnapping
> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following *purposes:*
>
> * * *
>
> (c) *to inflict bodily injury on or to terrorize the victim or another* . . . . [Emphasis added.]

Jaffray intended only to confine Williams until he and the Normandins could retrieve the dog. He did not intend to harm or terrorize Williams (see text accompanying n 25), and therefore would not be guilty of kidnapping under § 212.1(c) of the Model Penal Code.

[28] Section 212.3 of the Model Penal Code provides:

> False Imprisonment
> A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

This provision appears to apply to Jaffray who intended to restrain Williams so as to interfere substantially with his liberty.

Section 212.2 of the Model Penal Code provides:

> Felonious Restraint
> A person commits a felony of the third degree if he knowingly:
> (a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury . . . .

the "thousands of cases this Court has reviewed in the decade since the decision in *People v Wesley*, 421 Mich 375; 365 NW2d 692 (1984),"[29] has this Court been presented with a situation in which a defendant was convicted of kidnapping on the basis of a relatively minor confinement.

While this Court has reviewed thousands of cases, indeed even thousands of criminal cases, in the decade since *Wesley* was decided, it most assuredly has not reviewed thousands, or even hundreds, of kidnapping cases. It has reviewed even fewer secret confinement kidnapping cases.

This Court generally sees an application for leave to appeal only in a case in which a lengthy term of imprisonment has been imposed. Thus, we do not know to what extent charges of secret confinement kidnapping are washed out in plea bargaining in exchange for charge or sentencing concessions. Because an accused charged with a capital offense carrying a potential life sentence might be constrained to plead guilty to a lesser offense or to agree to the imposition of a particular sentence, it is especially important that the substantive law of kidnapping recognize the risk and potential for overcharging.

[29] *Ante*, p 316.

GIBSON v BRONSON METHODIST HOSPITAL

Docket No. 95395. Argued November 2, 1993 (Calendar No. 7). Decided June 7, 1994.

Robert Gibson, for himself and as next friend of his daughter Billie Jean, a minor, brought an action in the Kalamazoo Circuit Court against Bronson Methodist Hospital and Jonathan W. Hopkins, M.D., seeking damages resulting from surgery performed by Dr. Hopkins at the hospital, claiming that misrepresentations had been made by the defendants regarding the availability of a second opinion concerning Billie Jean's condition. The court, Donald Goodwillie, J., granted summary disposition for the defendants, finding that the assertion by the plaintiff of the physician-patient privilege at the beginning of a deposition of two physicians who had been consulted concerning Billie Jean's care precluded introduction under MCR 2.314(B)(2) of physical, documentary, or testimonial evidence relating to Billie Jean's medical history or physical condition. The Court of Appeals, D. E. HOLBROOK, JR., P.J., and GRIFFIN, J. (BRENNAN, J., dissenting), affirmed, holding that the sanction provided in MCR 2.314(B)(2) applies to an assertion of the physician-patient privilege during a deposition (Docket No. 133184). The plaintiff appeals.

In an opinion by Justice LEVIN, joined by Justices BRICKLEY and MALLETT, and an opinion by Justice BOYLE, joined by Justice RILEY, the Supreme Court *held:*

The sanction provided in MCR 2.314(B)(2), precluding the introduction of evidence of a party's physical condition after the party has asserted that such information is subject to the physician-patient privilege, does not apply where the privilege is asserted at a deposition.

1. MCR 2.314 provides that medical information subject to

REFERENCES

Am Jur 2d, Depositions and Discovery §§ 29, 262; Physicians, Surgeons, and Other Healers § 169.

Reports of treating physician delivered to litigant's own attorney as subject of pretrial or other disclosure, production, or inspection. 82 ALR2d 1162.

Assertion of privilege in pretrial discovery proceedings as precluding waiver of privilege at trial. 36 ALR3d 1367.

discovery includes, but is not limited to, medical records in the possession or control of a physician, hospital, or other custodian. It also provides that medical information about the condition of a party is subject to discovery of documents or tangible evidence under MCR 2.310. A party who wishes to assert a privilege and prevent discovery of medical information must assert the privilege in a written response under MCR 2.310. MCR 2.314 clearly contemplates the discovery of documentary or tangible medical information, rather than testimonial medical information.

2. Because the Supreme Court was persuaded that the sanction set forth in MCR 2.314(B)(2) should be made applicable where the physician-patient privilege is asserted at a deposition, effective September 1, 1994, amended MCR 2.302, 2.306, and 2.314(B)(2) make the sanction applicable to assertions of the privilege at a deposition and in other specified areas of discovery.

Reversed and remanded.

Justice GRIFFIN, joined by Chief Justice CAVANAGH, dissenting, stated that a plaintiff who allows discovery of medical information is not thereafter free to assert the physician-patient privilege in the same action. The plaintiff either must allow free discovery of medical information otherwise subject to the privilege or assert the privilege at the expense of forgoing any claims concerning the medical condition. Piecemeal use of privileged testimony or material would detrimentally increase the recognized tension between preserving the confidentiality of the physician-patient relationship and the truth-seeking function of the courts. Any attempt to use the privilege to manipulate the timing of the information to achieve a tactical advantage exceeds the scope of the privilege.

197 Mich App 67; 495 NW2d 162 (1992) reversed.

EVIDENCE — DISCOVERY — PHYSICIAN-PATIENT PRIVILEGE.

Effective September 1, 1994, the sanction precluding the introduction of evidence of a party's physical condition after the party has asserted that such information is subject to the physician-patient privilege, is applicable to assertions of the privilege at a deposition and in other areas of discovery specified in the court rules (MCR 2.302, 2.306, 2.314[B][2]).

Charfoos & Christensen, P.C. (by *David R. Parker, David W. Christensen,* and *Mary Pat Rosen*), for the plaintiffs.

Smith, Haughey, Rice & Roegge (by *Jon D. Vander Ploeg*) for defendant Bronson Methodist Hospital.

Bremer, Wade, Nelson, Lohr & Corey (by *Michael D. Wade* and *Phillip J. Nelson*) for defendant Hopkins.

LEVIN, J. The question presented is whether MCR 2.314(B)(2), providing that a party who asserts that "medical information" is subject to a privilege may not thereafter introduce evidence of the patient's physical condition, applies where the physician-patient privilege is asserted at a deposition. We hold that the sanction does not apply where the privilege is asserted at a deposition, and that the circuit court erred in dismissing plaintiff's complaint.

We are persuaded, however, that the sanction set forth in MCR 2.314(B)(2) should be made applicable where the physician-patient privilege is asserted at a deposition. This court rule is today amended to make that sanction applicable to assertions of the privilege at a deposition and in other specified areas of discovery effective September 1, 1994.

I

Billie Jean Gibson was admitted to Bronson Methodist Hospital in a comatose state. Surgery was performed six weeks later, a hematoma was removed from her brain, but she suffered serious residual effects.

Robert Gibson, for himself and as next friend of his daughter, a minor, commenced this action to recover damages, claiming, not malpractice, but that the defendant hospital and physician misrep-

resented the availability of a second opinion concerning Billie Jean's condition.[1]

Defendants scheduled the deposition of two physicians who had been consulted concerning Billie Jean's care. At the beginning of the deposition, plaintiff's counsel announced that his client had not waived the physician-patient privilege and he had no authority to waive it on her behalf. At one point he stated that he "asserted" the privilege. The depositions did not proceed.

Defendants moved for summary disposition, contending that plaintiff's assertion of the privilege meant that he "may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition." MCR 2.314(B)(2). The circuit court agreed and dismissed the complaint. The Court of Appeals affirmed.[2]

II

A majority of the Court of Appeals, agreeing with the circuit judge, held that the sanction provided in MCR 2.314(B)(2) applies to an assertion of the physician-patient privilege during a deposition. The dissenting judge agreed with the plaintiff that the sanction applies only where a party asserts the privilege in response to a request for

[1] The defendant physician recommended against surgery, preferring to wait for a diagnosed blood clot in plaintiff's brain to liquify, so that it might be removed through a needle.

Plaintiff's complaint alleges that he sought a second opinion, but that defendants misrepresented a number of facts, including the availability of other neurosurgeons to render a second opinion. They obtained a second opinion about six weeks after Billie Jean was admitted to the hospital from a neurosurgeon who operated and removed the clot. Plaintiff regained consciousness, but was left blind and with other significant neurologic impairments.

[2] 197 Mich App 67; 495 NW2d 162 (1992).

production of documents under MCR 2.310.[3] We agree with the dissenting judge.

MCR 2.314 concerns the discovery of "medical information." The rule states that "[m]edical information subject to discovery includes, but is not limited to, medical records in the possession or control of a physician, hospital, or other custodian."[4] The rule also states that medical information about the condition of a party "is subject to discovery under MCR 2.310,"[5] which provides for the production of "documents and things," and that a party may serve on another person a request to "inspect and copy designated documents . . . ."[6]

MCR 2.314 provides that a party who wishes to assert a privilege and prevent discovery of medical information, must assert the privilege "in the party's written response under MCR 2.310."[7] MCR 2.314 continues that a party who is served with a request for production of medical information under MCR 2.310 must "make the information available for inspection and copying," or assert a privilege, or object to the request as permitted by MCR 2.310(B)(2), or "furnish the requesting party with signed authorizations in the form approved by the state court administrator sufficient in number to

[3] Plaintiff asserts that the applicable sanction is set forth in MCR 2.302(B)(1)(b), which reads as follows:

> A party who has a privilege regarding part or all of the testimony of a deponent must either assert the privilege at the deposition or lose the privilege as to that testimony for purposes of the action. A party who claims a privilege at a deposition may not at the trial offer testimony of the deponent pertaining to the evidence objected to at the deposition.

[4] MCR 2.314(A)(2).

[5] MCR 2.314(A)(1). The information must be "otherwise discoverable under MCR 2.302(B)" to be subject to discovery under MCR 2.310.

[6] MCR 2.310(A)(1)(a).

[7] MCR 2.314(B)(1).

enable the requesting party to obtain the information requested from persons, institutions, hospitals, and other custodians in actual possession of the information requested."[8]

MCR 2.314 clearly contemplates the discovery of documentary or tangible medical information[9] rather than testimonial medical information. The staff comment to MCR 2.314 bears this out, stating "MCR 2.314 is largely new and covers discovery of medical records of a party via request for production under MCR 2.310. There were related provisions in GCR 1963, 506.7 regarding subpoenas for production of hospital records."

III

Defendants rely on *Domako v Rowe,* 438 Mich 347, 356; 475 NW2d 30 (1991). This Court there considered the physician-patient privilege[10] and held that it was proper for the defendant physician's lawyer to conduct an ex-parte interview of the plaintiff's treating physician in the circumstance that the physician-patient privilege had been waived when the plaintiff signed authorization forms permitting the release of medical information requested under MCR 2.310. This Court said: "The privilege was *not asserted,* and the plain language of MCR 2.314(B)(1) declares that if the privilege is not asserted in a written response to a request to produce, it is waived for purposes of that action." (Emphasis added.)

IV

Defendants advance a number of policy argu-

[8] MCR 2.314(C).

[9] This would include medical records and other tangible medical information such as x-rays.

[10] MCL 600.2157; MSA 27A.2157.

ments. We are persuaded that the sanction set forth in MCR 2.314(B)(2) should be made applicable where the physician-patient privilege is asserted at a deposition. This court rule and MCR 2.302 and 2.306 are today amended as set forth in appendix A to make the sanction set forth in MCR 2.314(B)(2) applicable to assertions of the privilege at a deposition and in other specified areas of discovery effective September 1, 1994.[11]

Reversed and remanded to the circuit court.

BRICKLEY and MALLETT, JJ., concurred with LEVIN, J.

APPENDIX A

[The language struck through is repealed and the underlined language is added.]

Rule 2.302 General Rules Governing Discovery

(A) [Unchanged.]

(B) Scope of Discovery.

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter.

~~(a)~~/It is not ground for objection that the information sought will be inadmissible at trial if the

[11] The majority is of the opinion that the subject matter has been sufficiently publicized so that the notice and comment procedure (MCR 1.201) ordinarily followed can appropriately be dispensed with.

information sought appears reasonably calculated to lead to the discovery of admissible evidence.

~~(b) A party who has a privilege regarding part or all of the testimony of a deponent must either assert the privilege at the deposition or lose the privilege as to that testimony for purposes of the action. A party who claims a privilege at a deposition may not at the trial offer the testimony of the deponent pertaining to the evidence objected to at the deposition.~~

(2)-(4) [Unchanged.]

(C)-(H) [Unchanged.]

Rule 2.306 Depositions on Oral Examination

(A)-(C) [Unchanged.]

(D) Motion to Terminate or Limit Examination.

(1)-(3) [Unchanged.]

(4) A party who has a privilege regarding part or all of the testimony of a deponent must either assert the privilege at the deposition or lose the privilege as to that testimony for purposes of the action. A party who claims a privilege at a deposition may not at the trial offer the testimony of the deponent pertaining to the evidence objected to at the deposition. A party who asserts a privilege regarding medical information is subject to the provisions of MCR 2.314(B).

(E)-(G) [Unchanged.]

Rule 2.314 Discovery of Medical Information Concerning Party

(A) Scope of Rule.

(1) When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under these rules ~~MCR 2.310~~ to the extent that

(a) the information is otherwise discoverable under MCR 2.302(B), and

(b) the party does not assert that the information is subject to a valid privilege.

(2) Medical information subject to discovery includes, but is not limited to, medical records in the possession or control of a physician, hospital, or other custodian, and medical knowledge discoverable by deposition or interrogatories.

(3) For purposes of this rule, medical information about a mental or physical condition of a party is within the control of the party, even if the information is not in the party's immediate physical possession.

(B) Privilege; Assertion; Waiver; Effects.

(1) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(E) Rule Not Exclusive.

(1) This rule does not prevent the discovery of medical information in proceedings under MCR 2.306 or other provisions of these rules.

(2) This rule does not prevent the assertion of a privilege at a time or in a manner otherwise permitted by these rules.

(E) [Formerly (F), redesignated, but otherwise unchanged.]

Staff Comment: The June 7, 1994 amendments make several changes in the provisions of the discovery rules dealing with assertion of privileges.

The language of former MCR 2.302(B)(1)(b) is moved to the deposition rule as new MCR 2.306(D)(4), and a cross reference to MCR 2.314 is added.

Several changes are made in MCR 2.314, the rule regarding discovery of medical information. As amended, the rule would apply the preclusive effect of subrule (B)(1) to a party who asserts a privilege as to medical information in connection with depositions and interrogatories as well as to requests for production of documents.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

BOYLE, J. (*concurring*). I concur with parts I and II, of Justice LEVIN's opinion. I also concur with part IV, on the understanding that the signers of the plurality opinion agree that "piecemeal" assertion of the privilege is precluded by the court rules as amended. See, generally, *post,* p 345, dissenting opinion of GRIFFIN, J.

RILEY, J., concurred with BOYLE, J.

GRIFFIN, J. I respectfully dissent. I would affirm and adhere to the Court of Appeals interpretation of the relevant court rules, which more accurately reflects the purpose of the physician-patient privilege.

In *Domako v Rowe,* 438 Mich 347; 475 NW2d 30 (1991), this Court held that an ex parte interview of the plaintiff's treating physician by defense counsel in a medical malpractice action is proper where the physician-patient privilege has been waived by lack of timely assertion. In addressing the parameters of discovery in the context of waiver this Court reiterated the underlying rationale of the physician-patient privilege:

> Unlike other forms of litigation, a case involving

medical malpractice cannot proceed without evidence of the physical or mental condition of the plaintiff. Therefore, requiring the plaintiff to decide whether to assert the privilege at the discovery stage, rather than at trial, promotes efficient use of judicial resources by fostering an early resolution of this issue.

The purpose behind the physician-patient privilege is to protect the confidential nature of the physician-patient relationship and to encourage the patient to make a full disclosure of symptoms and conditions. [Citations omitted.] The purpose of providing for waiver is to prevent the suppression of evidence. . . . An attempt to use the privilege to control the timing of the release of information exceeds the purpose of the privilege and begins to erode the purpose of waiver by repressing evidence. Both consequences are anathema to the open discovery policy of our state. [*Domako, supra,* pp 354-355.]

The all-or-nothing nature of the privilege was underscored by the *Domako* Court:

After the patient voluntarily allows discovery of the medical information, the plaintiff is not thereafter free to assert the privilege because the plain language of MCR 2.314(B)(1) declares that the privilege is waived *for that action.* The rule is a logical one; after filing a malpractice action and authorizing the release of medical information, the plaintiff can no longer claim an intent to preserve the sanctity of the physician-patient privilege. The privilege attempts to protect confidentiality, and the voluntary disclosure of the information takes away the need for confidentiality. The court correctly determined that the privilege had been waived. [*Id.,* p 357. Emphasis in original.]

In the instant case, the trial court, by applying the sanctions set forth in MCR 2.314(B)(2) to dismiss plaintiff's suit, acted not only within its

discretion but also in a manner consistent with the principles recognized in *Domako.*

MCR 2.314(B) provides:

> (1) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response under MCR 2.310. A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.
>
> (2) *Unless the court orders otherwise,* if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under *MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.* [Emphasis added.]

MCR 2.302(B)(1)(b) addresses the assertion of a privilege in the context of a deposition.

> A party who has a privilege regarding part or all of the testimony of a deponent must either assert the privilege at the deposition or lose the privilege as to that testimony for purposes of the action. A party who claims a privilege at a deposition may not at the trial offer the testimony of the deponent pertaining to the evidence objected to at the deposition.

The question before the Court is whether the sanction set forth in MCR 2.314(B)(2) applies when a party asserts the physician-patient privilege in the context of a deposition seeking medical information. The majority, relying on the reference in this court rule to MCR 2.310, concludes that the

sanction applies only where a party asserts the privilege in response to a request for production of documents under MCR 2.310. The majority maintains that "MCR 2.314 clearly contemplates the discovery of documentary or tangible medical information rather than testimonial medical information." *Ante,* p 336. The appropriate sanction under these circumstances would, according to the majority, be merely to exclude the physician from testifying at trial, rather than preventing plaintiff from introducing any evidence of her medical condition.

However, this conclusion is contradicted by the language of MCR 2.314. Section (A)(2) contains a broad definition of "[m]edical information subject to discovery," which "includes, *but is not limited to,* medical records in the possession or control of a physician, hospital, or other custodian." (Emphasis added.) Moreover, the penalty provision of MCR 2.314(B)(2) specifically refers to "medical information otherwise discoverable under MCR 2.302(B)," which certainly would include the knowledge of a physician that he might give at a deposition. It is likewise notable that MCR 2.314(E) specifically allows the discovery of medical information, and assertion of the privilege, by means of deposition.*

Significantly, the first phrase of MCR 2.314(B)(2), which begins "Unless the court orders otherwise," implies discretion in the trial judge to choose between the sanctions set forth in subsection (B)(2) or other penalty provisions set forth in the court

* MCR 2.314(E) provides:

(1) This rule does not prevent the discovery of medical information in proceedings under MCR 2.306 [governing depositions] or other provisions of these rules.

(2) This rule does not prevent the assertion of a privilege at a time or in a manner otherwise permitted by these rules.

rules, such as the assessment of costs and attorney fees pursuant to MCR 2.306. Consequently, assertion of the privilege at the depositions at issue could, as the trial court and Court of Appeals concluded, result in the appropriate invocation of the penalty provision of MCR 2.314(B)(2). The trial court in the case at hand acted within its discretion in dismissing the case.

The majority overlooks the fact that the court rules were written with many types of privileges in mind. Although the interpretation given by the majority might be appropriate in cases involving other privileges recognized under the law, it should be recognized that MCR 2.314 is the only court rule that is specifically tailored for situations involving privileged medical information. This particularized court rule exists for good reason—as noted above, the physician-patient privilege is not susceptible to piecemeal application. As explained by McCormick in his treatise on 1 Evidence (4th ed), § 103, p 384:

> A shrinking from the embarrassment which comes from exposure of bodily disease or abnormality is human and natural. It is arguable that legal protection from exposure is justified to encourage frankness in consulting physicians. But it is not human, natural, or understandable to claim protection from exposure by asserting a privilege for communications to doctors at the very same time when the patient is parading before the public the mental or physical condition as to which he consulted the doctor by bringing an action for damages arising from that same condition. This, in the oft-repeated phrase, is to make the privilege not a shield only, but a sword.

The trial court's decision to preclude further evidence of plaintiff's physical condition is a natu-

ral corollary to the principle set forth in *Domako, supra,* that once a plaintiff allows discovery of medical information, he is not thereafter free to assert the privilege in that action. A plaintiff either must allow free discovery of medical information otherwise subject to the privilege or assert the privilege at the expense of forgoing any claims concerning plaintiff's medical condition. Piecemeal use of privileged testimony or material would detrimentally increase the recognized tension between preserving the confidentiality of the physician-patient relationship and the truth-seeking function of the courts. *Domako, supra,* pp 356-357.

Defendants in their appellate brief express the legitimate fear that

> [a] clever plaintiff's attorney could assert privilege at the deposition of a treating physician, *whom plaintiff does not want to testify,* and thereby frustrate a defendant's attempt to discover the true nature of the plaintiff's injury or condition. According to the plaintiff, the only sanction for invoking the privilege in this fashion would be that the plaintiff could not later offer at trial the testimony of that particular physician. As already noted, however, in a case where the plaintiff wants to prevent that particular physician from testifying in the first place, the sanction provided by MCR 2.302(B)(1)(b) would be a meaningless sanction. [Emphasis in original.]

Any attempt to use the privilege to manipulate the timing of the information and achieve a tactical advantage exceeds the scope of the privilege. *Domako, supra.* The majority's rendition of the court rules in the case at hand reopens the door to abuse of the privilege that had been so purposefully closed in *Domako, supra.*

I would affirm the decision of the Court of Appeals upholding summary disposition in favor of defendants.

CAVANAGH, C.J., concurred with GRIFFIN, J.

ROWELL v SECURITY STEEL PROCESSING COMPANY

RIGGS v MOSSER CONSTRUCTION, INCORPORATED

Docket Nos. 94644, 95000. Argued October 5, 1993 (Calendar Nos. 1-2). Decided June 14, 1994.

Ted Rowell sought worker's compensation benefits for injuries received in the course of his employment with Security Steel Processing Company. A hearing referee granted benefits, determining his average weekly wage to be $346.50. The Worker's Compensation Appeal Board ruled that he actually had worked 7.4 weeks rather than eight weeks and determined his average weekly wage to be $375. The Court of Appeals, WEAVER, P.J., and WAHLS and TAYLOR, JJ., reversed, adopting its earlier opinion in *Tagliavia v Barton Malow Co,* 185 Mich App 556 (1990), which ruled that any week in which wages are earned is to be included in determining the average weekly wage (Docket No. 129065). The plaintiff appeals.

Edward R. Riggs sought worker's compensation benefits for injuries received in the course of his employment with Mosser Construction, Incorporated. A hearing referee granted benefits, finding his average weekly wage to be $603.60. The Worker's Compensation Appellate Commission, following *Tagliavia,* found his average weekly wage to be $316.16. The Court of Appeals, WAHLS, P.J., and SULLIVAN and BRENNAN, JJ., in an unpublished order, denied leave to appeal, citing *Tagliavia* (Docket No. 151717). The plaintiff appeals.

In an opinion by Justice BRICKLEY, joined by Chief Justice CAVANAGH, and Justices LEVIN, BOYLE, GRIFFIN, and MALLETT, the Supreme Court *held:*

In accordance with the overriding purpose of MCL 418.371(3); MSA 17.237(371)(3), to provide for a computation of an average weekly wage that fairly represents an employee's earning capacity as fixed at the time of an injury, in calculating the average weekly wage of an employee who has worked less than thirty-nine weeks, the percentage or fraction of work performed in a partially worked week should be included in the denominator where a week was partially worked because the day of hiring or the day of injury fell during the week.

1. MCL 418.371(3); MSA 17.237(371)(3) is ambiguous in that

the phrase, "the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked" is susceptible to several possible meanings. Where the language employed by the Legislature is susceptible to more than one interpretation, judicial construction is justified. Thus, when the Legislature employed the phrase "weeks actually worked," it intended total wages earned to be divided by the whole number of full weeks worked plus a fractional number representing the partially worked weeks in question here. Application of this construction leads to a calculation of an employee's average weekly wage that would most closely parallel a mathematical average, and is most consistent with the overall legislative intent expressed in § 371 when read in its entirety.

2. Read together, the provisions of § 371 illustrate that the Legislature attempted to draft a statute that would be sensitive to accuracy as the basis for the determination of weekly wage loss in a variety of employment situations. Treating the partially worked week of hiring and the partially worked week of injury as fractions of a full week comes closest to producing a true average weekly wage. The consideration of these partially worked weeks as fractions in the calculation is fair to both the employee and the employer and is a rational and reasonable interpretation of the statute. It is also consistent with the expressed legislative desire to provide a fair and accurate representation of an injured worker's average weekly wage.

Reversed and remanded.

Justice RILEY, dissenting, stated that MCL 418.371; MSA 17.237(371) does not permit the utilization of fractional work weeks to calculate worker's compensation benefits.

Subsection 3 provides that the average weekly wage is to be based on the total wages earned by the employee divided by the total number of weeks actually worked. Only weeks during which work was performed are to be considered, and any week in which work did not occur is not. Any week in which work occurred is considered a week actually worked. There is no exception for the first, last, or any other partially worked week as long as work is performed that week.

Nowhere in the statutory scheme is there reference to the utilization of fractional work weeks. To the contrary, subsection 3 mandates that the total number of weeks actually worked be utilized to compute a claimant's benefits. While the Legislature clearly articulated computations that account for the exigencies of employment and the untimely halt of employment due to injury, it did not provide for special fractional calculations of

incomplete weeks. Thus, the length or timing of the work week is irrelevant in this case. To conclude that fractional weeks may be the basis for the computation of benefits is nothing more than the unwarranted usurpation of legislative authority.

195 Mich App 578; 491 NW2d 265 (1992).

Zamler, Mellen & Shiffman, P.C. (by *Joel Jonas* and *Daryl Royal*), for the plaintiffs in *Rowell.*

Richard L. Warsh (*Daryl Royal,* of counsel), for the plaintiff in *Riggs.*

Conklin, Benham, Ducey, Listman & Chuhran, P.C. (by *David J. Berge* and *Martin Critchell*), for the defendants in *Rowell.*

Schellhase, Auld & Johnston (by *Robert F. Auld* and *Michael J. Mason*) for the defendants in *Riggs.*

BRICKLEY, J. The issue presented in this worker's compensation case is a consideration of the proper treatment under MCL 418.371(3); MSA 17.237(371)(3) of partially worked weeks, specifically the week of hiring and the week of injury, in the computation of an employee's average weekly wage where the employee has worked less than thirty-nine weeks.

We hold that in calculating the average weekly wage, the percentage or fraction of work performed in a partially worked week is to be included in the denominator where a week was partially worked because the day of hiring or the day of injury fell during the week. Such an interpretation is in accordance with the overriding purpose of the section, which is to provide for a computation of an average weekly wage that "fairly represents" the employee's earning capacity as fixed at the time of injury.

I

Ted Rowell was hired as a steel worker. He began his employment with defendant Security Steel Processing Company on Tuesday, April 5, 1983. After finishing out the first week, he then worked six full weeks. His last day of work was Tuesday, May 24, 1983, because of a work-related heart attack. The plaintiff earned $292.50 in his first week of employment, $360 regular pay during each of the intervening six weeks, overtime of $54 in each of two weeks, $67.50 in a third week, and $144 in the week in which he was injured, Rowell's gross wages totaled $2,772.

The hearing referee in *Rowell* followed the approach suggested by the Court of Appeals in *Tagliavia v Barton Malow Co,* 185 Mich App 556; 463 NW2d 116 (1990). The partially worked weeks were treated as whole weeks and used to divide the total wage earned in the course of employment. The average weekly wage was determined to be $346.50. The Worker's Compensation Appeal Board ruled that the "weeks 'actually worked' " were 7.4 weeks rather than 8 weeks and that the average weekly wage was $375.

Riggs was hired as a construction worker. He began his employment with defendant Mosser Construction, Incorporated on Tuesday, December 8, 1987. After finishing out his first week, he then worked one full week. His last day of work was Monday, December 21, 1987, because of a fall from a ladder and resultant back injury. Plaintiff worked twenty-four hours in his first week of employment and twenty-four hours in the following week, earning $399.36 each week. He was injured in the third week of employment, and was paid $149.76 for that week. Riggs' gross wages totaled $948.48.

In *Riggs,* the hearing referee applied the special circumstances exception provided by MCL 418.371(6); MSA 17.237(371)(6). On the basis of a forty hour week, the average weekly wage was $603.60. The Worker's Compensation Appellate Commission, following *Tagliavia,* found that the average weekly wage was $316.16.

The Court of Appeals in *Rowell v Security Steel Processing Co,* 195 Mich App 578; 491 NW2d 265 (1992), adopted as a first-out opinion its earlier decision in *Tagliavia.* We granted leave to appeal, 442 Mich 861 (1993), limited to the issue of the proper interpretation of subsection 371(3) of the Worker's Disability Compensation Act.

In *Riggs v Mosser Construction,* unpublished opinion per curiam, decided September 30, 1992 (Docket No. 151717), the Court of Appeals denied leave to appeal, citing *Tagliavia.* We consolidated and granted leave to appeal with *Rowell,* 442 Mich 903 (1993).

II

Resolution of the correct treatment of the week of hiring and the week of injury, in the context of an employee who has worked less than thirty-nine weeks requires application of MCL 418.371(3); MSA 17.237(371)(3).[1]

When applying any legislation, it must first be

[1] The quoted language is from subsection (3) of § 371 of the Worker's Disability Compensation Act. Section 371 in its entirety provides:

> (1) The weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employee's earning capacity in the employments covered by this act in which the employee was working at the time of the personal injury. The weekly loss in wages shall be fixed as of the time of the personal injury, and determined considering the nature and extent of the personal injury. The compensation

determined whether the language of the statute is clear and unambiguous. *Victorson v Dep't of Treasury*, 439 Mich 131, 138; 482 NW2d 685 (1992).

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payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury.

(2) As used in this act, "average weekly wage" means the weekly wage earned by the employee at the time of the employee's injury in all employment, inclusive of overtime, premium pay, and cost of living adjustment, and exclusive of any fringe or other benefits which continue during the disability. Any fringe or other benefit which does not continue during the disability shall be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount which is greater than 2/3 of the state average weekly wage at the time of injury. The average weekly wage shall be determined by computing the total wages paid in the highest paid 39 weeks of the 52 weeks immediately preceding the date of injury, and dividing by 39.

(3) If the employee worked less than 39 weeks in the employment in which the employee was injured, the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked. For purposes of this subsection, only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked.

(4) If an employee sustains a compensable injury before completing his or her first work week, the average weekly wage shall be calculated by determining the number of hours of work per week contracted for by that employee multiplied by the employee's hourly rate, or the weekly salary contracted for by the employee.

(5) If the hourly earning of the employee cannot be ascertained, or if the pay has not been designated for the work required, the wage, for the purpose of calculating compensation, shall be taken to be the usual wage for similar services if the services are rendered by paid employees.

(6) If there are special circumstances under which the average weekly wage cannot justly be determined by applying subsections (2) to (5), an average weekly wage may be computed by dividing the aggregate earnings during the year before the injury by the number of days when work was performed and multiplying that daily wage by the number of working days customary in the employment, but not less than 5.

(7) The average weekly wage as determined under this section shall be rounded to the nearest dollar. [MCL 418.371; MSA 17.237(371).]

Where the language of the statute is clear and unambiguous, no judicial interpretation is warranted. *Livonia v Dep't of Social Services,* 423 Mich 466, 487; 378 NW2d 402 (1985).

Contrary to the position taken by the dissent, the language of MCL 418.371(3); MSA 17.237(371)(3) is ambiguous in that the phrase, "the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked" is susceptible to several possible meanings. One possibility is that the gross wage is to be divided by a whole number that is rounded up whenever an employee performs any work in a week. Another possibility is that the number of weeks in the denominator only reflects weeks in which an employee has actually worked every day. Under this interpretation, partially worked weeks are to be disregarded in the calculation. Total wages are divided by fully worked weeks.

A third possible interpretation would not consider partially worked weeks in either the total wage figure or the number of weeks worked figure. Finally, the interpretation advanced by the plaintiffs suggests that when the Legislature employed the phrase "weeks actually worked," it intended total wages earned to be divided by the whole number of full weeks worked plus a fractional number representing the partially worked weeks.

Where the language employed by the Legislature is susceptible to more than one interpretation, judicial construction is justified. *State Treasurer v Wilson,* 423 Mich 138, 144; 377 NW2d 703 (1985). The goal of statutory construction is to "ascertain and give effect to the intent of the Legislature in enacting the statute." *In re Forfeiture of $5,264,* 432 Mich 242, 248; 439 NW2d 246 (1989). In determining legislative intent, individual

provisions should be considered in conjunction with the entire act. *Arrowhead Development Co v Livingston Co Rd Comm,* 413 Mich 505, 516; 322 NW2d 702 (1982). If the meaning of a statute is unclear, a court must consider the object of the statute and apply a reasonable construction that best accomplishes the Legislature's purpose. *Wilson, supra.* Furthermore, literal constructions that produce unreasonable and unjust results that are inconsistent with the purpose of the act should be avoided. *Salas v Clements,* 399 Mich 103, 109; 247 NW2d 889 (1976).

Under the interpretation advanced by the dissent and the Court of Appeals in *Tagliavia, supra,* the gross wage would be divided by a whole number that rounds up whenever an employee performs any work in a week. In *Tagliavia,* the Court ruled that if wages are earned in any part of a week, that week shall be included as a whole week in determining the average weekly wage. In so concluding, the Court of Appeals reasoned that that result was required by the second sentence of subsection 371(3), which provides:

> For purposes of this subsection, only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked.

We disagree with and disapprove of *Tagliavia.* In directing that only those weeks in which work is performed shall be considered, the Legislature did not direct that every week in which work is performed shall be counted as a whole week without regard to whether the week was fully or partially worked.

Application of the construction suggested by *Tagliavia* would create a downward distortion of

the average weekly wage. For example, the employee who began work on a Friday at the end of a work week, worked one full week and was injured on the following Monday, would effectively have little more than a week's wage divided by three as the basis for compensation.[2] Under the dissent's proposed formula, wages for one week and two days would be treated as if they fairly represented three weeks wages. In contrast, the employee who begins a job on a Monday and is injured three weeks later on a Friday, would see the basis for his compensation almost triple. It seems an absurd notion that the Legislature intended to distinguish between the employee injured on a Monday and the employee injured on a Friday. Because the resultant disparity would be irrational, we conclude that such a result was not the intention of the Legislature.

Similarly, we reject any interpretation of the statute that would disregard the partially worked weeks in question when dividing the gross wage. This would cause an upward distortion of the average weekly wage. For example, the employee discussed previously who began employment on a Friday, worked a full week and is injured the following Monday would have his total wages earned divided by one. This skews the average because the total wage figure would be inflated by the inclusion of two days wages. The result would be unfair to employers and would be inconsistent with the general provisions of subsection 1 regarding fair assessment of average weekly earnings.

While an interpretation of subsection 3 that would totally disregard partially worked weeks in

[2] *Chappell v Hall Electric* (Docket No. 95965), is being held in abeyance for the decision in these consolidated cases. Chappell worked one full week without incident, and earned gross wages of $634.40 in that normal work week. He was injured on the second day of the second work week, and earned $253.76 in that week.

either the numerator or the denominator might lead to an equitable solution, the Legislature did not choose the precise words that would lead to that interpretation. The Legislature specifically states that weeks in which work is performed are to be considered. However, the precise words that would lead to the distorted result reached by the dissent are absent. To interpret subsection 3 as rounding partially worked weeks up to the next whole number requires reading the words "any week in which work did occur is considered a week 'actually worked' "[3] into the statute.

It is our conclusion that when the Legislature employed the phrase "weeks actually worked," it intended total wages earned to be divided by the whole number of full weeks worked plus a fractional number representing the partially worked weeks in question here. Application of this construction leads to a calculation of an employee's average weekly wage that would most closely parallel a mathematical average. The employee who was hired to start on a Friday, worked one full week, and was injured on a Monday would have his total wages divided by 1.4 if his work week is based on five working days.[4]

III

This interpretation is most consistent with the overall legislative intent expressed in § 371 when read in its entirety. An examination of the other subsections surrounding subsection 3 reveals the Legislature's overriding desire to have the basis for compensation reflect an accurate measure of

[3] *Post,* p 364.

[4] The determination of the number of days customarily worked in a week, which becomes the basis for calculating the fraction of the week partially worked, would be a factual determination to be made by the magistrate.

wages. Section 371(2) establishes that wage is to include overtime, premiums, cost of living adjustments, and any fringe or other benefit that does not continue during the disability.[5] Section 371(2) further provides that where an employee has worked more than thirty-nine weeks before an injury, the highest paid weeks of the fifty-two weeks before the injury are to be the basis for determining wage loss. This reflects a legislative purpose to utilize those weeks that are as fair as possible to the employee when dividing by thirty-nine.

While the Legislature did not specifically address the treatment of the partially worked weeks sub judice when an employee works less than thirty-nine weeks, it did specifically address the employee who worked less than one week. Section 371(4) provides that the basis for determining wage loss for the employee injured during the first week of employment will be a determination of the number of hours the worker was to have worked, multiplied by the hourly rate, or simply the weekly salary.[6]

It would be incongruous for the Legislature to have intended more protection for the employee injured in the first week of employment, under the provisions of subsection 4, than it intended for the employee injured in the second week of employment, under the provisions of subsection 3.

Similarly, § 371(5) provides that where an hourly earning cannot be computed, the usual wage for similar services shall be considered as the basis for calculating compensation.[7] Subsection 6 applies "[i]f there are special circumstances under which the average weekly wage cannot justly be

[5] See n 1 for the text of MCL 418.371(2); MSA 17.237(371)(2).

[6] See n 1 for the text of MCL 418.371(4); MSA 17.237(371)(4).

[7] See n 1 for the text of MCL 418.371(5); MSA 17.237(371)(5).

determined by applying subsections (2) to (5) . . . ."[8] Where there are special circumstances, the Legislature provided that the average weekly wage could be computed by dividing the aggregate earnings by the number of days worked and then multiplying by the number of days customarily worked, "not less than 5." This provision demonstrates that the Legislature was willing to depart from the traditional definition of a work week if necessary to justly determine the basis for compensation.

Read together, the provisions of § 371 illustrate that the Legislature attempted to draft a statute that would be sensitive to accuracy as the basis for the determination of weekly wage loss in a variety of employment situations.

Treating the partially worked week of hiring and the partially worked week of injury as fractions of a full week comes closest to producing a true average weekly wage. The consideration of these partially worked weeks as fractions in the calculation would be fair to both the employee and the employer.

The treatment of these partially worked weeks as fractions is a rational and reasonable interpretation of the statute. It is also consistent with the expressed legislative desire contained in subsection

[8] See n 1 for the entire text of MCL 418.371(6); MSA 17.237(371)(6).

Appellant Riggs included the argument in his application for leave to appeal that subsection 6 should be applied. The magistrate had determined that wage loss should be calculated under subsection 6. The Worker's Compensation Appellate Commission reversed, finding there was no testimony to establish "special circumstances" and instead applied subsection 3, dividing the total wage by a denominator that included the partial week at the beginning of employment and the partial week in which the disabling injury occurred. The Court of Appeals denied application for leave to appeal. This Court's grant of leave to appeal was limited to the issue whether the Worker's Compensation Appellate Commission properly calculated plaintiff's average weekly wage pursuant to MCL 418.371(3); MSA 17.237(371)(3). 442 Mich 903 (1993).

1 to provide for a fair and accurate representation of an injured worker's average weekly wage.

IV

Therefore, we conclude that the treatment of the partially worked week of hiring and the partially worked week of injury as fractions of full weeks for the purposes of calculating the average weekly wage of an employee with less than thirty-nine weeks of employment best carries out the Legislature's overall intentions for calculating the average weekly wage in this situation.[9]

The judgment of the Court of Appeals is reversed in each case, and the cases are remanded to the Worker's Compensation Appellate Commission for further proceedings.

CAVANAGH, C.J., and LEVIN, BOYLE, GRIFFIN, and MALLETT, JJ., concurred with BRICKLEY, J.

RILEY, J. (*dissenting*). Because MCL 418.371; MSA 17.237(371) does not permit the utilization of fractional work weeks to calculate worker's compensation benefits, I respectfully dissent.

I

At issue in the instant case is the calculation of worker's compensation benefits due injured workers who work less than thirty-nine weeks but more than a week for their employer before their injury. More specifically, the issue presented is whether

[9] This opinion addresses the specific partial weeks presented by both plaintiffs, the week employment commenced and the week of injury. While we do not foreclose the applicability of our interpretation of MCL 418.371(3); MSA 17.237(371)(3) to all other situations presenting partial weeks, we note that application of subsection 3 assumes that fully worked weeks are the norm in the employment the injured worker was performing.

MCL 418.371; MSA 17.237(371) permits the calculation of weekly earnings for worker's compensation benefits by computing the first and last weeks of employment as fractional weeks. The majority holds

> that in calculating the average weekly wage, the percentage or fraction of work performed in a partially worked week is to be included in the denominator where a week was partially worked because the day of hiring or the day of injury fell during the week. Such an interpretation is in accordance with the overriding purpose of the section, which is to provide for a computation of an average weekly wage that "fairly represents" the employee's earning capacity as fixed at the time of injury. [*Ante* at 349.]

II

A

Contrary to the method utilized by the majority, I begin by examining the language employed by the Legislature to resolve this issue. MCL 418.371; MSA 17.237(371) provides:

> (1) The weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employee's earning capacity in the employments covered by this act in which the employee was working at the time of the personal injury. The weekly loss in wages shall be fixed as of the time of the personal injury, and determined considering the nature and extent of the personal injury. The compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not

exceed the employee's average weekly earnings at the time of the injury.

(2) As used in this act, "average weekly wage" means the weekly wage earned by the employee at the time of the employee's injury in all employment, inclusive of overtime, premium pay, and cost of living adjustment, and exclusive of any fringe or other benefits which continue during the disability. Any fringe or other benefit which does not continue during the disability shall be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount which is greater than 2/3 of the state average weekly wage at the time of injury. The average weekly wage shall be determined by computing the total wages paid in the highest paid 39 weeks of the 52 weeks immediately preceding the date of injury, and dividing by 39.

(3) If the employee worked less than 39 weeks in the employment in which the employee was injured, the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked. For purposes of this subsection, only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked.

(4) If an employee sustains a compensable injury before completing his or her first work week, the average weekly wage shall be calculated by determining the number of hours of work per week contracted for by that employee multiplied by the employee's hourly rate, or the weekly salary contracted for by the employee.

(5) If the hourly earning of the employee cannot be ascertained, or if the pay has not been designated for the work required, the wage, for the purpose of calculating compensation, shall be taken to be the usual wage for similar services if the services are rendered by paid employees.

(6) If there are special circumstances under which the average weekly wage cannot justly be

> determined by applying subsections (2) to (5), an average weekly wage may be computed by dividing the aggregate earnings during the year before the injury by the number of days when work was performed and multiplying that daily wage by the number of working days customary in the employment, but not less than 5.

This Court has long held that "[i]n every exposition of a statute, the intention of the Legislature is undoubtedly the end to be sought . . . ." *Leoni Twp v Taylor,* 20 Mich 148, 154-155 (1870). Because the Legislature is presumed to understand the meaning of the language it places into law, "[s]tatutory analysis necessarily begins with the wording of the statute itself." *Carr v General Motors Corp,* 425 Mich 313, 317; 389 NW2d 686 (1986). Each word of an act is "presumed to be made use of for some purpose," and "so far as possible, effect must be given to every clause and sentence." *Univ of Michigan Bd of Regents v Auditor General,* 167 Mich 444, 450; 132 NW 1037 (1911). Accordingly, the Court may not substitute or redefine a word. *People v Crucible Steel Co of America,* 150 Mich 563, 567; 114 NW 350 (1907). Nor may the Court assume that a mistake was made or that the Legislature inadvertently utilized one word instead of another. *Detroit v Redford Twp,* 253 Mich 453, 456; 235 NW 217 (1931).[1] Moreover, unless the statute or circumstances dictate otherwise, the Court should utilize the common understanding of words and phrases. *People ex rel Platt v Oakland Co Bank,* 1 Doug 282, 287

[1] See also *People v Crucible Steel Co of America, supra* at 567 ("We cannot assume the legislature made a mistake and used one word when it in fact intended to use another. The language of the statute is plain as it reads and we do not feel authorized to change its meaning by substituting another word for the one the legislature used"); *Stowers v Wolodzko,* 386 Mich 119, 133; 191 NW2d 355 (1971) ("Every word should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible").

(Mich, 1844).[2] Hence, "[a] fundamental principle guiding this Court is that a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin,* 443 Mich 59, 65; 503 NW2d 435 (1993).[3] In other words, "[a] statute is not open to construction as a matter of course, but only where the language used in the statute requires interpretation—where it is ambiguous or where 2 or more constructions can be placed upon it, where it is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *City of Lansing v Lansing Twp,* 356 Mich 641, 649; 97 NW2d 804 (1959).

These rules of statutory construction are especially appropriate in the instant case:

> "The compensation act is in derogation of the common law and, therefore, its measure of relief may not be extended beyond its express terms; it is a legislative creation permitting no enlargement by principles of equity or common-law adaptations. It is arbitrary and where it speaks nothing can be added nor changed by judicial pronouncement. It imposes liability upon operatives under its provisions and measures exclusive relief in its own terms." [*Solakis v Roberts,* 395 Mich 13, 20; 233

[2] Justice COOLEY elaborated:

> There are certain well settled rules for the construction of statutes, which no court can safely disregard. Where the statute is plain and unambiguous in its terms, the courts have nothing to do but to obey it. They may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern . . . . [*People ex rel Twitchell v Blodgett,* 13 Mich 127, 167-168 (1865).]

See also MCL 8.3a; MSA 2.212(1).

[3] See also *People v Plumsted,* 2 Mich 465, 469 (1853); *In re Forfeiture of $5,264,* 432 Mich 242, 248; 439 NW2d 246 (1989).

NW2d 1 (1975), quoting *Tews v C F Hanks Coal Co*, 267 Mich 466, 468-469; 255 NW 227 (1934).]

B

Subsection 3 provides that "the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked." The subsection defines, for its purposes only, that "only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked." Accordingly, any week in which work did not occur is not considered in the calculation, while any week in which work did occur is considered a week "actually worked." There is no exception for the first, last, or any other partially worked week as long as "work is performed" that week. In the instant case, therefore, each plaintiff's wages should be divided by the total number of weeks in which at least some work occurred, regardless of the actual hours worked or wages earned each week. This subsection is uncomplicated and provides for a readily determinable weekly wage. The fairness of the provision is not our concern.

The majority, however, ignores the clear meaning of the statute and substitutes a standard fashioned from whole cloth. Nowhere in the statutory scheme is there reference to the utilization of fractional work weeks. To the contrary, the subsection at issue mandates that the "total number of weeks actually worked" be utilized to compute a claimant's benefits. The ordinary meaning of this phrase is to interpret "week" as seven consecutive days (beginning on Sunday) and "total number of weeks" to mean the combined or full number of

weeks that work occurred. "[W]eeks actually worked" is specifically defined as any week in which work is performed. Contrary to the majority's holding, the subsection does not provide that shortened weeks at the beginning and end of a worker's employment are to be computed as fractions—the statutory definition of "actually worked" does not differentiate between shortened and full work weeks or between the first, middle, and last weeks of employment. In fact, no mention of first or last weeks exists in the section at issue whatsoever. Nor is there a provision for partially worked weeks. The section clearly provides that the total number of weeks in which any work was performed—regardless of the amount of work performed or when the week was worked—is to be used in the calculation. In short, there is no provision for the utilization of fractional weeks for the first and last weeks worked.

The majority, however, posits that the language is ambiguous by proffering four different interpretations of the language at issue, *ante* at 353, and then chooses the one interpretation it finds the most palatable. Yet, three of these interpretations are simply untenable distortions of language of the statute. The true objection of the majority, is that the clear language of the statute is "unfair." *Ante* at 355. This Court, however, may not misinterpret statutes so that they may seem more fair to its individual members.

If the Legislature wished to ensure that fractional weeks be utilized, it would have clearly expressed that intention. For example, subsection 3 explicitly provides that weeks during which no work occurred are not to be counted as weeks for the purpose of determining compensation. Similarly, subsection 4 provides for special calculations if an employee is injured before completing the

first work week "by determining the number of hours of work per week contracted for by that employee multiplied by the employee's hourly rate, or the weekly salary contracted for by the employee." Similarly, subsection 6 defines a week for its purposes as "the number of working days customary in the employment . . . ." The Legislature, therefore, has clearly articulated computations that account for the exigencies of employment and the untimely halt of employment due to injury. Nevertheless, the Legislature did not provide for special fractional calculations for incomplete weeks, calculations by multiplying the contracted hours by the hourly wage, or weeks "customary in the employment" in subsection 3. The majority, however, examines the separate subsections to support its conclusions that the Legislature intended its formula. To the contrary, the Legislature's purposeful decision not to include such special calculations reveals that it intended otherwise. In short, the length or timing of the work week is irrelevant in the instant case. The language utilized is not so doubtful or obscure that reasonable minds might be uncertain of its meaning. Indeed, the language could not be clearer. The majority simply engrafts on the statute a novel means of computing benefits in contradiction with its plain terms.

The majority protests that "[i]n directing that only those weeks in which work is performed shall be considered, the Legislature did not direct that every week in which work is performed shall be counted as a whole week without regard to whether the week was fully or partially worked." *Ante* at 354. To the contrary, the Legislature clearly provided that any week in which work occurred was to be considered a week "actually worked." The majority's interpretation has the

anomalous result of counting partially worked weeks at the beginning and the end of employment as fractions, but counting weeks partially worked in between the first and last week as a full week. Thus, a week "actually worked" possesses two entirely different definitions for the same worker at the same job. Such a reading is nothing if not "incongruous" or "absurd."

Contrary to the majority, we must assume that the Legislature intended to choose the precise words it utilized, and that it consciously chose not to utilize fractional weeks in the subsection at issue. We must not substitute the Legislature's words for our preferences. The Legislature enacted this language with the passage of 1980 PA 357. The act completely revised the prior statutorily mandated calculation by eliminating the calculation of wages by "multiplying the hourly rate or earning by the average number of hours worked . . . ."[4] The extensive alteration engendered by the act, carefully crafted a model for calculating the appropriate benefits to a claimant in the specific circumstances of an employee injured before completing thirty-nine weeks of employment. Like all legislation, the provision at issue was a legislative compromise. The majority undoes that compromise by amending the statute via judicial fiat. The Legislature did not find it fit to modify the statute—neither should this Court.

When confronted with an unambiguous statute,

[4] Before the enactment of 1980 PA 357, subsection 3 provided:

> When a hearing referee finds that the employee was employed specifically and not temporarily on a part-time basis, the average weekly wage shall be determined by multiplying the hourly rate or earning by the average number of hours worked in the part-time employment. When it is found that the employee has worked an average of 25 hours or more per week in all of his current employments, he shall not be considered a part-time employee.

we are not to find metaphysical and subtle meanings hidden between or behind the language of the statute. This case is not one about the justice or injustice of the statute involved. The majority bases its holding on the possible unfairness that might result from the application of the clear language. Yet, within our system of separate powers, the lawmaking function resides with the Legislature, not this Court. *Roosevelt Oil Co v Secretary of State,* 339 Mich 679, 694; 64 NW2d 582 (1954) ("it is not the function of the court to legislate"). Thus, unless proven unconstitutional, "[t]he wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere." *Melia v Employment Security Comm,* 346 Mich 544, 561; 78 NW2d 273 (1956). "Adherence to the language and legislative intent of a statute is essential to ensure that 'courts . . . declare the sense of the law' and do not 'exercise will instead of judgment . . . .' Hamilton, *The Federalist Papers,* No 78, Kramnick, ed (England: Penguin Books, 1987 [originally published in 1788]), p 440." *Coleman, supra* at 65. In other words, as a court of law, we do not create law or base opinions on questions of policy or our personal feelings. To the contrary, when construing a statute, our objective must only be to discern the Legislature's intent. The majority's conclusion that fractional weeks may be the basis for the computation of benefits, therefore, is nothing more than the unwarranted usurpation of legislative authority—the exercise of will instead of judgment.

PEOPLE v MALONE

Docket Nos. 94390, 94391. Argued December 1, 1993 (Calendar No. 1). Decided June 14, 1994.

Donald Malone was convicted by a jury in the Detroit Recorder's Court, Thomas E. Jackson, J., of first-degree murder and of possession of a firearm during the commission of a felony. The Court of Appeals, MURPHY, P.J., and CAVANAGH, J. (CONNOR, J., concurring), affirmed, concluding that third-party identification testimony was admissible under MRE 801(d)(1)(C) (Docket No. 120518. See also Docket No. 151188.). The defendant appeals.

In an opinion by Justice BOYLE, joined by Justices BRICKLEY, RILEY, GRIFFIN, and MALLETT, the Supreme Court *held:*

Under MRE 801(d)(1)(C), statements of identification are not hearsay when the identifier is subject to cross-examination.

1. Under rule 801(d)(1)(C), prior statements of identification are not hearsay regardless of whether the out-of-court declaration is denied or affirmed at trial. The statements need not be inconsistent with trial testimony, as under rule 801(d)(1)(A), nor offered to rebut other testimony, as under rule 801(d)(1)(B). As long as the statement is one of identification, rule 801(d)(1)(C) permits its substantive use, provided the person who made the identification is subject to cross-examination. Further, the rule makes no distinction regarding whether the statement is offered by a third party or is a statement by a witness on the stand about something the witness said previously.

2. Because the identifier in this case testified at trial and was subject to cross-examination, testimony by a third-party witness about his statement was properly admitted even though the identifier testified that he did not make the statement.

Affirmed.

Chief Justice CAVANAGH, joined by Justice LEVIN, dissenting, stated that, properly interpreted, MRE 801(d)(1)(C) excludes from the definition of hearsay only the out-of-court identification statements of a person who actually made an earlier identification. Thus, testimony regarding such an out-of-court

REFERENCES

Am Jur 2d, Federal Rules of Evidence §§ 209, 210.
See ALR Index under Hearsay.

statement by a third party who witnessed the identification falls within the definition of hearsay and is not admissible as substantive evidence.

Two types of persons may provide identification testimony during trial: a person who actually made an extrajudicial identification, and a third party who observed the identifier make the identification. MRE 801(d)(1)(C) provides that an extrajudicial statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement concerned identification of a person made after perceiving the person.

Although an extrajudicial identification cannot be tested by contemporaneous cross-examination, when it is offered by the identifier at trial, the opposing party can cross-examine the identifier, exposing any weaknesses and uncertainty of the identification and providing an indicia of reliability for the factfinder to judge the accuracy of the identification. When a third party testifies about a prior identification by the identifier, the accuracy of the identification cannot be tested, making it not only unreliable, but lacking in probative value. Thus, third-party identification testimony that bolsters an identification should not be admissible as substantive evidence; rather, consistent with the intent underlying MRE 801(d)(1)(C) and prior Michigan law, such testimony is restricted to the facts and circumstances surrounding the identification. The federal interpretation of FRE 801(d)(1)(C) is repugnant to the intent of the Supreme Court in adopting the Michigan rule and should be rejected.

In this case, the admission of third-party testimony about the identifier's earlier identification as substantive evidence was error. Also, the testimony of additional identifying witnesses was suspect at best. These facts, coupled with the heavy reliance most jurors place on a police officer's testimony, clearly prejudiced the defendant, entitling him to a new trial.

193 Mich App 366; 483 NW2d 470 (1992) affirmed.

EVIDENCE — HEARSAY — STATEMENTS OF IDENTIFICATION.

Statements of identification are not hearsay when the identifier is subject to cross-examination (MRE 801[d][1][C]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Research, Training, and Appeals, and *Janice M.*

Joyce Bartee, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *David A. Moran*) for the defendant.

BOYLE, J. The question presented in this case is whether the Michigan Rules of Evidence modify the definition of hearsay to define a prior statement of identification as nonhearsay. Specifically, we must decide whether the trial court acted properly in admitting as substantive evidence the testimony of two witnesses that a witness who denied having identified the defendant at trial had previously identified him at a photographic showup.

We hold that, under MRE 801(d)(1)(C), statements of identification are not hearsay when the identifier is subject to cross-examination.[1] The history of the rule and the goal of promoting reliable fact finding support this conclusion. The decision of the Court of Appeals is affirmed.

I

FACTS AND PROCEDURAL HISTORY

This case arose from the July 26, 1988, shooting death of Orlando Nance that occurred in an alley outside a market in Detroit. The defendant, Donald Malone, was charged with first-degree murder and possession of a firearm during the commission of a felony. Witnesses Robin Lasenby, Carey Jackson, and Melvin Mann each observed individuals running to, or from, the scene of the shooting.

Carey Jackson later identified the defendant at a photographic showup. At trial, however, Carey

[1] The dissent concedes that third-party testimony of a prior inconsistent statement is admissible for impeachment. *Post,* p 408, n 19.

Jackson denied having identified the defendant. Other eyewitnesses were also reluctant to testify. Robin Lasenby testified that, although he was not afraid for himself, his mother "[g]ot [him] to make a statement because she felt frightened for her safety or whatever." Defendant Malone "told [Lasenby] that the affair was none of Lasenby's business." Lasenby, who had previously given a statement that unequivocally identified the defendant as the person who got out of the black Omni with a dark object[2] in his hand, testified that the defendant later told him that the incident was "none of [his] business," and that, at that time as well, the defendant had in his possession a dark object.[3] It

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[2] *Q.* Did you see either one of the people that jumped out of the car with anything in their hands?

A. Yes. I saw something, but you know, I really can't say what it was at that time.

Q. Which other people had something in their hands?

A. Donald.

Q. What size was the item that you saw in the defendant's hand?

A. I can't really say what size it is because, you know, I was at a distance. I was like walking away in the other direction.

Q. Could you tell if it was in his right hand or his left hand?

A. No, I can't recall.

Q. Can you tell if it was a dark object or light object?

A. A dark object, I believe.

Q. Now, after you lost sight of Mr. Malone, where did you go right after you saw them jumping out of the car?

A. I went to my house on my porch.

[3] *Q.* What was the conversation that the two of you had?

A. He just said, I heard you know something. And I said, well, you know, whatever people tell you. I don't have nothing to do with it, that type of thing, you know.

Q. Who started the conversation?

A. I'm not for sure. I can't recall.

Q. Did you walk up to him or did he walk up to you?

A. No, I walked towards his car.

Q. And what specifically, please, after refreshing your recollection, did the two of you discuss?

A. I just told you what we discussed.

Q. Did you see anything in Donald Malone's lap at that time?

A. Yes.

Q. What did you see?

A. I couldn't make out what it was because at the time, I was not standing directly up on the car and when Sergeant Bivens asked me, you know what this was and I said yeah; I can't really say what it was.

Q. It was a big object or small object?

A. It could have been medium sized object.

Q. Was it a dark color or light color?

A. Dark color.

Q. You still live in the neighborhood around Puritan and Pilgrim don't you?

A. Uh-huh.

Q. Now, did the defendant tell you anything about something you supposedly said?

A. No.

Q. Did he tell you anything about something he heard?

A. No. I just told you he had heard back that I had been talking about something.

Q. Did he refer to what the something was?

A. No.

Q. Did you tell him anything, did you talk about anything?

A. No.

Q. I am going to direct you to your statement right here. Read that to yourself, please.

A. Yeah, I see what you are talking about.

Q. What did you tell Donald Malone?

A. I said, you know I can't, it's none of my business. I don't have anything to do with it whatsoever.

Q. Did he tell you what he did was really none of your business?

A. Yeah.

Q. Did you tell him something about what you were talking about was going no further than right here?

A. Yeah, I said that.

Q. Is that when you noticed an object in his lap?

A. No, but I couldn't see because I told you all the time I was standing directly up by the car.

Q. Shortly after that, were you subpoenaed to come to Court for a preliminary hearing?

* * *

Q. (By Ms. Worthy): Did you call Sergeant Bivens?

A. Yes. I heard he had been looking for me and I called him and told him I wasn't coming to Court.

Q. Why did you tell him you weren't coming to Court?

A. I didn't feel it was no reason for me to come. I didn't want to come.

Q. Is this after you had seen Donald Malone in the street?

A. Yes, it was sometime after that I believe.

was only after that conversation that Lasenby "didn't want to come" to court.

Over the defendant's objections, attorney James Hall, the attorney appointed to protect the defendant's right to a fair showup, testified that Carey Jackson identified defendant Malone as "the guy who had the gun," and signed a statement recording this identification. Attorney Hall also testified that the photographic showup was fair. Officer James Bivens of the Detroit Police Department also testified and confirmed Jackson's identification and signed statement. The trial court held that the testimony of both Officer Bivens and Attorney Hall was not limited to impeachment of Jackson's trial testimony and was admissible as substantive evidence under MRE 801(d)(1)(C).[4] The jury convicted the defendant of first-degree murder and possession of a firearm during the commission of a felony.

The Court of Appeals affirmed the defendant's convictions. 193 Mich App 366; 483 NW2d 470 (1992). The Court rejected the defendant's argument that the identification testimony was inadmissible hearsay. Judge CONNOR concurred only because he felt compelled to apply the rule announced in *People v Newcomb,* 190 Mich App 424,

Q. Is that why you were brought into this Court because you didn't show up for the first Court hearing?

A. Which time are you talking about?

Q. You told Sergeant Bivens you weren't going to show up for a Court hearing?

A. Yeah. I felt I didn't have to show up because I wasn't subpoenaed. If I was subpoenaed, it would have been different then. Just like he subpoenaed me here, I showed back up.

Q. In any event, you didn't show up for that hearing, did you?

A. No.

[4] The trial court noted that if the identification procedure was unfair or caused bias, the court could exclude it. The defendant does not contest the fairness of the identification procedures.

429-430; 476 NW2d 749 (1991), as required by Administrative Order No. 1990-6, 436 Mich lxxxiv. See 193 Mich App 372 (CONNOR, J., concurring). This Court granted the defendant's application for leave to appeal on March 16, 1993. 442 Mich 867.

II

THE TESTIMONY IS NOT HEARSAY UNDER MRE 801(d)(1)(C)

The testimony of Attorney Hall and Officer Bivens about the prior statement of witness Carey Jackson is not hearsay. On this point, the Rules of Evidence could not be more clear:

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him . . . . [MRE 801(d)(1)(C).]

MRE 801(d) is an outgrowth of attempts to abandon the orthodox rule that prior statements of a witness were admissible only for impeachment or under a recognized exception to the hearsay rule. The proponents of change, among them Wigmore and Learned Hand, countered the orthodox view that substantive use was objectionable because the prior statement when made was not under oath, subject to cross-examination, or in the presence of the trier of fact. They observed that the oath was no longer the principal safeguard of trustworthiness, that the interests of cross-examination were met by the declarant's presence at trial, and that the trier's advantage of observing the demeanor of the witness was also satisfied. In Hand's classic statement:

> If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. [*Di Carlo v United States*, 6 F2d 364, 368 (CA 2, 1925).]

The reformers' views are represented in the Model Code of Evidence Rule 503, which abolishes the orthodox rule and provides that all prior statements are admissible if the declarant is found to be "present and subject to cross-examination." 2 McCormick, Evidence (4th ed), § 251, p 118. However, concern that the Model Code approach would produce the manufacture of prior statements led to an intermediate position taken by the advisory committee on the Federal Rules of Evidence,[5]

> exempting from classification as hearsay certain prior statements thought by circumstances to be free of the danger of abuse. The exempt statements are (A) inconsistent statements, (B) consistent statements when admissible to rebut certain attacks upon the credibility of the witness, and (C) statements of identification. [2 McCormick, *supra*, p 120.]

The Congress modified the original proposal, and the structure of MRE 801(d), as ultimately adopted by this Court, parallels FRE 801(d), as modified. The rule clearly indicates the circumstances in which prior statements are defined as not hearsay: where the prior statement was made under oath and is inconsistent with the witness' testimony,[6]

[5] The advisory committee's approach was also proposed by the Michigan Committee on the Rules of Evidence.

[6] Congress modified FRE 801(d)(1)(A) to define an inconsistent statement as a statement given "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . ." The Michigan Supreme Court adopted the federal rule as modified.

MRE 801(d)(1)(A); where the prior statement is consistent and offered to rebut, MRE 801(d)(1)(B); and where the prior statement is one of identification, MRE 801(d)(1)(C). Unlike subrules (A) and (B) of Rule 801(d)(1), subparagraph (C) does not require laying a foundation other than that the witness is present and found to be available for cross-examination.

Thus, statements of identification are not limited by whether the out-of-court declaration is denied or affirmed at trial. There is no requirement "of inconsistency" as in subparagraph (A), nor is there a condition of previous impeachment as in subparagraph (B). As long as the statement is one of identification, Rule 801(d)(1)(C) permits the substantive use of any prior statement of identification by a witness as nonhearsay, provided the witness is available for cross-examination. 4 Weinstein & Berger, Evidence, ¶ 801(d)(1)(C)[01], pp 801-214 to 801-215.

All that is contemplated is an out-of-court statement of identification (which is simply a particular type of prior statement) and that the out-of-court declarant be subject to cross-examination "concerning" the statement. Thus, it is clear that the effect of both MRE 801(d)(1)(A) and MRE 801(d)(1)(B) is to change Michigan law, and the committee notes confirm this. 399 Mich 1003. Further, there is no distinction regarding whether the out-of-court statement is offered by a third party or is the statement of identification of a witness on the stand regarding something the witness previously said. Under the orthodox definition of hearsay, an out-of-court statement offered for the truth is inadmissible, whether offered through its maker or a third party. A statement of identification defined

as nonhearsay is substantively admissible under Rule 801, without regard to its proponent.[7]

Because Mr. Jackson testified regarding the subject of identity at trial, and was subject to cross-examination regarding his identification, the testimony was properly admitted.

III

THE DRAFTING HISTORY OF MRE 801(d)(1)(C)

A full review of the committee commentary on the Michigan Rules of Evidence confirms that the testimony in question is not hearsay. After first stating that MRE 801(d)(1)(A) and (B) were "inconsistent with prior Michigan law" that defined prior inconsistent statements and consistent statements as hearsay, see, e.g., *People v Hallaway,* 389 Mich 265, 271-279; 205 NW2d 451 (1973) (opinion of BRENNAN, J.), the committee summarized the effect of Rule 801(d)(1)(C):

> MRE 801(d)(1)(C) is consistent with prior Michigan law in admitting testimony by a witness as to his own prior statement of identification of a person made after perceiving him. *People v Poe,* 388 Mich 611; 202 NW2d 320 (1972); *People v Londe,* 230 Mich 484; 203 NW 93 (1925). [399 Mich 1004.]

The committee's statement that MRE 801(d)(1)(C) was consistent with prior law "*admitting* testimony by a witness as to his own prior statement . . . ," *id.* (emphasis added), does not mention previous Michigan law *excluding* a wit-

[7] The statement of identification is not hearsay. The witness' perception of the act is tested under oath for the benefit of the factfinder. Indeed, as Judge MARK CAVANAGH recognized in the Court of Appeals, if the rule were read to preclude third-party testimony of a statement of identification, it would not address the recanting witness problem because, by definition in this situation, the only party who can introduce the evidence is the third party. 193 Mich App 370.

ness' prior inconsistent statements as hearsay.[8] That line of authority was overruled in the committee's version of MRE 801(d)(1)(A).[9] Since the committee's proposals would have made all prior inconsistent statements admissible as substantive evidence without limitation, the only category of statements of identification evidence not contemplated by the proposal was a prior statement of identification admitted by the witness. Since *People v Poe* and *People v Londe, supra,* admitted as substantive evidence the prior statement of identification of a witness affirming his in-court identification, the commentary to FRE 801(d)(1)(A), (B), and (C) accurately describes the changes proposed in Michigan law.

The Committee Note also describes MRE 801(d)(1)(C) as identical to its federal counterpart. 399 Mich 1002-1003. According to the General Comment, when a particular rule is drawn from "the corresponding Federal rule, the Michigan Committee Note usually does not restate the rule's background or comment on its meaning. Rather the Federal Advisory Committee Notes and Congressional reports are allowed to speak for them-

[8] The committee's statements regarding "Impact on Prior Michigan Law" merely indicate the committee's perceptions of the correspondence, or lack of it, between the rules and prior Michigan law. Prepared as an aid to Bench and Bar in the transition from prior Michigan law to these rules, these statements are descriptive only, and not prescriptive. They are not to be carried forward as a gloss on the new rules. [399 Mich 955.]

[9] This rule provided that

> [a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony . . . .

As noted, however, this Court did not adopt this rule as written, but instead modified it to match its federal counterpart. Cf. n 5.

selves." 399 Mich 955.[10] The Report of the Senate Judiciary committee addressed this precise situation in explaining why the rule is desirable:

> "The identification occurs before [the witness'] recollection has been dimmed by the passage of time. Equally as important, it also takes place before the defendant or some other party has had the opportunity, through bribe or threat, to influence the witness to change his mind." [4 Weinstein & Berger, *supra,* p 801-6, quoting the Report of the Committee on the Judiciary, Senate, 94th Cong, 1st Sess, No 94-199, pp 2-4 (1975).]

We assume that the justices of this Court were familiar with the interpretative materials, leading commentators, the extensive case law preceding adoption of the federal rules that admitted first- or third-party identification without limitation,[11] and the federal rule and its effect on common-law practice. Indeed, whatever the views of the individual justices[12] regarding the arguments for and

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[10] Consistent with this intention, this Court has continued to look to the commentary on the Federal Rules of Evidence, see, e.g., *People v VanderVliet,* 444 Mich 52, 60, n 7; 508 NW2d 114 (1993), and decisions interpreting these rules, see, e.g., *Solomon v Shuell,* 435 Mich 104, 108-139, 140-153; 457 NW2d 669 (1990) (opinions of ARCHER and BOYLE, JJ.).

[11] See, e.g., cases collected in anno: *Admissibility of evidence as to extrajudicial or pretrial identification of accused,* 71 ALR2d 449.

[12] *People v Sanford,* 402 Mich 460; 265 NW2d 1 (1978), was pending at the time this Court adopted the Michigan Rules of Evidence. None of the five justices who voted in *Sanford* that it was not error to admit the police officer's testimony suggested the limitation that the dissent would read into the rule.

Justice RYAN wrote separately to point out that, although in his view prior law would have excluded the identification for substantive purposes, MRE 801(d)(1)(C), like its federal counterpart, allows the introduction as long as the identifier testifies at trial and is subject to cross-examination. *Id.* at 497. Significantly, and contrary to the defendant's position, Justice RYAN stated that, in adopting the rule, "the Court implicitly acknowledges . . . that the hearsay character and cumulative effect of the testimony of a *third person* to an out-of-court identification, as well as that given by the identifier himself, is not so

against retention or reform of the common-law rules of limited admissibility, it is beyond dispute that at least four justices were persuaded that previously inadmissible statements should be defined as nonhearsay, MRE 801(d)(2)(D), and that statements previously admitted only for impeachment or support should be admitted as substantive evidence, MRE 801(d)(2)(A) and MRE 801(d)(2)(B). The Court clearly cast its vote against orthodoxy and in favor of "the promotion of growth and development in the law of evidence." MRE 102.

IV

THIS TESTIMONY DOES NOT PRESENT THE DANGERS OF HEARSAY

As Professor Wigmore observes in explanation of FRE 801(d)(1):

> The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and reexamination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony. In addition, allowing it as substantive evidence pays a further dividend in avoiding a

inherently prejudicial that it must necessarily be excluded in all cases." *Id.* (Emphasis added.)

The issue in *Sanford* and the other cases cited by the dissent is the admissibility of third-party testimony "bolstering" statements of identification, i.e., where the identifier has identified the defendant at trial. See also *People v Mead,* 50 Mich 228; 15 NW 95 (1883), and *People v Londe* and *People v Poe, supra.*

limiting instruction quite unlikely to be heeded by a jury. [2 McCormick, *supra,* § 251, p 120.]

The United States Supreme Court considered the asserted dangers of hearsay in *California v Green,* 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970). The question there was whether the trial court properly admitted as substantive evidence a statement to the police and testimony at preliminary examination that the defendant supplied marijuana to a witness, where the witness became markedly evasive at trial and claimed he could not remember the actual events.

The Court held that admission of the declarant's out-of-court statements at trial does not violate the Confrontation Clause as long as the declarant testifies as a witness and is subject to full and effective cross-examination. In reaching this conclusion, the Court observed that the alleged dangers of admitting the out-of-court statement are not present when the witness is under oath and forced to submit to cross-examination and the jury is allowed to observe the witness' demeanor in assessing his credibility.

> It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections. If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury . . . . [399 US 158-159.]

Addressing the claim that the jury could not evaluate the declarant's demeanor when he first made his out-of-court statement, the Court stated:

> The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story. [*Id.* at 160.]

Finally, to the extent that the orthodox rule rested on the value of contemporaneous cross-examination, the Court observed in words equally applicable here:

> The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth." . . . That danger, however, disappears when the witness has changed his testimony so that, far from "hardening" his prior statement has softened to the point where he now repudiates it. [*Id.* at 159.]

In *United States v Owens,* 484 US 554, 561; 108 S Ct 838; 98 L Ed 2d 951 (1988), nearly twenty years later, the Supreme Court upheld the admission of a prior identification under FRE 801(d)(1)(C), and the Confrontation Clause. The Court con-

cluded that the opportunity for cross-examination is not denied when the witness testifies about his current belief, the basis for which he cannot recall, or when the witness' past belief is introduced and he is unable to recollect the reason for that past belief. In both, the foundation for the belief (current or past) cannot effectively be elicited, but other means of impugning the belief are available. *Id.*[13] Writing for the Court, Justice Scalia interpreted the identical language at issue here as requiring only that the declarant take the stand and answer questions under oath:

> It seems to us that the more natural reading of "subject to cross-examination concerning the statement" includes what was available here. Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions. . . . Rule 801(d)(1)(C), which specifies that the cross-examination need only "concer[n] the statement," does not on its face require more. [*Id.* at 561-562.]

We, too, conclude that a statement of identification is admissible under MRE 801(d)(1)(C) if a witness is present in court and under oath and is considered subject to cross-examination about his

[13] The claim that this requirement was not satisfied because the declarant denied making the statement seems to rest on the assumption that unless the witness admits the statement, there is nothing for the cross-examiner to cross-examine. It fails to appreciate, however, that when the declarant denies making the prior identification, the defendant has received all the benefit that cross-examination can produce:

> The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant. [*California v Green, supra* at 159.]

prior position. The jury can determine the credibility of a disavowal as well as his present position. Likewise, the third party who is under oath also is subject to cross-examination regarding the circumstances of the identification.[14]

V

AUTHORITATIVE SOURCES INTERPRETING THE PARALLEL FEDERAL RULE

Authorities considering this precise question under Federal Rule of Evidence 801(d)(1)(C) overwhelmingly agree that third-party testimony about a prior statement of identification is not hearsay. Judge Weinstein states that "if at the trial the eyewitness fails to remember or denies that he made the identification, the previous statement of the eyewitness can be proved by the testimony of a person to whom the statement was made, and the statement can be given substantive effect." 4 Weinstein & Berger, Evidence, ¶ 801(d)(1)(C)[01], p 801-222. As Judge Henry Friendly observed the year before MRE 801(d)(1) was adopted: "The purpose of the rule was to permit the introduction of identifications made by a witness when memory was fresher and there had been less opportunity for influence to be exerted upon him." *United States* v *Marchand,* 564 F2d 983, 996 (CA 2, 1977). Elaborating on why the prior identification was properly admitted in that case, he explained that outside influence "was one plausible explanation of the

[14] When A testifies that on a prior occasion B pointed to the accused and said, "That's the man who robbed me," the testimony is clearly hearsay. If, however, B is present in court, testifies on the subject of identity, and is available for cross-examination, a case within [FRE 801(d)(1)(C)] is presented. Similarly, if B has himself testified to the prior identification. [2 McCormick, *supra,* § 251, p 122.]

loss of recollection of the identifying witness . . . ." *Id.* at 996, n 23. See also *United States v Lewis,* 565 F2d 1248, 1251-1252 (CA 2, 1977), cert den 435 US 973 (1978). *United States v Jarrad,* 754 F2d 1451, 1456 (CA 9, 1985), cert den 474 US 830 (1985).

While this Court is not bound by these decisions, because of the parallel purpose and similar language of the state and federal rules, they are highly persuasive. Like its federal counterpart, MRE 801(d)(1)(C) permits the jury to assess the substantive worth of a prior statement of identification where the identifying witness fails, refuses, or reaffirms a prior statement of identification at trial.

VI

THE FALLACY OF THIRD-PARTY ANALYSIS

In Michigan, a distinction was drawn at common law between a party's testimony affirming his own prior identification and the testimony of a third party corroborating the witness' out-of-court identification. The former was admissible for the truth of the matter. The latter was not. Because this distinction has been the basis for difference of opinion in the Court of Appeals regarding the proper interpretation of MRE 801(d)(1)(C),[15] a brief discussion of the common-law rules is in order. The history of those rules reveals that the distinction arose from early efforts to reform the rigid

[15] Most recently, *People v McConnell,* 124 Mich App 672, 679-680; 335 NW2d 226 (1983), *People v Jones,* 144 Mich App 1, 4-5; 373 NW2d 226 (1985), and *People v Michael,* 181 Mich App 236, 239-241; 448 NW2d 786 (1989), have held that identification statements do not fall within MRE 801(d)(1)(C) when a third party is testifying. Panels have applied the rule correctly, however, in *People v McCurdy,* 185 Mich App 503, 505-506; 462 NW2d 775 (1990), *People v Newcomb,* 190 Mich App 424, 429-430; 476 NW2d 749 (1991), and this case.

orthodox rule of hearsay, and should not be read as a limitation on what statements are not hearsay.

It bears repeating here that a statement of identification is merely one species of a prior statement. All prior statements, whether offered through the declarant or a third party,[16] were hearsay under the orthodox definition of hearsay and were inadmissible except under a recognized exception or for impeachment or support.

Third-party identification testimony, like other prior statements, was admissible on the issue of credibility. Thus, if a prior statement, including a prior statement of identification, was inconsistent with trial testimony, it could be admitted to impeach. If adopted as true by the witness, it was admitted as substantive evidence. *Ruhala v Roby,* 379 Mich 102, 120; 150 NW2d 146 (1967) (opinion of BRENNAN, J.). Likewise, if the tenor of cross-examination suggested that a witness' testimony was a recent fabrication, a prior consistent statement, including one of identification, was admissible in support of credibility.

Properly understood, then, under the orthodox definition of hearsay: (1) all prior out-of-court statements of identification were hearsay, but prior statements offered to prove that the statement was made, irrespective of its truth, were admitted where relevant to credibility; (2) extrinsic evidence of prior inconsistent statements of identification was admissible for impeachment; (3) prior consistent statements of identification were admissible to rehabilitate; and (4) where the prior statement of a witness agreed with his testimony, prior

[16] The third-party statement of identification testimony was not excluded at common law because identification testimony was unreliable. In this connection, the dissent has mixed two dissimilar lines of analysis, the definition of hearsay and the supposed unreliability of identification testimony.

consistent statements were simply irrelevant bolstering because prior statements were hearsay and not admissible for the truth of the matter, but only for credibility. *People v Hallaway, supra,* 389 Mich 276-277 (BRENNAN, J., separate opinion).[17]

More than one hundred years ago, however, Michigan created a common-law exception to the orthodox definition of hearsay and admitted first-party statements of identification for the truth of the matter. In *People v Mead,* 50 Mich 228; 15 NW 95 (1883), Justice COOLEY approved admission of a prior statement of identification for the truth of the matter, where the witness made an in-court identification. Otherwise, Michigan common law generally followed the orthodox rule that prior statements were admitted only on a proper showing that they were relevant to credibility. See *People v Jolly,* 193 Mich App 192, 195; 483 NW2d 679 (1992). The Michigan rule of first-party identification thus appears to be a hundred-year-old precursor of a break with orthodoxy.[18]

A limiting construction of MRE 801(d)(1)(C) cannot be inferred from the fact that the Michigan rule allowed the substantive use of first-party testimony regarding a prior statement of identification. The exception is historically significant, but otherwise irrelevant. Indeed, to the extent that an

[17] 1 McCormick, *supra,* § 47, p 172, n 1. Exclusion was justified by the saving of time and avoiding a defense of the witness before the need for one appeared.

[18] Justice COOLEY is also credited with having originated the notion that there were situations in which it would outrage "common sense" to limit prior consistent statements solely to rebut fabrication. See *United States v Rubin,* 609 F2d 51, 66-67 (CA 2, 1979) (Friendly, J., concurring) (citing *Stewart v People,* 23 Mich 63, 74-76 [1871]). And as this Court is well aware, the Michigan Supreme Court also early on adopted a first complaint exception to the hearsay rule on the basis of the common-sense notion that if a jury did not learn of a fresh complaint in a rape case, it would suspect the credibility of the victim. See *People v Gage,* 62 Mich 271; 28 NW 835 (1886).

historical approach sheds light on the present inquiry, history shows that the justices of this Court were not hide bound to the orthodox approach. In fact, to read the common-law exception to hearsay recognized in *Mead* as limiting prior statements of identification now defined as nonhearsay illogically converts the historical exception to hearsay into the contemporary definition of what is not hearsay.

Finally, a distinction between first- and third-party testimony under MRE 801(d)(1)(C) cannot rest on the premise that the third party cannot credibly provide the trier of fact with facts the third party knows to be true. It would follow from this premise that a third party cannot testify to any extrajudicial statement of a witness because, by definition, the third party does not know it to be true. Because a third party can not vouch for the accuracy of an inconsistent statement under MRE 801(d)(1)(A) or of a consistent statement under MRE 801(d)(1)(B), any more than a third party can vouch for the accuracy of a statement of prior identification, the premise would simply emasculate the redefinition of hearsay adopted in Rule 801.

The common-law distinction between first- and third-party testimony of an out-of-court statement of identification was made to escape the orthodox definition of hearsay, which precluded prior statements unless relevant to credibility. There is no basis in logic or policy to employ the escape route from orthodoxy as a vehicle for its reestablishment. The current rule simply makes much of what was previously admissible in Michigan only to impeach or rebut, admissible for the truth of the matter. Statements of identification are no longer defined as hearsay. Subject to the trial

court's authority under MRE 403,[19] the distinction between first- and third-party statements of prior identification does not limit substantive admissibility.

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

BRICKLEY, RILEY, GRIFFIN, and MALLETT, JJ., concurred with BOYLE, J.

CAVANAGH, C.J. (*dissenting*). Because the majority opinion compliantly embraces the federal interpretation of the Federal Rules of Evidence, disregarding Michigan precedent and policy, I respectfully dissent. Properly interpreted, MRE 801(d)(1)(C) excludes from the definition of hearsay only the out-of-court identification statements of the person who actually made the earlier identification. Thus, testimony of the out-of-court statement by a third party who witnessed the identification falls within the definition of hearsay and is not admissible as substantive evidence. MRE 802.

I

Two types of persons may provide identification testimony during trial: (1) the person who actually made the extrajudicial identification (the "identifier"), and (2) a third party who observed the identifier make the out-of-court identification. Generally, the objections asserted regarding the admission of the extrajudicial identification concern (1) the hearsay nature of the testimony, and (2) the effect of improperly bolstering the identifier's in-

[19] Because the parties failed to cite MRE 403, this Court need not reach the issue whether courts may properly exclude bolstering testimony under MRE 403. See *People v Prophet*, 101 Mich App 618; 300 NW2d 652 (1980).

court identification. *People v Sanford,* 402 Mich 460, 486; 265 NW2d 1 (1978).

MRE 801(d)(1)(C) governs the admissibility of extrajudicial identification testimony. The rule states:

> (d) *Statements which are not hearsay.* A statement is not hearsay if—
>
> (1) *Prior statement of witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving him . . . .

II

When determining the proper application of a Michigan rule of evidence, the rules of statutory construction are instructive. When a statutory provision is clear and unambiguous, the court will apply the provision as written.[1] *Gilroy v General Motors Corp (After Remand),* 438 Mich 330, 341;

[1] I take issue with my sister's declaration that the language of MRE 801(d)(1)(C) "could not be more clear." See *ante,* p 375. The language of MRE 801(d)(1)(C) fails to resolve which type of identification testimony is excluded from the definition of hearsay. The rule's ambiguity is further evidenced by the Court of Appeals split on its proper application. While some panels admit only the identification testimony of the identifying witness, limiting third-party testimony to the facts and circumstances of the prior identification, *People v Michael,* 181 Mich App 236, 241; 448 NW2d 786 (1989), *People v Turner,* 120 Mich App 23, 38; 328 NW2d 5 (1982), *People v Price,* 112 Mich App 791, 801-803; 317 NW2d 249 (1982), *People v Mock,* 108 Mich App 384, 387-388; 310 NW2d 390 (1981), *People v Prophet,* 101 Mich App 618, 621-623; 300 NW2d 652 (1980), and *People v Horton,* 98 Mich App 62, 71; 296 NW2d 184 (1980), other panels have not limited third-party identification testimony, instead allowing the third-party to testify of the extrajudicial identification, *People v Newcomb,* 190 Mich App 424; 476 NW2d 749 (1991), *People v McCurdy,* 185 Mich App 503, 505; 462 NW2d 775 (1990), *People v Beam,* 125 Mich App 289; 335 NW2d 684 (1983), *People v McConnell,* 124 Mich App 672, 679-680; 335 NW2d 226 (1983), *People v Turner,* 116 Mich App 421; 323 NW2d 425 (1982), and *People v Adams,* 92 Mich App 619; 285 NW2d 392 (1979).

475 NW2d 271 (1991). In the event that the Court is required to construe a provision, the Court must discover and effectuate the intent of the formulating body. *Storey v Meijer, Inc,* 431 Mich 368, 376; 429 NW2d 169 (1988). The Court must ascertain and apply a reasonable construction that promotes the purpose of the provision.

A

This Court adopted the Michigan Rules of Evidence in 1978. A preview of the proposed rules included the drafting committee's comments regarding the rules' effect on prior Michigan law. While the committee's comments are in no way binding upon this Court, they are nevertheless instructive with respect to this Court's intent in adopting the rules.

While the committee recognized the similarity between the language of proposed MRE 801(d)(1)(C), and its federal counterpart, FRE 801(d)(1)(C), it did not indicate that the application of the Michigan rule would mirror the application of the federal rule. To the contrary, the committee, in its statement regarding MRE 801(d)(1)(C)'s effect on prior Michigan law, expressly acknowledged that the rule was consistent with prior Michigan law.[2]

> MRE 801(d)(1)(C) *is consistent with prior Michigan law in admitting testimony by a witness as to his own prior statement of identification of a person made after perceiving him. People v Poe,* 388

[2] It is important to note that the committee expressly indicated the rules that modified or changed prior Michigan law. For an example, see the comments concerning MRE 801(d)(1)(A) and (B), 399 Mich 1003 (1977). Furthermore, the committee explicitly acknowledged when a proposed rule was "generally consistent," permitting some room for deviation from the prior Michigan position. For an example, see the comments concerning MRE 801(d)(2)(A) and MRE 803(3), *id.* at 1004, 1010.

Mich 611; 202 NW2d 320 (1972); *People v Londe,* 230 Mich 484; 203 NW 93 (1925). [399 Mich 1004 (1977). Emphasis added.]

An identifier's courtroom testimony of an earlier extrajudicial identification constituted hearsay by definition,[3] nevertheless, this Court allowed its use as substantive evidence before the adoption of MRE 801(d)(1)(C). However, the Court limited the admissibility of third-party identification testimony, generally excluding it from use as substantive evidence.

Admittedly, before today this Court had not announced whether third-party identification testimony is admissible as substantive evidence when the identifier has either denied making or failed to recall the identification. The Court has, however, expressed its pre-MRE position regarding the use of third-party identification testimony to bolster the identifier's identification. In *People v Mead,* 50 Mich 228; 15 NW 95 (1883), the victim of a burglary identified the defendant on the street in the presence of her husband. At trial, the woman identified the defendant as the burglar, and testified about her previous out-of-court identification. The victim's husband also testified. The prosecutor asked the husband if his wife had recognized

[3] Hearsay is defined as an extra-judicial statement which is offered for the purpose of proving the truth of the thing said. While some writers have suggested that the hearsay rule need not be applied to the extra-judicial statements of a declarant, who later testifies as a witness, this Court has not recognized such an exception to the hearsay rule. Of course, prior inconsistent statements of a witness can be shown for impeachment purposes. . . . Where the prior extra-judicial statement of a witness agrees with his testimony, the out-of-court remark is self-serving, and is not generally permitted under any established exception to the hearsay rule. [*People v Hallaway,* 389 Mich 265, 275-276; 205 NW2d 451 (1973) (opinion of BRENNAN, J.).]

anyone on the street, and, if so, whom. The husband responded that his wife had recognized the defendant as the robber. The trial court struck the husband's answer from the record, and this Court upheld the trial court's action. While the identifier's repetition of her extrajudicial identification was properly admitted as substantive evidence, the third-party identification testimony was inadmissible. Justice COOLEY explained:

> [T]he witness, not content with giving a simple answer to it, added what in effect was a statement that his wife told him she recognized the respondent as the burglar. *The statement was hearsay, and it was likely to be exceedingly mischievous, for much depended in the case upon this recognition.* [*Id.* at 230. Emphasis added.]

Remaining faithful to this premise, the Court restated the standard regarding the admissibility of extrajudicial identification testimony in *Londe.* While an identifier may testify regarding an extrajudicial identification, a third party who witnessed the extrajudicial identification may only testify regarding the "circumstances [under which] the identification was made." *Id.* at 487.

Almost fifty years later, this Court reaffirmed the *Londe* holding excluding third-party evidence of extrajudicial identifications. *People v Poe, supra* at 618-619. *Poe* arose from a robbery of a supermarket. Four witnesses of the crime attended pretrial lineups. The police notes concerning the lineups indicated that two of the four eyewitnesses positively identified defendant Poe as the robber; one eyewitness stated that Poe looked like the robber, but he could not assert that in court; and the fourth eyewitness identified someone other than the defendant. Despite the lineup results,

each witness testified at trial that Poe was the robber.

While the Court approved of the admission of the police officer's testimony and lineup notes to reflect the hesitation by one witness and the misidentification by the other,[4] it prohibited their use as substantive evidence to reveal the consistent pretrial identification made by the two remaining eyewitnesses. The Court, relying on *Londe,* restricted third-party identification testimony to " 'what took place' and under 'what circumstances the identification was made . . . .' "[5] *Poe* at 618. Unlike *Londe,* however, the *Poe* Court defined inadmissible third-party identification testimony as testimony concerning "the nature or quality of the identification." *Poe* at 618.

The status of the Michigan rule remained settled despite this Court's plurality opinion in *Sanford.* While the entire Court concluded that the admission of the third-party identification testimony of the extrajudicial identification did not require reversal of the defendant's conviction, the Court split regarding *why* the admission did not compel relief.[6]

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[4] "The use of these documents to refresh the witnesses' memory and to test their reliability was proper. See, generally, 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 598, p 775." *Poe* at 617. Refreshing a witness' memory, with hearsay evidence, is permitted as a recognized exception to the hearsay rule. See, generally, *Jaxon v Detroit,* 379 Mich 405; 151 NW2d 813 (1967), and MRE 803(5). Furthermore, use of the notes to impeach a witness' trial testimony, is similarly an accepted procedure. Although, in such an instance, the trial court should instruct the jury regarding the evidence's limited purpose. MRE 105.

[5] In addition, the *Poe* Court did not disturb the trial court's decision to admit the identifying witnesses' testimony of their own extrajudicial identification. *Poe* at 618-619.

[6] This Court adopted the Michigan Rules of Evidence after the *Sanford* opinion was written, but before it was signed. The common-law rules governed the disposition in *Sanford;* thus, any discussion regarding the newly enacted Michigan Rules of Evidence can only be characterized as nonbinding dicta. See *McNally v Wayne Co Bd of Canvassers,* 316 Mich 551, 557-558; 25 NW2d 613 (1947).

> The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties. [*People v Anderson,* 389 Mich 155, 170; 205 NW2d 461 (1973).]

The *Mead/Londe/Poe* trilogy firmly established Michigan's pre-MRE position regarding the admissibility of identification testimony. An identifier's testimony of an extrajudicial identification, albeit hearsay by definition, is admissible as substantive evidence. Third-party identification testimony offered to bolster the identifier's identification, however, is limited to the circumstances surrounding the identification, prohibiting testimony about the content of the identification as substantive evidence.

Justice BOYLE's interpretation of the rule contradicts the drafting committee's comments that "MRE 801(d)(1)(C) *is consistent with prior Michigan law . . . .*" 399 Mich 1004. (Emphasis added.) This Court repeatedly held that a third party, who witnessed an extrajudicial identification, may only testify about the "circumstances [under which] the identification was made." *Londe, supra* at 487. See also *Mead* and *Poe.* The Court refused to allow a third party to testify of the identification to bolster the identifier's identification. Nevertheless, Justice BOYLE's interpretation permits the admission of the prohibited testimony. To temper this fundamental anomaly, Justice BOYLE notes in a footnote that trial courts *may* exclude the bolstering testimony via MRE 403. *Ante,* p 390, n 19. This is a far cry from the previously mandated exclusion of

such evidence. With a few keystrokes, my sister has eradicated a century-old rule that was intended to remain consistent.

Furthermore, a vivid or eccentric imagination is not required to reach the conclusion that if this Court consistently excluded third-party identification testimony that merely bolsters the identifier's identification, then it would have, given the opportunity, assuredly excluded the less reliable, inherently more suspect, third-party identification testimony of a recanted or forgotten identification. In this context, Justice COOLEY's justification for exclusion is equally compelling: "it [the third-party identification testimony] was likely to be exceedingly mischievous, for much depended in the case upon this recognition." *Mead, supra* at 230. Third-party identification testimony is inherently unreliable because the accuracy of the identification cannot be adequately assessed by the trier of fact.

This Court recognized the problems inherent in eyewitness identification. See *People v Anderson, supra,* and accompanying appendix at 192-220. While one infirmity concerns the suggestiveness of the identification procedure employed, this is only one of many infirmities that render eyewitness identification suspect.

> Some are implicit in the original situation, including, for example, the insignificance—at the time and to the observer—of the events, the length of time of observation, and the less than ideal observation conditions which generally apply (distance, poor lighting, fast movement, or crowds). The witness himself is a major source of unreliability, due to the effect of observing under stress (especially applicable in the case of observers who are the victims as well), or often to defects in physical condition such as age, sickness, or fa-

tigue.[7] [Comments, *The use of prior identification evidence in criminal trials under the federal rules of evidence,* 66 J Crim L & Criminology 240, 246 (1975).]

The majority opinion overlooks the infirmities inherent in eyewitness identification. Even in the absence of a suggestive identification procedure, the intrinsic infirmities in eyewitness identification remain. When an identifier denies or forgets an extrajudicial identification, the jury cannot assess whether the identifier was equipped to make an accurate identification. Furthermore, the third party cannot provide information relating to the identifier's initial observation of the defendant and the identifier's ability to accurately transfer these images to the extrajudicial identification.

When the identifier denies or forgets an extrajudicial identification, the jury is not presented with the tools necessary to determine whether the alleged extrajudicial identification was accurate. When the third-party identification testimony is offered merely to bolster, the jury will have had the benefit of hearing how the identifier made the identification. The accuracy of the identification can be tested. It defies logic to suggest that earlier panels of this Court would have embraced third-party identification testimony whose accuracy could not be credibly tested when it excluded third-party identification testimony whose accuracy could be tested.

B

The policies prompting the universal exclusion

[7] I will concede that some witnesses have sufficient opportunity to observe the defendant, coupled with the ability to adequately transfer the observed image to the extrajudicial identification. I would submit, however, that this is the exception to the rule. See *Anderson,* and accompanying appendix.

of hearsay testimony, as well as the justification for established exceptions, shed further light on this Court's intent regarding the proper boundaries of MRE 801(d)(1)(C).

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Generally, hearsay evidence is inadmissible unless it qualifies as an exception to the hearsay rule. MRE 802. Hearsay is repugnant to the truth-seeking function of litigation because the statement is made in the absence of testimonial safeguards implemented to foster reliability. At trial a witness must testify under oath or affirmation, exposed to the threat of perjury. The trier of fact can observe a witness' demeanor and physical response to offered testimony.[8] Furthermore, a witness is exposed to contemporaneous cross-examination regarding his offered assertions. Binder, Hearsay Handbook (2d ed), § 3.01, p 59. Cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore (Chadbourn rev), § 1367, p 32. The safeguards are believed to aid the exposure of possible ambiguity, insincerity, faulty perception, and erroneous memory. The absence of the three testimonial safeguards render hearsay statements untrustworthy.

Similarly, the recognition that certain extrajudicial statements possess sufficient indicia of reliability, coupled with a need for the evidence, has prompted this Court to recognize exceptions to the hearsay rule.

[8] The solemnity of the occasion and possibility of public disgrace can scarcely fail to impress the witness, and falsehood no doubt becomes more difficult if the person against whom [it is] directed is present. [2 McCormick, Evidence (4th ed), § 245, p 94.]

> Exceptions to the hearsay rule are justified by the belief that the hearsay statements are *both necessary and inherently trustworthy.* [*People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). Emphasis added.]

On the basis of the policies prompting the hearsay rule and its exceptions, it cannot be denied that the Court generally intends to exclude from trial evidence that is untrustworthy and unreliable. It is from this premise that the different types of identification testimony must be examined in order to determine whether such statements are excluded from the definition of hearsay pursuant to MRE 801(d)(1)(C).

III

This Court extensively examined the reliability of eyewitness identification in *People v Anderson, supra.* On the basis of documentation of instances of erroneous eyewitness identification and scientific principles, the Court concluded "that there are serious problems concerning the accuracy of eyewitness identification and that real prospects for error inhere in the very process of identification completely independent of the subjective accuracy, completeness or good faith of witnesses." *Id.* at 180.

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the

> brutalities of ancient criminal procedure." [*United States v Wade,* 388 US 218, 228; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).]

As a result, eyewitness identification testimony is burdened by the same characteristic found offensive in hearsay evidence: it is untrustworthy.[9]

> Considering that no evidence, other than an outright confession, probably carries as much weight, not only with lay jurors but with many law enforcement officials as well, such criticisms are by no means academic. [66 J Crim L & Criminology 245.]

1. IDENTIFICATION TESTIMONY BY THE IDENTIFIER

While the reliability of an eyewitness identification is questionable, it has nevertheless been recognized that an identification made soon after an event is generally more probative than an identification made during trial.

> [T]he earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [4 Weinstein & Berger, Evidence, ¶ 801(d)(1)(C)[01], p 801-217. Citation omitted.]

> We should not blind ourselves to what the law has learned by bitter experience—identification in court is frequently an almost worthless formality. . . . By the time of trial positions have often become so fixed and memory so attenuated and distorted by subsequent events that witnesses sel-

[9] For a considered examination of the reliability of eyewitness testimony, see *Anderson* at 172-180, and accompanying appendix at 192-220.

dom make identifications on the basis of their raw recollection of the original event. [*United States v Barbati,* 284 F Supp 409, 413 (ED NY, 1968). Citations omitted.]

The identifier's identification testimony possesses attributes that elevate eyewitness identification from its unreliable status to a position that satisfies this Court's intent of admitting evidence that is necessary and trustworthy.[10] In an attempt to provide the most probative evidence to the trier of fact, this Court has admitted testimony of an extrajudicial identification offered by the identifier for over one hundred years.[11] While the reliability of eyewitness identifications is dubious, the identification is often essential to resolution of the case. Admittedly, an extrajudicial identification cannot be tested by contemporaneous cross-examination. However, when an extrajudicial identification is offered by the identifier, the opposing party can scrutinize the circumstances prompting the identifier's selection. Cross-examination will reveal how the identifier came to make the identification, potentially exposing any weaknesses and uncertainty of the prior identification. This ability to test the identification and the process attendant to the identification provides, in essence, an indicia of reliability, not necessarily that the identification is correct, but in the sense that the factfinder is adequately equipped to judge the accuracy of the often vital identification.[12]

[10] Trustworthy evidence includes evidence that, while suspect, can be adequately tested and scrutinized by the trier of fact. This type of evidence furthers the truth-seeking function of trial.

[11] See discussion of *Mead, supra* at 393-394.

[12] Generally, a hearsay statement is deemed to possess an indicia of reliability when made under specific circumstances that make it more probable than not that the substance of the statement is true. This recognition justifies admitting hearsay, an exception to its general exclusion. For example, the dying declaration exceptions recognize

Identification testimony offered by the identifier is the most reliable evidence of identification because it was made before the influences found at trial, before the identifier's position has become fixed. The trustworthiness of the assertion can be tested through cross-examination before the trier of fact, while the identifier is under oath. Furthermore, the identifier has personal knowledge of why the identification was made, providing a basis not only for cross-examination, but for meaningful cross-examination.

This type of evidence is in accord, not only with this Court's pre-MRE position concerning identification testimony, but also with its purpose and policies underlying adherence to the hearsay rule and the recognition of various exceptions. Accordingly, MRE 801(d)(1)(C) excludes from the definition of hearsay the out-of-court statements of identification as communicated at trial by the identifier.

2. THIRD-PARTY IDENTIFICATION TESTIMONY

Unlike identification testimony of the identifier, third-party identification testimony possesses none of the attributes that would elevate it from its unreliable status. When a third party testifies about a prior identification by the identifier, the accuracy of the identification (which is generally being used to convict a defendant of a crime),

that most people will not lie when they believe that death is impending. See MRE 804(b)(2). Similarly, MRE 803(2) permits the introduction of excited utterances, which are hearsay by definition. Admission is justified because the spontaneous statement that results from a startling event is considered to be a sincere response.

While not identical, admission of the identifier's testimony of an extrajudicial identification possesses analogous safeguards: the proximity of an earlier identification is more probative than the formalistic in-court identification, *and* its accuracy can be evaluated by the trier of fact.

cannot be tested. As a result, the third-party identification testimony is not only unreliable, but it lacks probative value. It cannot credibly provide the trier of fact information the third party knows to be true. MRE 801(d)(1)(C) does not authorize the admission of third-party identification testimony as substantive evidence irrespective of the identifier's testimony regarding the extrajudicial identification.

a. IDENTIFIER TESTIFIES OF EXTRAJUDICIAL IDENTIFICATION

Regardless of the identifier's identical testimony, third-party testimony of another's identification is unreliable. The third-party identification testimony cannot vouch for the accuracy of the identification, and its cumulative effect is potentially dangerous.

> Third-party bolstering occurs when, for example, a police officer present at the lineup testifies in court that the witness in his presence said, "This is the man." Obviously the testimony of the police officer is of no value whatsoever. If the witness made a "wrong" identification, the police officer is bolstering that mistake. If the witness made a "right" identification, the police officer is bolstering evidence he knows nothing about, since he himself never saw the perpetrators. Yet juries ask, "How can they *both* be mistaken?" [Sobel, Eyewitness Identification (2d ed), § 4.3(b), p 4-18. Emphasis in original.]

The third-party identification testimony fails to reveal whether the identifier accurately transferred the mental images made during the commission of the crime to the later extrajudicial identification. The third party cannot testify about

the identifier's "ability to remember and articulate the details of the crime, and the appearance of the offender." Mauet, *Prior identifications in criminal cases: Hearsay and confrontation issues,* 24 Ariz L R 29, 49 (1982). The third party cannot testify about the factors scrutinized by the trier of fact when determining the accuracy of the identifier's identification. Such testimony is not only irrelevant, but misleading because it appears to corroborate the identifier's testimony while it is not true corroboration testimony at all.[13] *Id.* While the third party can corroborate the fact that the identifier did identify a person at a certain time and place, the third party has no basis on which to corroborate the accuracy of the statement.

In light of the unreliability of such testimony, coupled with this Court's pre-MRE position regarding third-party identification testimony, third-party identification testimony that bolsters the identifier's identification is inadmissible as substantive evidence. Third-party identification testimony is restricted to " 'what took place' and under 'what circumstances the identification was made' . . . ." *Poe* at 618. The third party *cannot* testify about the identifier's actual identification because this type of statement is hearsay, MRE 801(c), and it is not excluded from the definition of hearsay under MRE 801(d)(1)(C).[14]

[13] Mauet characterizes true corroboration testimony as testimony by different sources, based on firsthand knowledge, that reveals the same conclusion. *Id.* at 49.

[14] The third party may testify, however, about the identifier's prior identification if it has been suggested that the identifier's in-court identification is the product of recent fabrication, improper influence or motive.

> *Statements which are not hearsay.* A statement is not hearsay if—
>
> (1) *Prior statement of witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with

b. IDENTIFIER DENIES OR FORGETS MAKING EXTRAJUDICIAL IDENTIFICATION

Third-party testimony of an identifier's identification that the identifier has either denied making or failed to recall is devoid of any attributes that would make it reliable.[15] The eyewitness identification itself is unreliable. Furthermore, under this situation there is no one available to testify to the accuracy of the identification.[16] While the alleged identifier can be cross-examined,[17] the cross-examination is, in reality, an exercise in futility.

> "[S]uppose that at the trial the witness not only fails to identify the defendant, but also denies that he ever identified him on a prior occasion. May the

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his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . . [MRE 801(d)(1)(B).]

[15] Third-party testimony of an identification the identifier denies or forgets making offers neither the traditional indicia of reliability: statement made under specific circumstances that make it more probable than not that the substance of the statement is true, nor an analogous safeguard: the availability of information that provides the trier of fact with the ability to access the accuracy of the statement.

[16] Admitting third-party identification testimony creates a potential problem of constitutional dimension. Specifically, whether the introduction of such testimony violates a defendant's constitutional guarantee of confrontation. Admission appears especially suspect in instances in which the identifier denies or forgets making the extrajudicial statement. While the federal courts have examined this issue and found no federal constitutional violation, *United States v Owens,* 484 US 554; 108 S Ct 838; 98 L Ed 2d 951 (1988), this Court has yet to determine the issue under the Michigan Constitution. Const 1963, art 1, § 20. I do not address this issue because this case can be disposed of on nonconstitutional grounds. " 'Constitutional questions will not be passed upon when other decisive questions are raised by the record which dispose of the case.' " *Lisee v Secretary of State,* 388 Mich 32, 40; 199 NW2d 188 (1972) (citations omitted). The majority, however, concludes that MRE 801(d)(1)(C) allows the admission of third-party identification testimony. Yet, the majority fails to examine the confrontational issue that its holding implicates.

[17] The rule conditions admissibility of the statement of identification on the opposing party's opportunity to cross-examine the identifier. MRE 801(d)(1)(C).

> prosecutor prove by mere observers that a positive identification actually took place, and obtain a conviction on the basis of that testimony? Clearly the answer would be no. . . . The plain common sense prohibiting such testimony is obvious. True it is that the person alleged to have made the out-of-court statement (*i.e.,* the original identification) is present in court and available for cross-examination . . . . Here, however cross-examination would constitute an exercise in futility. Of what possible value to the defendant is a cross-examination of a witness as to the accuracy of an identification he claims he never made?" [4 Weinstein & Berger, ¶ 801(d)(1)(C)[01], p 801-223, n 27, quoting Wall, Eye-Witness Identification in Criminal Cases, 161-162 (1965).]

The Massachusetts Supreme Court reached a similar conclusion:

> Prior identifications are admissible as probative evidence notwithstanding their hearsay attributes because of the superior probative worth of an identification made closer in time to the events in question. Where, however, the extrajudicial identification is established not by the identifying witness but by a person who observed the identification, we believe that probative worth is outweighed by "the hazard of error or falsity in the reporting." Where there is a dispute not only as to the accuracy of a pretrial identification, but also as to whether the identification was in fact made, "the evidential value of the prior identification is almost completely dissipated." Thus, a police officer's attribution to a witness of a positive identification denied by the witness at trial is not admissible to prove the identification. Its effect is limited to impeachment. [*Commonwealth v Daye,* 393 Mass 55, 61; 469 NE2d 483 (1984). Citations omitted.]

While the majority insists that defense counsel

has the ability to attack the extrajudicial identification via cross-examination, it cannot seriously contend that cross-examination can expose the accuracy, trustworthiness or the reliability of the identification.[18] The absence of a scintilla of reliability of this type of testimony, coupled with this Court's pre-MRE position regarding the admissibility of third-party identification testimony, compels the conclusion that MRE 801(d)(1)(C) does not exclude from the definition of hearsay, third-party identification testimony of an identifier's extrajudicial identification when the identifier denies or forgets making the extrajudicial identification.[19] This testimony is repugnant to the truth-seeking function of trial, contrary to the intent and policies surrounding the adoption of MRE 801(d)(1)(C).

3. THE FEDERAL INTERPRETATION

While I am aware of the federal interpretation of FRE 801(d)(1)(C), see *United States v Jarrad,* 754 F2d 1451 (CA 9, 1985); *United States v Lewis,* 565 F2d 1248 (CA 2, 1977), I cannot espouse its rationale or result. Admittedly, the federal approach provides persuasive authority; this Court, however, is not bound by the federal application. We have in the past interpreted the MREs more

[18] The factors upon which the credibility of testimony depends are the perception, memory, and narration of the witness. Did the witness perceive accurately? Has he retained an accurate impression of what he perceived? Is his language such as to convey that impression correctly? [2 McCormick, *supra,* § 245, p 581.]

[19] The critical issue regards the credibility of the recanting or forgetful identifier. The third-party identification testimony is admissible for impeachment purposes as a prior inconsistent statement. The jury does not need third-party identification testimony as substantive evidence to evaluate the identifier's credibility. Once confronted with the impeaching evidence, the jury can give weight to the witness and his trial testimony.

stringently than their federal counterparts. See *Meeboer (After Remand)* at 340, n 1 (BRICKLEY, J., dissenting). When the federal approach is repugnant to this Court's intent in adopting the MREs, it is this Court's duty to reject the federal application. Furthermore, not all commentators embrace the direction the federal rule has taken. See Seidelson, *Third-party testimony about prior identifications and federal rule of evidence 801(d)(1)(C): A petition for rehearing,* 8 Rev of Litigation 259 (1989). Professor Seidelson suggests that the federal courts have erred in their application of FRE 801(d)(1)(C) because of their erroneous reliance on extraneous statements made during the floor debate. "It is established law . . . that the statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes." *Id.* at 271, n 38 (citations omitted). Professor Seidelson asserts that the federal courts would have properly applied FRE 801(d)(1)(C) had it effectuated the intent of the conference committee: The codification of existing federal law which allowed "only the substantive admissibility of an identifying witness's testimony as to his prior identification." *Id.* at 267. I would not disregard the precedent and policies of this Court to simply mimic the Federal Rules of Evidence and other jurisdictions.

IV

Third-party identification testimony is limited to the facts and circumstances surrounding the identification, prohibiting testimony of the content of the identification as substantive evidence. Accordingly, the admission of Officer Bivens and attorney Hall's testimony of Carey Jackson's earlier identification as substantive evidence was erroneous. MRE 802.

Furthermore, I cannot agree with the Court of Appeals conclusion that "admission in this case was not prejudicial because two very credible witnesses for the prosecution positively identified the defendant." 193 Mich App 371.

The testimony of Lasenby and Mann is suspect at best. In regard to Lasenby, his trial testimony contradicted the initial statement he gave to the police. Additionally, he acknowledged that he testified only because he feared arrest. Such testimony is neither positive nor particularly credible.

The other "credible witness" was the state witness, Melvin Mann. Mann's testimony can only be characterized as "incredible." Mann failed to inform the police of his presence at the crime scene until he was arrested for the victim's murder. In addition to this active concealment, Mann went out of his way to hide pertinent evidence following the shooting of his friend and business partner. Immediately following the shooting, Mann left the scene of the crime in the Jeep in which Nance was shot under the pretense of getting help.[20] While his friend was dying on the ground, Mann drove to another acquaintance's house, hid the Jeep in a garage, disposed of the bullet-riddled seatcover and hid the keys to the vehicle. Upon his return to the crime scene, he failed to report anything to the police. While he was "persuaded" to give a statement,[21] this statement differed from his ultimate trial testimony.

In addition to the dubious credibility of both identifying witnesses, their versions of the event were inconsistent. Lasenby asserted that the defendant wore blue jeans at the time of the shoot-

[20] Recall that Mann was at a public phone at the time of the shooting. A call to 911, for assistance, is free.

[21] Mann failed to give a statement until his arrest for Nance's death.

ing, while Mann stated that the defendant wore beige shorts.

These facts, coupled with the heavy reliance most juror's place on a police officer's testimony,[22] clearly prejudiced the defendant. Accordingly, the defendant is entitled to a new trial.

LEVIN, J., concurred with CAVANAGH, C.J.

[22] Justice RILEY, during her tenure at the Court of Appeals, recognized the potential danger of allowing police officers to repeat an extrajudicial identification. Third-party identification testimony "should be confined to relating the circumstances surrounding the identification," *Prophet,* n 1 *supra* at 624, "[t]his is especially true where, as here, a central issue at trial is identification and where the third party is a police officer, whose testimony may be given undue weight by the jury."

PEOPLE v DENNANY

PEOPLE v JONES

Docket Nos. 94225, 95271. Argued November 2, 1993 (Calendar Nos. 2-3). Decided June 21, 1994.

Nicholas Dennany was convicted by a jury in the Kalamazoo Circuit Court, Richard R. Lamb, J., of first-degree criminal sexual conduct involving his twelve-year-old daughter. The trial court denied his request to represent himself with the aid of standby counsel. The Court of Appeals, SHEPHERD, P.J., and D. E. HOLBROOK, JR., and CONNOR, JJ., in an unpublished opinion per curiam, remanded the case for a new trial to allow the defendant an opportunity to reassert his motion to proceed pro se (Docket No. 100969). The people appeal.

Emmett Jones was convicted by a jury in the Kalamazoo Circuit Court, William G. Schma, J., of unarmed robbery. Following a bench trial, he was convicted of being a third-felony offender. The defendant had been permitted to represent himself, and to consult with standby counsel. The Court of Appeals, MURPHY, P.J., and D. E. HOLBROOK, JR., and SAWYER, JJ., remanded the case in an unpublished opinion per curiam (Docket No. 110202). On remand, the circuit court reaffirmed the conviction. After remand, the Court of Appeals reversed the conviction in an unpublished opinion per curiam, finding that the trial judge had not adequately explained the pitfalls of self-representation or fully determined that the waiver of counsel was knowing, intelligent, and voluntarily made (Docket No. 110202). The people appeal.

In separate opinions, the Supreme Court *held:*

There is no absolute right to proceed to trial without counsel. The Michigan Court Rules require that, before a defendant is permitted to proceed pro se, the trial court must advise regard-

REFERENCES

Am Jur 2d, Criminal Law §§ 993-995, 997.

Accused's right to represent himself in state criminal proceeding—modern state cases. 98 ALR3d 13.

Existence and extent of right of litigant in civil case, or of criminal defendant, to represent himself before state appellate courts. 24 ALR4th 430.

ing the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risk involved in self-representation. The waiver must be reaffirmed at each subsequent proceeding. In addition, pursuant to *People v Anderson,* 398 Mich 361 (1976), at the time of the defendant's initial request to proceed pro se, the court must determine that the request is unequivocal; that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the disadvantages of self-representation; and that self-representation will not disrupt, unduly inconvenience, or burden the court. Where there is error, but it is not one of complete omission of the requirements of MCR 6.005(D), (E) and *Anderson,* reversal is not required. Whether a particular departure justifies reversal will depend on the nature of the noncompliance. The presence of standby counsel is not an exception to the requirements of *Anderson* or the court rules and can never be deemed an unequivocal assertion of the defendant's rights; it will not legitimize a waiver-of-counsel inquiry that does not comport with legal standards.

In *Jones,* the failure of the trial court to advise the defendant of the dangers of self-representation requires remand for a new trial.

In *Dennany,* the erroneous conclusion of the trial court that the defendant's request to proceed pro se was not knowingly made requires remand for a new trial.

Justice GRIFFIN, joined by Justices BRICKLEY and MALLETT, stated:

The right to appear pro se is implicitly guaranteed in the Sixth Amendment of the United States Constitution, Const 1963, art 1, § 13, and by statute. However, there is no absolute right to standby, advisory counsel or hybrid representation under the Sixth Amendment or the Michigan Constitution. Whether such counsel will be permitted is within the sound discretion of the trial court. A defendant has a constitutional right to self-representation or to representation by counsel, but not both.

In *Jones,* the defendant was never advised of the dangers and disadvantages of self-representation, nor did the court conduct the detailed three-part inquiry required by *Anderson.* It also did not reaffirm the right to counsel at each subsequent proceeding as then required by MCR 6.101(C)(3). Thus, the defendant did not effectively relinquish his right to counsel, and the trial court erred in allowing the defendant to proceed pro se, requiring a new trial.

In *Dennany,* the trial court addressed the defendant's request

to proceed pro se within the analytical framework of *Anderson*. However, the Court of Appeals erred in holding that a defendant's request is unequivocal where standby counsel to assist with procedural matters merely is requested, although it correctly found that the trial court misunderstood the second requirement of *Anderson*—that a waiver must be knowing, intelligent, and voluntary, requiring a new trial.

Chief Justice CAVANAGH, joined by Justice LEVIN, concurring in part and dissenting in part, stated:

It is unnecessary to discuss whether the Michigan Constitution provides a right to standby counsel. The test articulated by the lead opinion that assertion of the right of self-representation be unequivocal, knowing, intelligent and voluntary, and that the defendant's self-representation must not disrupt, burden, or unduly inconvenience the administration of the court's business, coupled with the procedure outlined in MCR 6.005(D), (E), is all that is needed to decide these cases.

In *Dennany,* the record clearly shows that the defendant's assertion of the right to represent himself was unequivocal, knowing, intelligent, and voluntary. Therefore he was impermissibly denied his constitutional right of self-representation. In *Jones,* the defendant's motion to represent himself was granted with absolutely no inquiry regarding whether his assertion of the right was knowing and intelligent or whether he understood the dangers and disadvantages of that course of action. Thus, his conviction may be overturned on this basis alone. In sum, neither defendant asserted a right to standby or hybrid counsel at trial. Even if either had, it is unnecessary to decide whether Const 1963, art 1, § 13 provides such a right. Both cases may be decided on the basis of established Michigan law.

The lead opinion would create a trap for the unwary defendant in holding that a request to proceed pro se with standby counsel—be it to help either with procedural or trial issues—is an equivocal, and thereby ineffective, assertion of the defendant's constitutional right to self-representation as a matter of law. If the Supreme Court is going to make such combined requests equivocal as a matter of law, then it should also demand that a defendant be so informed before the request is made or allow a defendant to renew the request after the trap has been sprung. Michigan, as well as federal, law requires that a defendant proceeding pro se be alerted to the dangers and disadvantages of self-representation. The injustice of not doing so is compounded by the fact that common wisdom and actual experience indicate that standby counsel is almost invariably

appointed whenever a defendant chooses self-representation. It is fundamentally unfair to punish a defendant for requesting what all assume will be provided in the first place.

Strict compliance with the court rules should be required. The court rules provide the minimum level of procedural protection that must be afforded every criminal defendant in Michigan when asserting the Michigan constitutional right of self-representation.

Justice BOYLE, joined by Justice RILEY, concurring in part and dissenting in part, stated:

A departure from the requirements of MCR 6.005(D) and (E) regarding waiver of counsel should not justify reversal of a conviction. Where the record establishes that a waiver of the right to counsel is knowing and voluntary, reversal is not justified.

A defendant validly asserts the right to proceed pro se when the record indicates a knowing and intelligent forgoing of the right to counsel and an ability and willingness to abide by rules of procedure and courtroom protocol. Whether a waiver is knowing and intelligent is to be assessed in a nonformal manner. The ultimate test is not a court's express advice, but rather the defendant's understanding.

Imposition of the requirement that the trial court obtain a new waiver at each stage of proceedings runs counter to the notion that self-representation is a right. A defendant who knowingly and intelligently exercises the right to self-representation has made a choice. Given that the likely consequence of such a choice will be to the defendant's disadvantage, a searching inquiry into the degree of understanding the alternatives and consequences is initially appropriate. Literal compliance with the formal waiver requirements of MCR 6.005(E) at each successive appearance before the same trial judge is redundant, and does not serve to further any obvious policy.

Applying the nonformal approach in *Jones,* the defendant made a knowing and intelligent waiver of his right to counsel and his conviction should be affirmed.

Jones, affirmed.

Dennany, affirmed in part, reversed in part, and remanded.

1. CRIMINAL LAW — RIGHT TO COUNSEL — WAIVER OF COUNSEL.

There is no absolute right to proceed to trial of criminal charges without counsel.

2. CRIMINAL LAW — RIGHT TO COUNSEL — WAIVER OF COUNSEL.

Before a defendant is permitted to proceed pro se, the trial court

must advise regarding the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risk involved in self-representation; the waiver must be reaffirmed at each subsequent proceeding; in addition, at the time of the defendant's initial request to proceed pro se, the court must determine that the request is unequivocal; that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the disadvantages of self-representation; and that self-representation will not disrupt, unduly inconvenience, or burden the court; whether a particular departure justifies reversal will depend on the nature of the noncompliance (MCR 6.005[D], [E]).

3. CRIMINAL LAW — RIGHT TO COUNSEL — STANDBY COUNSEL — WAIVER OF COUNSEL.

The presence of standby counsel is not an exception to the requirements for waiver of counsel and can never be deemed an unequivocal assertion of the defendant's rights; it will not legitimize a waiver-of-counsel inquiry that does not comport with legal standards (MCR 6.005[D], [E]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *Michael H. Dzialowski,* Assistant Prosecuting Attorney, for the people.

Nicholas Dennany in propria persona.

State Appellate Defender (by *Richard B. Ginsberg*) for defendant Jones.

GRIFFIN, J. We consolidated and granted leave to appeal in these two cases to consider the requisite judicial inquiry to be made before a criminal defendant who affirmatively seeks to proceed in propria persona[1] may be permitted to waive his correlative right to counsel and represent himself.

In *People v Jones,* we conclude that the trial court committed error requiring reversal by failing

[1] The terms "in propria persona" and "pro se" are used interchangeably throughout this opinion, both meaning self-representation.

to advise defendant of the dangers and disadvantages of self-representation, and, therefore, we affirm the decision of the Court of Appeals, which ordered a new trial.

In *People v Dennany,* a new trial is also required. Because the trial court essentially denied defendant his right to self-representation upon the erroneous ground that his decision to proceed pro se was not made knowingly and voluntarily, we affirm in part the Court of Appeals decision.

I

A. STATEMENT OF FACTS—*PEOPLE v JONES*

Emmett Jones was charged with unarmed robbery,[2] and breaking and entering an occupied dwelling with intent to commit larceny.[3] He was also charged in a supplemental information with being an habitual offender. Defendant requested the assistance of counsel, and an attorney was appointed to represent him. Trial was scheduled for December 1, 1987. On November 8, 1987, defendant filed a motion to discharge his attorney and to proceed pro se. He alleged that appointed counsel had not visited him to discuss the case, had not responded to phone calls, had refused to release legal documents relating to the case, had waived circuit court arraignment without his knowledge or consent, and had denied him the right to participate actively in his own defense. Defendant represented that he was seeking to proceed pro se because he wanted the trial to start on its scheduled date, and substitute counsel would not have sufficient time to prepare.

At a hearing on November 23, 1987, the trial

[2] MCL 750.530; MSA 28.798.

[3] MCL 750.110; MSA 28.305.

court considered a motion by the prosecutor to use the defendant's prior convictions for impeachment purposes and the defendant's motion to proceed pro se. With regard to the prosecutor's motion, defendant indicated: "Okay, [appointed counsel] can handle this today and I will—would like the Court to grant me permission to take over the proceedings from there."

The trial court allowed appointed counsel to be heard concerning the request to proceed pro se. Counsel indicated that defendant wished to proceed as his own attorney and that he would stay on in an advisory capacity if requested to do so by the court. Defendant then stated:

> Yes, sir, if you would allow an attorney to assist me, I would, I mean ask to appear in pro per, but I do recognize my need for having certain motions Xeroxed as I am currently in the county jail, I don't have current facilities to Xerox and type motions. I will do the research, and I would need them served on the Court and it is hard for me to get in and get a docket number and get dates on cases and if an attorney would assist me, I would have no objection to that.

The assistant prosecutor stated that she took no position regarding the defendant's desire to represent himself, but pointed out that trial was scheduled for the next week. The trial court extended a motion deadline and told the defendant:

> [Appointed counsel] will cooperate in getting you those [court records]. He's got all the records. And as a part of your representing yourself, I will have [appointed counsel] also be present to assist you if you need him or want his assistance during the course of the trial. And also, [counsel], if you would assist him between now and then in the preparation of trial, including the motions.

The December trial date was adjourned at the prosecution's request so that another scheduled case could be tried. At a January hearing on defendant's motion for release on personal recognizance bond, defendant complained about the lack of assistance provided by appointed counsel, and stated that he still had not received materials the court had directed counsel to give him. Counsel failed to appear at this hearing until specifically summoned by the trial judge.

On March 22, 1988, a hearing was held on several pretrial motions. Defendant sought to delay the trial date, arguing that because he had been busy preparing to defend another case, he had not been able to devote adequate time to this matter. The presiding judge denied defendant's motion, noting during the course of argument that defendant should have relied more on his counsel, who was present in the courtroom and available to assist him. Defendant asked the court to order the official in charge of the jail to allow him to use the law facilities at the jail every day during trial because the jail staff had stated that he would only be allowed to use the law library on weekends. The judge advised defendant that he would have to rely on appointed counsel for any legal research or contact with witnesses.

A jury trial commenced on March 23, 1988. Defendant gave an opening statement, cross-examined two prosecution witnesses, and presented three defense witnesses. He also testified in his own behalf. Defendant presented a lengthy closing argument and objected during the prosecution's closing argument. Before the beginning of jury deliberations, appointed counsel moved on defendant's behalf, alternatively, for a mistrial, dismissal of the breaking and entering count, or to have the court decide the breaking and entering

charge on the basis of a statement made during trial. Following lengthy discussion, defendant waived a jury trial with regard to the breaking and entering count and the jury then deliberated only with regard to the unarmed robbery charge. The jury convicted defendant of unarmed robbery, but he was acquitted by the trial judge of breaking and entering. The bench trial on the supplemental information followed. Appointed counsel represented defendant during this proceeding. Defendant was convicted of being a third-felony offender. He was sentenced on May 16, 1988, to serve an enhanced prison term of from fifteen to thirty years.

Defendant filed a claim of appeal through appointed counsel. The Court of Appeals ultimately reversed defendant's conviction on the grounds that the trial judge did not adequately explain to the defendant the pitfalls of self-representation or fully determine that his waiver of counsel was knowingly, intelligently, and voluntarily made. However, the Court stated:

> In so concluding, we do not ignore, nor are we unsympathetic to, the arguments by the prosecutor. Those arguments point out that defendant was represented at the time of making his motion to be allowed to proceed in propria persona, that he conducted himself well when he was representing himself, and that his court-appointed attorney continued on as advisory counsel to assist defendant in preparing and presenting his defense. However, neither the court rule nor the case law recognizes this as an exception to the strict requirements imposed upon the trial court before allowing a defendant to proceed in propria persona. While we would urge the prosecutor to seek leave to appeal to the Supreme Court to have the Court reconsider whether such strict requirements are necessary where a defendant is represented at

> the motion to be allowed to proceed in propria persona, or where there is standby counsel available throughout the proceedings, it is for the Supreme Court, and not this Court, to adopt such an exception.[4]

The prosecutor filed an application for leave to appeal with this Court. We granted the application and further ordered that this case be argued and submitted with *People v Dennany.* 442 Mich 936 (1993).

B. STATEMENT OF FACTS—*PEOPLE v DENNANY*

Defendant Nicholas Dennany was convicted by a jury of first-degree criminal sexual conduct,[5] on the basis of an alleged sexual assault of his daughter when she was twelve years old. Defendant was sentenced to serve twenty-five to fifty years in prison.

The sole issue with which we are concerned in this appeal is defendant's request, denied by the trial court, to represent himself at the trial. The facts pertinent to defendant's efforts to proceed pro se are set forth in the Court of Appeals opinion:

> Defendant first asked to represent himself through a June 19, 1986 motion for withdrawal of counsel. At the hearing on the motion, defendant's attorney told the court that defendant wanted to represent himself, but that he would like the assistance of an attorney for procedural matters. The attorney also told the court that his client's position was that he has been completely immersed in this matter through DSS proceedings and proceedings in juvenile court, and that defendant is representing himself against charges of abuse

[4] Unpublished opinion per curiam, decided October 29, 1992 (Docket No. 110202).

[5] MCL 750.520b(1)(a); MSA 28.788(2)(1)(a).

and neglect in juvenile court. Defendant told the court that he believed that there were issues of fact and law that would not be raised if not raised by him. He also told the court that he had successfully represented himself in a criminal prosecution involving the education of his children at home. When the court asked defendant if he was aware that he would have to follow the rules of evidence if he represented himself, defendant replied that he was so aware. The court also asked defendant if he recognized that there was a distinction between his juvenile court proceedings and the criminal case in that, while he might lose custody or parental rights in the former, he could lose his freedom in the latter. Defendant responded that he was aware of that. Defendant also told the court that the fact that he will not have the benefit of objective counsel was weighed in his decision to ask to represent himself.

The court denied defendant's request. It said that it was taking into account the fact that defendant was charged with a very serious offense, the current status of the case file, i.e., that the case had already been to pretrial, and that defendant's attorney had been representing defendant for some time and was familiar with the factual background of the case. The court found that, because defendant asked for assistance of counsel with procedural matters, his request was not unequivocal. The court also found that, although the request was voluntarily and intelligently made, it was not knowingly made because defendant thought some things in the voluminous juvenile court file were relevant and, thus, admissible, while, actually, they were not. Thus, concluded the court, defendant did not fully understand the consequences of his decision to represent himself. The court further found that defendant's acting as his own attorney would unduly inconvenience and burden the court's business and that it would not be in defendant's own best interests.

A week before trial began, defendant again asked to be allowed to represent himself. Defen-

dant again told the court that he had successfully represented himself in a case involving home education that involved complicated constitutional issues and that he was aware of the problems in self-representation. He stated that his relationship with his attorney was cordial but that he wished to represent himself because of disagreements over trial strategy. Apparently, defendant's attorney wanted to keep the case narrowed to the issue of whether defendant committed the particular act for which he was charged, but defendant wanted to bring in evidence about several other allegations of sexual abuse made by his children against him in an effort to show that all of the allegations had been coerced by his ex-wife and her new husband as part of a custody battle.

The court reversed its earlier finding that defendant's request for assistance with procedural matters made his request to represent himself equivocal, and it found that he was aware of the dangers involved in self-representation. Nonetheless, the court denied his request because it had grave concerns that defendant's desire to prove that the allegations were coerced by presenting evidence of other allegations would not result in a trustworthy determination of guilt or innocence due to the potent prejudicial effect of such evidence. The court went on to say that it was apparent that defendant would say things not properly before the trier of fact, that defendant's subjective involvement in the matter was very apparent, and that his subjective state of mind was such that he was not making his request with his eyes completely open.[6]

Following trial,[7] defendant appealed, arguing

[6] Unpublished per curiam opinion, decided June 11, 1992 (Docket No. 100969), slip op, pp 2-3.

[7] Before the commencement of trial, defendant filed an emergency application for leave to appeal with the Court of Appeals, alleging that the trial court had erred in denying his motion for self-representation. The Court denied his application in an order entered October 31, 1986.

that he should have been permitted to represent himself at trial. The Court of Appeals agreed and remanded the case to the trial court to allow defendant an opportunity to reassert his motion to proceed pro se.[8] In so doing, the Court of Appeals, applying the standards set forth in *People v Anderson,* 398 Mich 361; 247 NW2d 857 (1976) (see discussion, *infra*), held:

> First, the trial court was correct when it reversed its initial finding that defendant's request for help made his request for self-representation equivocal. . . . [T]he rule seems to be that a defendant's request for self-representation is equivocal where the defendant wants to have an attorney to perform some of the trial duties, but is unequivocal where he merely wants standby counsel to assist with procedural matters. . . .
>
> * * *
>
> We believe that the second requirement expressed in *Anderson, supra,* i.e., that a defendant's request to represent himself must be made knowingly, intelligently and voluntarily, was also satisfied in the present case. As noted above, the trial court found that the request was voluntarily and intelligently made, but that it was not knowingly made because defendant thought some evidence was admissible but it actually was not. We believe that the trial court incorrectly understood the "knowingly" requirement. . . . In *Anderson,* our Supreme Court stated that, although a defendant's competence is a pertinent consideration, competence does not refer to legal skills. . . . [T]he fact that defendant thought that some evidence was admissible when it actually was not does not mean that his request was not knowingly made, particularly because defendant specifically stated that he was aware that he would have to follow the rules

[8] Defendant raised numerous other issues not relevant to this appeal that the Court of Appeals did not address "for the reason tha such issues would be moot if a new trial is granted." Slip op, p 5.

of evidence if he represented himself and because the trial court acknowledged that defendant was aware of the dangers in self-representation. In any event, skilled attorneys regularly attempt to have inadmissible evidence admitted. They, like defendant must, nevertheless, abide by the trial court's ruling on the evidence.

* * *

In the present case, defendant's expression of why he wanted to represent himself was as sophisticated and comprehensive as that of Overby. Defendant told the court that he believed that there were issues of fact and law that would not be raised if not raised by him. He also told the court that he had successfully represented himself in a criminal prosecution involving the education of his children at home. Furthermore, he was representing himself in the abuse and neglect proceedings connected with the allegations present in this criminal case. Therefore, we believe that the trial court was incorrect when it found that defendant's request was not knowingly made.

Regarding the third requirement . . . .

* * *

In light of the fact that the trial court did not elucidate upon its finding that defendant's self-representation would inconvenience and burden the court, and in light of the fact that defendant has experience in representing himself and has agreed to abide by the rules of evidence, we conclude that there is nothing to indicate that the court's business would be unduly inconvenienced or burdened. [Slip op, pp 3-4.]

The Court of Appeals ordered a new trial,[9] and the prosecution then filed an application in this

[9] The case was originally remanded with instructions that the defendant was to receive a new trial only if he again validly waived the right to counsel. If defendant were to insist on counsel, or failed to make a valid waiver, his conviction was to be reinstated. Slip op, p 5. Defendant filed a motion for rehearing, which was granted by the Court of Appeals. In an order entered November 13, 1992, the Court issued an order that stated that a new trial was required regardless of

Court for leave to appeal, which was granted. 442 Mich 935 (1993).

II

A. THE RIGHT TO SELF-REPRESENTATION

In *Faretta v California,* 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), the United States Supreme Court held that the right of self-representation is implicitly guaranteed in the Sixth Amendment of the United States Constitution.[10] Under that amendment,

> It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State

whether defendant requests appointment of counsel or seeks again to represent himself in connection with that trial.

[10] The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. [*Id.* at 819-820. See also *McKaskle v Wiggins,* 465 US 168, 174; 104 S Ct 944; 79 L Ed 2d 122 (1984); *Rock v Arkansas,* 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987); *Riggins v Nevada,* 504 US —; 112 S Ct 1810; 118 L Ed 2d 479 (1992). See, generally, anno: *Accused's right to represent himself in state criminal proceeding—modern state cases,* 98 ALR3d 13.]

The right of self-representation under Michigan law is secured by both constitution and statute. Const 1963, art 1, § 13, provides: "A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney."

State statute reinforces that right:

> On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face. [MCL 763.1; MSA 28.854.]

However, none of the above provisions, federal or state, guarantees an absolute right to proceed to trial without counsel. *Faretta, supra; People v Anderson, supra,* p 366.

B. THE REQUISITE INQUIRY—FEDERAL CASES

The *Faretta* Court recognized that in exercising the right of self-representation, a defendant necessarily waives his correlative Sixth Amendment right to counsel. Consequently, a knowing and

intelligent waiver of the right to counsel was deemed by the Court to be an essential prerequisite to the right to proceed pro se:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. *Johnson v Zerbst,* 304 US [458] 464-465 [58 S Ct 1019; 82 L Ed 1461 (1938)]. Cf. *Von Moltke v Gillies,* 332 US 708, 723-724 [68 S Ct 316; 92 L Ed 309 (1948)] (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams v United States ex rel McCann,* 317 US [269] 279 [63 S Ct 236; 87 L Ed 268 (1942)]. [*Faretta, supra,* 422 US 835.]

In *Johnson v Zerbst, supra,* p 464, cited in *Faretta,* the Court first defined effective waiver, in the context of a defendant's right to counsel, as "an intentional relinquishment or abandonment of a known right or privilege." The *Johnson* Court held that courts must " 'indulge every reasonable presumption against waiver' " and that the effectiveness of waiver "should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id.,* pp 464-465.

In *Von Moltke v Gillies, supra,* pp 723-724,

which also cited *Faretta,* Justice Black, speaking for a plurality of the Court,[11] stated:

> [I]n light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

The United States Supreme Court has not yet defined the necessary parameters of a *Faretta* inquiry. All the federal courts construe the United States Constitution to require a defendant to effectively waive his right to counsel before being granted the right to self-representation. The circuits are divided, however, on the extent of the judicial inquiry needed to confirm a valid waiver. See, generally, 2 LaFave & Israel, Criminal Procedure, §§ 11.3 and 11.5, pp 29-34 and 42-53.

The majority of federal courts, while acknowl-

[11] In *Von Moltke,* the defendant was convicted of violating the Espionage Act of 1917. Before trial, she signed a paper that purported to waive her right to counsel. The United States Supreme Court reversed her conviction, finding evidence that the defendant had been unduly pressured by the FBI into signing the waiver and that the defendant, who spoke German as her native language, may not have understood the words used in the written waiver.

edging *Von Moltke,* have taken a nonformalistic approach in ascertaining the right of self-representation. See *Hsu v United States,* 392 A2d 972, 983 (DC App, 1978). For instance, the United States Court of Appeals for the Ninth Circuit has stated that "[w]hile no particular form of interrogation is necessary, the court must assure itself that the defendant understands the charges and the manner in which an attorney can be of assistance." *United States v Gillings,* 568 F2d 1307, 1308-1309 (CA 9, 1978). See also *United States v Balough,* 820 F2d 1485 (CA 9, 1987); *United States v Aponte,* 591 F2d 1247, 1250 (CA 9, 1978). The United States Court of Appeals for the Tenth Circuit has stated that "the trial judge should conduct an inquiry sufficient to establish a defendant's knowledge and understanding of the factors" relevant to his decision to waive counsel, *United States v Padilla,* 819 F2d 952, 959 (CA 10, 1987). See also *Sanchez v Mondragon,* 858 F2d 1462, 1465 (CA 10, 1988); *United States v Gipson,* 693 F2d 109, 111 (CA 10, 1982), cert den 459 US 1216 (1983); *United States v Bennett,* 539 F2d 45, 50 (CA 10, 1976), cert den 429 US 925 (1976).

The United States Court of Appeals for the Third Circuit does not require a detailed listing of advice similar to that mandated for guilty plea proceedings conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure, but does require a "searching inquiry" sufficient to satisfy the trial judge that the defendant's waiver was understanding and voluntary. *United States v Welty,* 674 F2d 185, 189 (CA 3, 1982). See also *United States v Gallop,* 838 F2d 105, 109-110 (CA 4, 1988); *Wiesner v Abrams,* 726 F Supp 912, 917 (ED NY, 1989), aff'd without opinion, 909 F2d 1473 (CA 2, 1990).

Several courts have stated that a waiver hearing

expressly addressing the disadvantages of a pro se defense is much preferred but not absolutely necessary. See, e.g., *Fitzpatrick v Wainwright,* 800 F2d 1057, 1064 (CA 11, 1986); *United States v Bailey,* 219 US App DC 67, 78, n 17; 675 F2d 1292 (1982), cert den 459 US 853 (1982); *Tuitt v Fair,* 822 F2d 166 (CA 1, 1987), cert den 484 US 945 (1987).

The United States Court of Appeals for the Sixth Circuit now requires trial judges to follow the model inquiry set forth in 1 Bench Book for United States District Judges (3d ed), 1.02-2 to 1.02-5. See *United States v McDowell,* 814 F2d 245 (CA 6, 1987), cert den 484 US 980 (1987). Other examples of a model inquiry format are set forth in *People v Arguello,* 772 P2d 87 (Colo, 1989); and *People v Lopez,* 71 Cal App 3d 568, 571-573; 138 Cal Rptr 36 (1977).

The common thread that can be gleaned from these cases is that "[t]he ultimate test is not the trial court's express advice, but rather the defendant's understanding." *Fitzpatrick, supra,* p 1065. See also *United States v Harris,* 683 F2d 322 (CA 9, 1982), appeal after remand 726 F2d 558 (CA 9, 1984). The most reliable assurance of an awareness by the defendant of the dangers and disadvantages of self-representation is by means of a colloquy on the record between the judge and the defendant. *Bailey, supra,* p 74.

C. THE REQUISITE INQUIRY—MICHIGAN LAW

In contemplation of these concerns, Michigan has established stringent requirements before a defendant may be allowed to proceed pro se.

In *People v Holcomb,* 395 Mich 326, 336-337; 235 NW2d 343 (1975), the Court acknowledged *Faretta* and required trial judges henceforth to advise a

defendant who requests to proceed pro se of the " 'dangers and disadvantages of self-representation' " and seek affirmatively to establish on the record that the defendant is " 'literate, competent and understanding' " of the choice that confronts him and " 'voluntarily exercising his informed free will' in declining to be represented by counsel and in seeking to represent himself."

Subsequently, in *People v Anderson, supra,* in the context of a defendant's eleventh hour request to dismiss his counsel and proceed pro se, this Court specified three requirements to be met before a defendant's request to dismiss his counsel and proceed in propria persona could be granted:

> First, the request must be unequivocal. . . .
>
> Second, once the defendant has unequivocally declared his desire to proceed pro se the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily. *Faretta, supra,* 422 US 835; *Holcomb, supra* at 337. The trial court must make the pro se defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. *Id.* Defendant's competence is a pertinent consideration in making this determination. *Westbrook v Arizona,* 384 US 150; 86 S Ct 1320; 16 L Ed 2d 429 (1966). But his competence does not refer to legal skills, "[f]or his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." *Faretta, supra.*
>
> The third and final requirement is that the trial judge determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business. [*Anderson, supra,* pp 367-368.][12]

[12] Defendant Dennany urges this Court to recognize a distinction

In addition, the Michigan Court Rules provide direction concerning the timing and substance of the judicial inquiry to be made when a defendant affirmatively indicates that he wishes to proceed pro se. As is true of the present rule,[13] the former court rule, MCR 6.101(C)(3), which was in effect at

between pretrial requests to proceed pro se and mid-trial requests. Relying on language contained in the post-*Anderson* case *People v Wakeford,* 418 Mich 95; 341 NW2d 68 (1983), defendant maintains that pretrial requests to proceed pro se are absolute, whereas mid-trial requests are qualified by the *Anderson* requirements.

Although in *Wakeford, supra,* p 121, this Court, citing *Faretta,* summarily stated that the "defendant had an absolute right to represent himself," and, citing *Anderson,* further found that the defendant had voluntarily exercised that right, this sweeping statement must be regarded as dicta, for the following reasons. First, *Faretta* does not expressly establish self-representation as an absolute right. On the contrary, the imposition of specific waiver of counsel requirements in that case, which incidentally involved a timely pretrial request to proceed pro se, as an essential prerequisite to self-representation, contraindicates the alleged absolute nature of the right.

Second, in citing *Anderson,* the *Wakeford* Court did not address the express pronouncement in *Anderson* that neither the United States nor the Michigan Constitution guarantees an absolute right to proceed to trial without counsel. *Anderson, supra,* p 366. The *Anderson* Court specifically discussed cases involving both pretrial and mid-trial requests in reaching the conclusion that several requirements should be met before a defendant's request to proceed in proper person is granted. *Id.,* p 367. Moreover, the *Anderson* Court contemplated, but rejected, limiting the right to proceed pro se to only pretrial requests. *Id.,* p 368. In so doing, the Court clearly anticipated application of the qualified three-part test to both pretrial and mid-trial requests. Consequently, we reject defendant's contention that the right to proceed pro se is absolute if it is made before trial.

[13] MCR 6.005, effective since October 1, 1989, now provides in pertinent part:

> (D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to waive the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a

the time of the trials of these defendants, provided that waiver of the right to counsel must be reaffirmed at each subsequent proceeding.

While it is clear that once a defendant has affirmatively declared his desire to proceed pro se, the trial court must, on the record, advise the defendant of the dangers and disadvantages of self-representation, the application of this requirement has been inconsistent because, as one court has observed, "there are no exact guidelines regarding what warnings should be given to a defendant who wishes to proceed in propria persona." *People v Burden,* 141 Mich App 160, 163; 366 NW2d 23 (1985).

For instance, in *People v Kimber,* 133 Mich App 184; 348 NW2d 60 (1984), the defendant waived his right to counsel at arraignment, but was not asked to reaffirm that waiver at trial. The *Kimber* panel insisted upon strict compliance with the court rules and *Anderson, supra:*

> Merely informing the pro se defendant that he will be held to the same standards as an attorney who appears in court does not sufficiently focus on

retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

(E) Advice at Subsequent Proceedings. Even though a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) must affirmatively show that the court advised the defendant of the right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

> the dangers and disadvantages of pro se representation. To satisfy the requirement of *Holcomb* and *Anderson,* something of the special skills and training necessary to effectively handle a criminal defense must be conveyed to the defendant. Because of the noncompliance with GCR 1963, 785.4(3) and the failure to set forth the disadvantages and dangers of pro se representation as required by *Holcomb* and *Anderson,* we are unable to conclude that defendant effectively relinquished his fundamental right to counsel. [*Kimber, supra,* p 189.]

Similarly, in *People v Blunt,* 189 Mich App 643; 473 NW2d 792 (1991), the defendant represented himself at trial and then pleaded guilty to a supplemental information. In permitting self-representation, the trial court merely advised the defendant that proceeding pro se was perilous, but did not explain the risks that accompany it. The record further indicated that the defendant's decision was hastily made in the middle of trial. The appellate court concluded that "because of the trial court's failure to set forth the disadvantages and dangers of pro se representation as required by court rule and case law, defendant did not effectively relinquish his fundamental right to counsel." *Id.,* p 650.

In contrast, in *People v Morton,* 175 Mich App 1; 437 NW2d 284 (1989), the defendant requested and was allowed to appear in propria persona at trial. The Court of Appeals held that the trial court's statement to the defendant that representing himself was analogous to acting as his own doctor and removing his own appendix was adequate warning where the defendant's request was knowledgeable and unequivocal:

> We do not believe the court rule, MCR 6.101(C)(3),

> is intended to be strictly applied, as suggested by the dissent, where a defendant chooses to discharge his attorney and to represent himself. . . .
>
> If the constitution means anything in this regard, a defendant who knowingly exercises his right to defend himself need not be badgered and pressured at every turn to give up his right to defend himself. Should a trial judge appoint counsel for a defendant whether defendant wants counsel or not? We think not. We believe the trial judge should permit a defendant to exercise his constitutional right to defend himself, as was done here.
>
> * * *
>
> We believe that the record in this case unmistakably shows that defendant understood exactly what he was doing and chose to represent himself while fully aware of his alternatives. To permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of a conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. We would not permit it. [*Morton, supra,* pp 7-9.]

Likewise, in *People v Mack,* 190 Mich App 7; 475 NW2d 830 (1991), the defendant was dissatisfied with his appointed attorney's performance. At a pretrial hearing, he orally moved for a finding of ineffective assistance of counsel. The trial court gave the defendant the option of representing himself or continuing with appointed counsel. The defendant decided to represent himself, but the court ordered appointed counsel to remain at the defense table throughout the proceedings. Without addressing the issue of compliance with the applicable court rules, the Court of Appeals concluded

that the trial court did not err in permitting the defendant to represent himself at trial:

> Here, before allowing defendant to proceed in pro per, the trial court alerted defendant to the serious nature of the charges and that a conviction would result in a possible life sentence. Second, the trial court was willing to declare a mistrial early in the proceedings in order to allow defendant to retain counsel; however, defendant vehemently opposed that option, choosing instead to proceed on his own. Third, defendant had access to his appointed counsel throughout the proceedings and, in fact, deferred to appointed counsel on many occasions. Finally, at one point during the trial, the court instructed defendant on proper courtroom decorum and explained to defendant that he could not proceed in pro per if he engaged in disruptive behavior.
>
> In sum, we conclude that it is "inconceivable that defendant did not know what he was doing." [*Id.*, p 16.]

The appeals now before us afford an opportunity to provide guidance by summarizing the warnings and inquiry required under *Anderson* and the court rules. The underpinnings for these requirements are based not only in the protection of a defendant's fundamental constitutional rights, *Faretta* and *Anderson, supra,* but on practical considerations as well:

> "Whether the prospective pro per is a naïve character who sincerely believes he can represent himself better than can a lawyer, a cagey loser who is going to try to reduce the trial to a shambles in the hope that somehow reversible error will creep in, a free soul with a touch of ham, or simply someone who wants to have some fun with the judicial establishment, the trial judge must recognize that the first ground on appeal is proba-

> bly going to be that the defendant was allowed to represent himself without having intelligently and voluntarily made that decision. Such are the facts of life. Therefore, pragmatically, and defensively, in addition to the legal necessity of establishing that a defendant voluntarily and intelligently reached this decision, the trial court should also protect itself—and the record." [*Blunt, supra,* p 649, quoting from *People v Lopez, supra,* pp 571-572. See also *Morton, supra,* pp 8-9.][14]

Obviously, the most effective way for a trial court to safeguard against the opening of an appellate parachute is to comply with the court rules and *Anderson.*

The applicable court rules, MCR 6.005(D) and (E), are very specific. First, the court may not permit the defendant to waive the right to be represented by a lawyer without advising the defendant of (a) the charge, (b) the maximum possible prison sentence for the offense, (c) any mandatory minimum sentence required by law, and (d) the risk involved in self-representation.

Second, a defendant who wishes to proceed pro se must be offered the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Third, even though a defendant has waived the assistance of a lawyer, the waiver must be reaffirmed at each subsequent proceeding.

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[14] As the *Faretta* Court held:

> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel." [*Id.,* p 835, n 46.]

In addition, pursuant to *Anderson, supra,* the court must, upon a defendant's initial request to proceed pro se, determine three things: (1) that the request is unequivocal; (2) that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the disadvantages of self-representation; and (3) that self-representation will not disrupt, unduly inconvenience, or burden the court.

Where there is error but it is not one of complete omission of the court rule and *Anderson* requirements, reversal is not necessarily required. Cf. *Guilty Plea Cases,* 395 Mich 96, 122-124; 235 NW2d 132 (1975). Whether a particular departure justifies reversal "will depend on the nature of the noncompliance." *Id.,* p 113.

In light of its relationship to the *Anderson* requirements, and because of its significance in the *Dennany* case, we turn now to consideration of the claimed "right" to standby counsel.

III

THE "RIGHT" TO STANDBY COUNSEL

In *Faretta, supra,* the United States Supreme Court suggested:

> [A] State may—even over objection by the accused—appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. [*Id.,* p 835, n 46.][15]

In its subsequent decision in *McKaskle v Wig-*

[15] " 'Standby' counsel" has been defined as a situation in which a pro se defendant is given the assistance of advisory counsel who may take over the defense if for some reason the defendant becomes unable to continue. *Locks v Sumner,* 703 F2d 403, 407, n 3 (CA 9, 1983).

gins, supra,[16] the court made explicit what was already implicit in *Faretta:*

> A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense. [*McKaskle, supra,* p 184.]

The *McKaskle* Court also spoke about the distinct but related issue of "hybrid" representation:[17]

> *Faretta* does not require a trial judge to permit "hybrid" representation of the type Wiggins was actually allowed. But if a defendant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel's subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by counsel. Once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unam-

[16] In *McKaskle,* the Court addressed what role standby counsel, who has been appointed by the trial court over the defendant's objections, may play at trial consistent with the protection of the defendant's *Faretta* rights.

[17] "Hybrid representation" describes an arrangement whereby both the defendant and his attorney would conduct portions of his trial and share joint presentation of his defense, while the defendant retains ultimate control over defense strategy. *State v Gethers,* 197 Conn 369, 383; 497 A2d 408 (1985).

biguously renews his request that standby counsel be silenced. [*Id.*, p 183.]

While the United States Supreme Court has recognized the efficacy of advisory counsel in assisting a pro se defendant, that Court has not directly addressed the constitutional dimensions of the right to standby or hybrid counsel. However, the federal courts have uniformly held that neither the right to standby counsel nor hybrid representation are absolute under the Sixth Amendment, but rather are within the sound discretion of the trial judge.[18]

Several state courts have held that while their state constitutions guarantee a right to self-representation, there is no constitutionally mandated right to standby or hybrid counsel.[19]

Some courts have expressed the view that the appointment of standby counsel, while not mandatory, is the preferred and prudent course to take when a defendant elects to proceed pro se. See

[18] See, e.g., *United States v Betancourt-Arretuche*, 933 F2d 89 (CA 1, 1991), cert den 502 US 959; 112 S Ct 421; 116 L Ed 2d 441 (1991); *United States v Mosely*, 810 F2d 93, 97 (CA 6, 1987), cert den 484 US 841 (1987); *Julius v Johnson*, 755 F2d 1403 (CA 11, 1985) (modified 854 F2d 400 [1988]), cert den 488 US 960 (1988); *United States v Weisz*, 231 US App DC 1; 718 F2d 413 (1983), cert den 465 US 1027 (1984); *United States v Tarantino*, 269 US App DC 398, 434; 846 F2d 1384 (1988), cert den 488 US 867 (1988); *Locks v Sumner*, n 15 *supra; United States v Kimmel*, 672 F2d 720 (CA 9, 1982); *United States v Halbert*, 640 F2d 1000 (CA 9, 1981); *United States v Gigax*, 605 F2d 507, 516-517 (CA 10, 1979); *United States v Dunlap*, 577 F2d 867 (CA 4, 1978), cert den 439 US 858 (1978); *United States v Hill*, 526 F2d 1019 (CA 10, 1975), cert den 425 US 940 (1976); *United States v Klee*, 494 F2d 394, 396-397 (CA 9, 1974), cert den 419 US 835 (1974); *United States v Gaines*, 416 F Supp 1047, 1050-1051 (ND Ind, 1976); *United States v Swinton*, 400 F Supp 805 (SD NY, 1975).

[19] See, e.g., *Scarbrough v State*, 777 SW2d 83, 92 (Tex Crim App, 1989); *Parren v State*, 309 Md 260; 523 A2d 597 (1987); *People v Arguello, supra; State v Gethers*, n 17 *supra* (and cases cited therein); *People v Mirenda*, 57 NY2d 261; 442 NE2d 49 (1982); *Hooks v State*, 416 A2d 189 (Del, 1980); *State v Russell*, 270 Ind 55; 383 NE2d 309 (1978); *State v Burgin*, 539 SW2d 652 (Mo, 1976).

Sanchez v Mondragon and *United States v Padilla, supra.*[20]

Although the Michigan Constitution, art 1, § 13 provides that "[a] suitor in any court in this state has the right to prosecute or defend his suit, either in his own proper person *or* by an attorney" (emphasis added), we do not find in this language an absolute entitlement to standby counsel.

The primary rule of construction in ascertaining the meaning of words in a constitution is the rule of "common understanding." A court should give effect to plain meaning of such words as understood by the people who adopted it. *Advisory Opinion on Constitutionality of 1978 PA 426,* 403 Mich 631, 638; 272 NW2d 495 (1978). Use of the disjunctive "or" in art 1, § 13 contradicts any suggestion that a defendant has a right to appear pro se *and* simultaneously be accorded the assistance of advisory counsel. The word "or," under these circumstances, serves to "disjunctively co-ordinate the two propositions [so] that each in turn excludes the other . . . ." *American Fidelity Co v R L Ginsburg Sons' Co,* 187 Mich 264, 276; 153 NW 709 (1915). In other words, a defendant has a constitutional entitlement to represent himself or to be represented by counsel—but not both.[21]

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[20] In *United States v Welty, supra,* p 193, n 5, the Third Circuit cited with approval Standard 6-3.7 of 1 ABA Standards for Criminal Justice (2d ed), Special Functions of the Trial Judge, pp 6-41 to 6-42, which provides:

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

[21] Earlier decisions of the Court of Appeals have, without extended

Such an interpretation is consistent with the underlying purpose of standby counsel, which has relatively recent origins as a tool of trial management for the courts to use in aiding a defendant who chooses the perilous path of self-representation. We conclude that art 1, § 13 permits the use of standby counsel as a matter of grace, but not as a matter of right.[22]

Having concluded that the right to standby counsel is a matter of discretion for the trial court, a question remains how a request for, or the presence of, standby counsel affects the validity of waiver of counsel. In one of the cases now before us, *People v Dennany,* the Court of Appeals formulated the following conclusion:

> Based on *Faretta, supra,* and the cases from this Court . . . the rule seems to be that a defendant's request for self-representation is equivocal where the defendant wants to have an attorney to perform some of the trial duties, but is unequivocal where he merely wants standby counsel to assist with procedural matters. Therefore, the trial court in the present case correctly determined that defendant's request unequivocal. [*Dennany, supra,* slip op, p 3.]

The procedural/substantive distinction drawn by the Court of Appeals finds little support in either case authority or practical considerations. We note

discussion, reached a similar conclusion. See *People v Gravitt,* 113 Mich App 482, 484-485; 317 NW2d 330 (1982); *People v Seaton,* 106 Mich App 234; 307 NW2d 454 (1981); *People v William Ramsey,* 89 Mich App 260, 264; 280 NW2d 840 (1979).

[22] To extract a greater right from the language of the Michigan statute, which provides that "a party accused shall be allowed to be heard by counsel and may defend himself," MCL 763.1; MSA 28.854, would likewise be inconsistent with the history and origins of standby counsel. We find no record that the Legislature ever intended that the statute should provide a guarantee of either standby or hybrid representation.

initially that the requirement that a waiver of counsel be "unequivocal" serves two purposes:

> First, it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self-representation . . . [b]ecause a defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself. . . .
>
> The requirement that a request for self-representation be unequivocal also serves an institutional purpose: It prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial between wishing to be represented by counsel and wishing to represent himself could place the trial court in a difficult position: If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation, the defendant could claim that he had been denied the right to counsel. . . . The requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates, he is presumed to have requested the assistance of counsel. [*Adams v Carroll,* 875 F2d 1441, 1444 (CA 9, 1989).]

The right to proceed pro se and the right to counsel have been described as " 'two faces of the same coin,' " because the waiver of one right constitutes the assertion of the other; consequently, "for purposes of determining whether there has been a deprivation of constitutional rights a criminal defendant cannot logically waive or assert both rights." *United States v Conder,* 423 F2d 904, 908 (CA 6, 1970), cert den 400 US 958 (1970). Many

courts have therefore concluded that a pro se defendant's conditional request to proceed with assistance of counsel, either in the form of hybrid representation or standby counsel, is an equivocal and therefore unacceptable waiver. See *United States v Oakey,* 853 F2d 551, 552-554 (CA 7, 1988), cert den 488 US 1033 (1989); *Tuitt v Fair, supra,* p 174 ("[w]hen a defendant refuses to waive his right to counsel, while demanding to proceed pro se, the trial court will find it hard to know which constitutional right is being asserted"); *United States v Gaines,* 416 F Supp 1047 (ND Ind, 1976); *State v Gethers,* 197 Conn 369; 497 A2d 408 (1985); *State v Russell,* 270 Ind 55; 383 NE2d 309 (1978); *Nagy v State,* 270 Ind 384; 386 NE2d 654 (1979).

In *Maynard v Meachum,* 545 F2d 273 (CA 1, 1976), the court addressed an appeal alleging ineffective waiver of counsel where the defendant had the assistance of standby counsel during his trial. The court concluded that the defendant was entitled to a new trial because, despite the presence of standby counsel, the trial court had not fulfilled its affirmative obligation to ask such questions and receive such satisfactory answers to enable it to conclude that a valid waiver had been effected. The *Maynard* court stated:

> Whatever label is attached to it, the net result was that Maynard had less than the full representation by counsel to which, absent a valid waiver, he was entitled under the Sixth Amendment. . . . *We can conceive of no reason why the standard for waiving part of a constitutional right should be different from the standard for waiver of the entire right.* Respondent argues, and we agree, that it is within the discretion of the trial court to allow the sort of hybrid arrangement that was adopted in this case . . . [b]ut it does not follow that such an arrangement is the equivalent of full

> representation by counsel for purposes of waiver. . . . On respondent's analysis, the right to counsel is satisfied, regardless of the reality of self-representation, so long as counsel is not formally allowed to withdraw and remains in the courtroom. We do not believe that the protections of this right that have evolved from *Johnson v Zerbst,* 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938), can be so casually swept away.
>
> Thus, although the record reveals that Maynard knew of his right to appointed counsel, and that he affirmatively acquiesced in the procedure at trial . . . the question remains whether this acquiescence was competent, intelligent and voluntary. See *Johnson v Zerbst, supra,* 304 US 465 . . . *Moore v Michigan,* 355 US 155, 164; 78 S Ct 191; 2 L Ed 2d 167 (1957). [*Id.,* p 277. Emphasis added.]

We agree with *Maynard* that the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards. We therefore do not recognize the presence of standby counsel as an exception to the *Anderson* or court rule requirements.

Moreover, we reject the dichotomy drawn by the Court of Appeals in *Dennany* between requests for attorney assistance with trial duties and assistance with procedural matters. Because there is no substantive right to standby counsel, the trial court is under no obligation to grant such a request. Consequently, a request to proceed pro se with standby counsel—be it to help with either procedural or trial issues—can never be deemed to be an unequivocal assertion of the defendant's rights.

Further, the distinction drawn by the Court of Appeals would create a new subclassification of co-counsel which has never before been accepted by the courts. While current case law recognizes "hy-

brid" and "standby" counsel, no authority has further divided these categories into task-oriented groups for purposes of determining the validity of a waiver.[23] It is a distinction without basis in law,[24] and, as a practical matter, it unduly binds the trial court's discretion, creating the appellate parachute that we would close with the imposition of the stringent requirements set forth in this decision.

IV

We now apply these principles to the facts of the two cases at hand.

A

In *People v Jones,* the trial judge never advised defendant of the dangers and disadvantages of self-representation as contemplated by *Faretta* and *Holcomb,* nor did he conduct the detailed three-part inquiry expressly required by *Anderson.* We note also that the trial court did not reaffirm the right to counsel at each subsequent proceeding as

[23] In *McKaskle, supra,* the Court viewed the help an attorney gives a pro se defendant in these terms—but it was for the narrow purpose of deciding whether standby counsel's interference with the defendant's *Faretta* rights violated the Sixth Amendment.

[24] An underlying fault of the *Dennany* Court's approach is its misinterpretation of Michigan precedent. The Court cites *People v Heard,* 178 Mich App 692; 444 NW2d 542 (1989), and *People v Burden, supra,* as proof that "the assistance of counsel in an advisory capacity [does] not render the defendant's request to represent himself equivocal." Slip op, p 3. However, those cases make no express reference to the defendant requesting advisory counsel; advisory counsel was simply appointed by the court after the defendant moved to proceed pro se. *People v Ramsey, People v Seaton,* and *People v Gravitt,* n 21 *supra,* all stand for the proposition that a defendant "cannot have it both ways" and must clearly state he is willing to go it alone. Thus, the Court of Appeals determination that "while *Gravitt, supra,* seems to indicate that a request for advisory counsel may make a defendant's request to represent himself equivocal, it is against the great weight of authority" is simply incorrect. *Id.*

required by the then-existing court rule, MCR 6.101(C)(3).[25]

Under these circumstances, we conclude that the trial court erred in allowing defendant to proceed in propria persona and that reversal is required. We agree with the Court of Appeals that defendant did not effectively relinquish his fundamental right to counsel.[26] The decision of the Court of Appeals therefore should be affirmed.

B

In *People v Dennany,* the trial court did address defendant's request to proceed pro se within the analytical framework of *Anderson.* However, we find that the Court of Appeals erred by holding that a defendant's request "is unequivocal where

[25] MCR 6.005(D) and (E), as adopted effective October 1, 1989, had not yet been promulgated at the time of the trial of either defendant in these cases.

[26] Justice BOYLE, in her concurring opinion, would hold that defendant Jones made a knowing and intelligent waiver of his right to counsel, on the basis of his "history of personal involvement with the criminal justice system" and the consequent characterization of him as a sophisticated defendant. *Post,* p 467. At best, defendant's record of six prior felonies and four misdemeanors demonstrates his familiarity with the court system; it does not necessarily follow, however, that defendant appreciates the value of counsel or, conversely, the disadvantages of self-representation, in the absence of any evidence of his past experiences with the courts and counsel. It should not be forgotten that defendant Jones' main reason for proceeding pro se was his unhappiness with his attorney and his desire to proceed as scheduled in his case; he was not undertaking self-representation because he was familiar with the workings of the courts.

Moreover, the fact that defendant Jones was represented by counsel during the motion to proceed pro se, and by standby counsel throughout trial and sentencing, should not, contrary to Justice BOYLE's assertion (*post,* p 466), weigh in favor of a finding that defendant's decision was knowing, voluntary, and intelligent. As we have noted above, p 447, the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards.

Finally, the important issue whether waiver of the right to counsel is subject to a harmless error analysis, raised sua sponte by the concurrence, is a question that should be addressed, if at all, after the parties have been afforded an opportunity to brief and argue this jurisprudentially significant issue.

he merely wants standby counsel to assist with procedural matters." Slip op, p 3.

We agree with the Court of Appeals that the trial court misunderstood the second *Anderson* requirement—that a waiver be made "knowingly, intelligently and voluntarily." The trial court found that defendant's request was not "knowingly" made because defendant thought some evidence, i.e., allegations concerning alleged improprieties with other family members, would be admissible when, under the rules, it would not be allowed as evidence. *Anderson* contradicts such an interpretation, noting that although a defendant's competence is a pertinent consideration, competence does not translate into legal skills:

> "[For] his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." [*Anderson, supra,* p 368, quoting *Faretta, supra.*]

Accordingly, in *Dennany,* we would reverse in part, affirm in part, and remand for a new trial.

BRICKLEY and MALLETT, JJ., concurred with GRIFFIN, J.

CAVANAGH, C.J. (*concurring in part and dissenting in part*). I concur with much of the lead opinion. I agree that the trial court erred in *Jones* by failing to advise the defendant of the dangers of self-representation as expressly required by *People v Anderson,* 398 Mich 361; 247 NW2d 857 (1976), and the unambiguous language of MCR 6.101(C)(3).[1] I also agree that the trial court erred in *Dennany* by erroneously concluding that Dennanny's waiver was not knowingly made. Accordingly, both defendants must have new trials.

[1] Presently MCR 6.005(E).

I write separately, however, for three reasons: (1) to express my disagreement with the unnecessary interpretation of our constitution in part III of the lead opinion, (2) to point out the trap that the lead opinion creates for an unwary defendant, and (3) to voice my belief that strict compliance with the court rules will do more to reduce appeals than requiring anything less.

I

It is a well-established rule of construction that this Court will avoid interpreting our constitution when a case can be decided on an alternate basis. *Lisee v Secretary of State,* 388 Mich 32, 40; 199 NW2d 188 (1972). I cannot endorse part III of the lead opinion that interprets Const 1963, art 1, § 13, because that interpretation is unnecessary to decide these cases.

As the lead opinion correctly observes, established Michigan law requires that an assertion of the right of self-representation must be: (1) unequivocal; (2) knowing, intelligent, and voluntary; and, finally, (3) a defendant's self-representation must not disrupt, burden, or unduly inconvenience the administration of the court's business. *Ante* at 432. This test, coupled with the procedure outlined in the court rules, is all that this Court needs to decide these cases. Therefore, it is unnecessary to discuss whether the Michigan Constitution provides a "right" to standby counsel.

It is true that defendant Dennany urges this Court to establish that right. It is interesting to note, however, that he never asserted a right to standby counsel at trial. At trial, Dennany made the following request:

> In reference to my request to have Mr. Mequio

> [defendant's court-appointed attorney], another person available to advise me in this procedure, *what's intended isn't a conditional request at all, but rather had to do with an expediency,* if you will. . . .
>
> *That doesn't have anything to do with my reluctance or lack of reluctance to represent myself, it's absolutely essential, I say that unequivocally, it's absolutely essential that I represent myself.* But it is a convenience as it were, as much for the Court as for myself if there's counsel available . . . . [Emphasis added.]

Thus, Dennany never asserted a "right" to have standby counsel. He merely observed that such counsel would be a benefit both to himself and the court in facilitating the trial. And with good reason, Dennany apparently realized that if he demanded standby counsel his assertion would be deemed "equivocal" and thus ineffective. The trial court recognized as much:

> Mr. Dennany is saying it's [his assertion of the right to represent himself] unequivocal, he wants to represent himself and he wants counsel here as a convenience. And then he uses his words very carefully, and *it is not merely a difference in words without a substantive distinction.* I think I take what Mr. Dennany is saying to me to be this:
>
> "I unequivocally wish to represent myself. I recognize that I'm not a lawyer, I'm not familiar with courtroom proceeding[s] and perhaps the rules that everyone abides by, but I still feel that I can deliver the services I think are necessary in this case most effectively by myself. And if Mr. Mequio was here to help me overcome any road blocks to delivering my message, that would be helpful."
>
> So the—it's clear to me that he's stating unequivocally within the meaning of that word in the context of an assertion of the right to represent one's self that he's saying in no uncertain

terms "I want to represent myself." [Emphasis added.]

The trial court did not deny defendant's motion because his waiver was unequivocal. It denied it because it believed that the waiver was not knowingly made. The trial court remarked:

> My ultimate conclusion on this is while you have made your statement unequivocally and you're aware of some of the dangers and disadvantages of self-representation, your involvement with this case and your subjective state is such that you're not doing it with your eyes completely opened . . . .

The trial transcript of Dennany's motion to represent himself clearly shows that it was knowingly made. The test for a knowing assertion of the right to represent oneself was established in *Anderson:*

> [T]he existence of a knowing and intelligent waiver must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. [*Id.* at 370.]

Applying this test to Dennany leads to the conclusion that his request was knowingly made. As the trial court observed, Dennany's request was so sophisticated that he carefully limited it so as not to make it "equivocal." This level of sophistication, and the comprehensive nature of the request as reflected by the record, belies any conclusion other than a knowing and intelligent assertion of his constitutional right of self-representation.

Furthermore, Dennany's request was voluntary. He was fully advised of the dangers and disadvan-

tages of representing himself. Dennany's demeanor, conduct, and early[2] assertion of his right to represent himself obviated any claim that granting his motion would unduly inconvenience, disrupt, or burden the court.

I would affirm the decision of the Court of Appeals solely on the basis of *Anderson* and its constitutional requirements. The record in this case clearly shows that Dennany's assertion of his right to represent himself was unequivocal, knowing, intelligent, and voluntary. Therefore, Dennany was impermissibly denied his constitutional right of self-representation.

Similarly, defendant Jones' appeal may be resolved on the basis that the trial court utterly failed to follow *Anderson.* Speaking on his own behalf, Jones said:

> [I]f you would allow an attorney to assist me, I would, I mean ask to appear in pro per, but I do recognize my need for having certain motions Xeroxed as I am currently in the county jail, I don't have current facilities to Xerox and type motions. I will do the research, and I would need them served on the Court and it is hard for me to get in and get a docket number and get dates on cases and if an attorney would assist me, I would have no objection to that.

Defendant's motion was granted with absolutely no inquiry regarding whether defendant's assertion of his right to represent himself was knowing and intelligent or whether he understood the dangers and disadvantages of that course of action. This is a clear *Anderson* violation. Defendant

[2] I agree with the lead opinion that pretrial requests to proceed pro se are not absolute. The *Anderson* requirements must be satisfied in all cases. However, pretrial requests significantly diminish the chance that a defendant's request will "unduly inconvenience" or "burden" administration of the court's business.

Jones' conviction may, therefore, be overturned on this basis alone.

In sum, neither defendant asserted a "right" to standby or hybrid counsel at trial. Even if either had, it is still unnecessary for this Court to decide whether art 1, § 13 provides for such a right. Both cases may be decided on the basis of established Michigan law, and neither calls for a new analysis of art 1, § 13. Accordingly, I respectfully dissent from part III of the lead opinion.[3]

II

The lead opinion creates a trap for the unwary defendant by holding that a request to proceed pro se with standby counsel—be it to help either with procedural or trial issues—is an equivocal, and thereby ineffective, assertion of the defendant's constitutional right to represent himself as a matter of law.

The trap is demonstrated by contrasting what happened to Dennany and Jones. Dennany realized that if he demanded standby counsel his waiver would be deemed "equivocal." Therefore, Dennany went out of his way to point out that this was not what he intended. It is clear that Dennany would have preferred to have assistance from counsel. It is equally clear, however, that had Dennany been given a choice of going it alone and waiving all right to counsel, standby or otherwise, he would have happily done so.

Unfortunately, Jones did not possess the same level of sophistication. At the same time that he asserted his right to represent himself, he also

[3] I do, however, endorse that portion of part III in which the lead opinion would hold that "the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards." *Ante* at 446.

asked that standby counsel be available to assist him. Thus, unknowingly, he made the waiver of his right to counsel "equivocal" simply by acknowledging the fact that it would be easier for someone not in jail to make copies and serve them on the court than it would be for him while in jail.

If this Court is going to make such combined requests "equivocal" as a matter of law, then it should also demand that a defendant be so informed *before* the request is made or allow a defendant to renew the request after the trap has been sprung.[4] Michigan, as well as federal, law requires that a pro se defendant be alerted to the dangers and disadvantages of self-representation "so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Anderson* at 368, and citing *People v Holcomb,* 395 Mich 326, 337; 235 NW2d 343 (1975), and *Faretta v California,* 422 US 806, 835; 95 S Ct 2525; 45 L Ed 2d 562 (1975). A defendant does not "know what he is doing" and does not have his "eyes open" when he is not informed that a request to have an attorney assist with such mundane matters as making copies will vitiate the very right he seeks to assert. As *Faretta* noted:

> "There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence." [*Faretta* at 822-823, quoting 1 Stephen, A History of the Criminal Law of England, 341-342 (1883).]

[4] Neither *Faretta v California,* 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), *Anderson,* nor the court rules limit the number of times such requests can be made. In fact, Dennany made no less than four of them. Theoretically then, if a defendant fell into this trap, the defendant could simply renew his request without the offending plea for standby counsel.

The injustice of such an approach is compounded by the fact that common wisdom, and actual experience, indicate that standby counsel is almost invariably appointed whenever a defendant chooses to represent himself.[5] It is fundamentally unfair to punish a defendant for requesting what all assume will be provided in the first place.[6] To allow the uninformed to unwittingly waive their right of self-representation merely by requesting standby counsel "is to imprison a man in his privileges and call it the Constitution." *Adams v United States ex rel McCann,* 317 US 269, 280; 63 S Ct 236; 87 L Ed 268 (1942).

III

Implicit in the lead opinion is the conclusion that strict compliance with MCR 6.005 and the *Anderson* requirements will prevent creating an "appellate parachute" in cases in which a criminal defendant chooses to exercise the right of self-representation. *Ante* at 447. I wholeheartedly agree. I would not, however, be so subtle about it. I would explicitly require strict compliance with the court rules.

The court rules provide the minimum level of procedural protection that must be afforded every criminal defendant in this state when asserting the Michigan constitutional right of self-representation. They speak in an unambiguous, mandatory fashion:

(D) Appointment or Waiver of a Lawyer. If the

[5] As the lead opinion notes, many federal circuits and the ABA Standards for Criminal Justice require as much. *Ante* at 441-442 and n 20.

[6] This is exactly what happened to Jones. Just before his motion, his appointed attorney told the court: "I have indicated to him [Jones] that I am assuming the Court will probably ask me to stay on [in] an advisory capacity." After granting the motion, the court did just that.

court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. *The court may not permit the defendant to waive the right to be represented by a lawyer without first*

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

(E) Advice at Subsequent Proceedings. Even though a defendant has waived the assistance of a lawyer, *the record of each subsequent proceeding* (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) *must affirmatively show* that the court advised the defendant of the right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant *must* reaffirm that a lawyer's assistance is not wanted; or

(2) if the defendant requests a lawyer and is financially unable to retain one, the court *must* appoint one; or

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court *must* allow the defendant a reasonable opportunity to retain one. [MCR 6.005. Emphasis added.]

The best way to foreclose appeals in these situations is to follow the letter of the court rules. In light of the explicit and comprehensive nature of the rules, their simple recitation virtually *guarantees* that an appellate parachute is not created. This Court should be demanding strict compliance

with the court rules if for no other reason than to forestall the onslaught of appellate claims that will surely arise as courts struggle to determine just how imprecise a recital must be before a defendant's constitutional rights will be protected. See *ante* at 439.

LEVIN, J., concurred with CAVANAGH, C.J.

BOYLE, J. (*concurring in part and dissenting in part*). I concur with the result of the lead opinion in *Dennany*. I also agree that a request for standby counsel is not, as a matter of law, an unequivocal assertion of a desire to proceed pro se. I write separately to disagree with the Court's suggestion that a departure from the requirements of MCR 6.005(D) and (E) will justify reversal of a conviction. Where the record establishes that a waiver of the right to counsel is knowing and voluntary, reversal is not justified. Consequently, I would reverse the decision of the Court of Appeals with regard to defendant Jones and reinstate his conviction.

I

The court rule imposes a number of strict requirements on a trial judge confronted with a defendant who asserts a desire to proceed pro se.[1]

[1] First, pursuant to MCR 6.005(D):

> The court may not permit the defendant to waive the right to be represented by a lawyer without first
>
> (1) advising the defendant of [a] the charge, [b] the maximum possible prison sentence for the offense, [c] any mandatory minimum sentence required by law, [d] and the risk involved in self representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Although, the remedy for a trial court's failure to comply with all or some of these requirements is the central issue to be decided in this case,[2] the

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Second, pursuant to MCR 6.005(E):

> Even though a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to the possible revocation of youthful trainee status, hearings, trial or sentencing) must affirmatively show that the court advised the defendant of the right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

Finally, in *People v Anderson,* 398 Mich 361, 367-368; 247 NW2d 857 (1976), the Court set forth the parameters for effectuating self-representation:

> [1] First the request must be unequivocal. . . .
>
> [2] Second, once a defendant has unequivocally declared his desire to proceed *pro se* the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily. The trial court must make the *pro se* defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that his choice is made with his eyes open. Defendant's competence is a pertinent consideration in making this determination. But his competence does not refer to legal skills, "[f]or his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." [Citations omitted.]
>
> [3] The third and final requirement is that the trial judge determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business.

[2] The Court of Appeals in *People v Jones* encouraged the prosecutor to petition this Court:

> [W]e do not ignore, nor are we unsympathetic to, the arguments by the prosecutor. . . . However, neither the court rule nor the case law recognizes this as an exception to the strict

lead opinion would not expressly decide it.[3] Instead, the lead opinion generally alludes to the nature of the noncompliance and specifically requires reaffirmance of the waiver at each subsequent proceeding. *Ante* at 434. I would reaffirm the nonformalistic approach approved of in *People v Anderson,* 398 Mich 361, 370; 247 NW2d 857 (1976). A defendant validly asserts the right to proceed pro se when the record indicates that "he knowingly and intelligently forgoes his right to counsel" and "is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle v Wiggins,* 465 US 168, 173; 104 S Ct 944; 79 L Ed 2d 122 (1984).

While the court rules provide useful guidance to trial courts, our experience refutes the proposition that "appellate parachutes" are closed by establishing lengthy check lists.[4] When a lapse in the

requirements imposed upon the trial court before allowing a defendant to proceed in propria persona. While we urge the prosecutor to seek leave to appeal to the Supreme Court to have the Court reconsider whether such strict requirements are necessary where a defendant is represented at the motion to be allowed to proceed in propria persona, or where there is standby counsel available throughout the proceedings, it is for the Supreme Court, and not this Court, to adopt such an exception. [Unpublished opinion per curiam, decided October 29, 1992 (Docket No. 110202).]

[3] See *ante* at 439, where the lead opinion notes:

> Where there is error but it is not one of complete omission of the court rule and *Anderson* requirements, reversal is not necessarily required. Cf. *Guilty Plea Cases,* 395 Mich 96, 122-124; 235 NW2d 132 (1975). Whether a particular departure justifies reversal "will depend on the nature of the noncompliance." *Id.,* p 113.

In contrast, Chief Justice CAVANAGH, writing separately, would "explicitly require strict compliance with the court rules." *Ante* at 456.

[4] In *People v Blue,* 428 Mich 684, 689; 411 NW2d 451 (1987), Justice GRIFFIN, writing for a unanimous Court, noted: "[w]e have held that technical noncompliance with the court rules in accepting a plea of guilty or nolo contendere does not necessarily require reversal. *In re*

litany provides an avenue for appellate relief, adoption of a litany approach creates an appellate parachute. All things being equal, the longer the litany and the more times it is required, the more likely it is that a lapse will occur.

A

Neither the precedents of this Court nor those of the United States Supreme Court require a formalistic approach. In *People v Anderson, supra* at 370, this Court noted that the requirement of a knowing and intelligent waiver stems from *Johnson v Zerbst,* 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938), which endorsed a case-by-case approach when reviewing a waiver, including consideration of "the background, experience and conduct of the accused." *Anderson, supra* at 370. Adopting such an approach in *Anderson,* we reversed the decision of the Court of Appeals, because the defendant's sophisticated responses and history of involvement with the criminal justice system indicated "that he knew what he was doing and made his choice with eyes open." *Id.* at 371.

Likewise, as the United States Supreme Court explained in *McKaskle v Wiggins, supra* at 173, the constitutional requirements for proceeding pro se are straightforward: "an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." Thus, both Michigan[5] and federal

Guilty Plea Cases, 395 Mich 96, 113; 235 NW2d 132 (1975)." The Court went on to hold that a trial court properly accepted a valid plea of guilty but mentally ill in a case in which there was less than strict compliance with procedural requirements.

[5] The assertion in the lead opinion that art 1, § 13 of the state constitution grants a state right to proceed pro se in a criminal trial is problematic.

precedent hold that a defendant may proceed pro se if he makes a knowing and intelligent waiver of his right to counsel and is able to properly conduct himself in the courtroom.

We should adopt as the standard for appellate review this shorter and simpler approach, which allows appellate courts to assess whether a defendant made his decision to proceed pro se " 'with eyes open.' " *Faretta v California,* 422 US 806, 835; 95 S Ct 2525; 45 L Ed 2d 562 (1975). First, the defendant must waive his right to counsel "knowingly and intelligently." *Id.*[6] When seeking a waiver, the important inquiry is whether a defen-

Article 1, § 13 states:

> A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.

Article 1, § 20 provides that "[i]n every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense . . . ." Substantially similar provisions were present in the Constitution of 1850.

Until the nineteen-sixties and *Faretta v California,* 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), art 1, § 13 was only applied in civil cases. Considering both the language of the provision and the fact that application of art 1, § 13 to the criminal setting makes the right to an attorney found in art 1, § 20 redundant, such a reading is understandable. This Court in *Anderson,* without discussion, recognized § 13 as the operative constitutional provision in this area. This is an issue of some importance. If § 13 does not provide a right to self-representation in the criminal setting, we would need to find it either implicitly in § 20 of the constitution or under statute. While a right to self-representation may exist under MCL 763.1; MSA 28.854 (see *ante* at 443, n 22), under the historical jurisprudence approach in *Sitz v Dep't of State Police,* 443 Mich 744, 763; 506 NW2d 209 (1993), it is open to question whether we would discover such a right under the state constitution.

[6] In determining whether the waiver is "knowingly and intelligently" made, the inquiry found in MCR 6.005(D) "advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation," is useful. However, approval of the usefulness of this inquiry, apparently modeled on the plurality in *Von Moltke v Gillies,* 332 US 708; 68 S Ct 316; 92 L Ed 309 (1948), should not be viewed as requiring a formalistic approach on appeal.

dant knows what his rights are, and the risks, "dangers and disadvantages" of waiving those rights and going it alone. *Id.* Any defendant who either refuses to, or is incapable of, fully, or unequivocally, waiving his right to counsel, will not be permitted to proceed pro se.[7] In the second inquiry, the judge must determine whether the defendant "is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle* at 173. These two inquiries are all that *Faretta, McKaskle,* and *Anderson* require of a trial judge who is charged with determining whether an accused will be permitted to conduct his own defense.

As the lead opinion acknowledges, the majority of federal courts have adopted a nonformalistic approach when determining whether a defendant has properly waived his right to counsel: "[t]he common thread that can be gleaned from [the federal] cases is that '[t]he ultimate test is not the trial court's express advice, but rather the defendant's understanding.' " *Ante* at 431. LaFave and Israel explain further:

> Other courts take the position that *Faretta* requires only that the defendant have been aware of the disadvantages of proceeding pro se, and that awareness can be established without regard to any admonitions or colloquies. "Because the test [for a valid waiver] concerns what the accused understood rather than what the court said or

[7] We agree with the lead opinion that the Court of Appeals erred in concluding as a matter of law that a request for standby counsel is an unequivocal request to proceed pro se. Although sympathetic to the views of the Chief Justice that a request for standby counsel may create a trap for the defendant who really wants to go it alone, *ante* at 454, his solution requiring advice of no right to standby counsel creates the trap for the unwary trial judge—the threat of reversal on appeal for failure to comply with rigid requirements. It is precisely such appellate pitfalls that counsel the factual approach to the issue on appeal adopted in *Anderson.*

> understood, explanations are not required." A waiver is constitutionally acceptable where such factors as defendant's involvement in previous criminal trials, his representation by counsel before trial, and his explanation of his reasons for proceeding pro se indicate that he was fully aware of the difficulties of self-representation. [2 LaFave & Israel, Criminal Procedure, § 11.5, p 47.]

This approach is consistent with that taken in *Anderson,* in which this Court held that although "the trial court did *not* explicitly inform defendant Overby of the dangers and disadvantages of self-representation . . . the sophisticated and comprehensive nature of defendant Overby's expressed reasons for dissatisfaction with his appointed counsel, together with his history of personal involvement with the criminal justice system, indicates that he knew what he was doing and made his choice with eyes open." *Id.* at 370-371. (Emphasis added.) Finally, this nonformalistic approach is consistent with this Court's reluctance to reverse criminal convictions on the basis of technical noncompliance with the Michigan Court Rules.[8]

B

The requirement in MCR 6.005(E) that a trial court obtain a new waiver at every subsequent proceeding is neither compelled nor discussed by *Faretta, McKaskle,* or *Anderson.* The imposition of such a requirement for a valid waiver runs counter to the notion, present in all three opinions, that self-representation is a right. A defen-

[8] In the *Guilty Plea Cases,* 395 Mich 96, 123-124; 235 NW2d 132 (1975), this Court abandoned the formalistic approach of former GCR 1963, 785.7 and recognized that in cases of waiver, the inquiry is not whether there was an imprecise recital of rights or omission of some given right. The inquiry is whether "the defendant understood what a trial is and that by pleading guilty he was knowingly giving up his right to a trial and the rights and incidents of a trial." *Id.* at 124.

dant who knowingly and intelligently exercises his right to represent himself has made a choice. Given that the likely consequence of such a choice will be to the defendant's disadvantage, a searching inquiry into the degree to which the defendant understands the alternatives and consequences is initially appropriate. Assuming, however, that a defendant has in fact intelligently exercised that right at a stage in the proceeding, he need not be subjected at each new proceeding to an intimation that the choice was a poor one.

We do not permit defendants to waive counsel at arraignment on the warrant despite expression of a desire to do so. Unless a defendant says he will retain counsel, an attorney is appointed; "assistance of counsel is automatic; assuming the right is not waived, assistance must be made available at critical stages of a criminal prosecution, whether or not the defendant has requested it." *Adams v Carroll,* 875 F2d 1441, 1444 (CA 9, 1989) (citation omitted). We do not permit defendants to waive rights at felony arraignment without the assistance of counsel, nor do defendants express a desire for self-representation at preliminary examination.[9] The issue of self-representation is typically a trial-stage problem for the trial judge.

At the stage in the criminal process when the issue of self-representation commonly arises, the most sophisticated defendant is well aware of the right to counsel. He has, in fact, been advised of the right or provided with counsel in at least two previous court appearances. Thus, it should not be presumed that an individual who repeatedly receives the assistance of counsel and negotiates the barriers to waiver "forgets" the right to be repre-

[9] Standard forms approved by the State Court Administrative Office require the agreement of counsel and the defendant, after advice of rights, to waiver of the examination.

sented or the consequences of self-representation.[10] Literal compliance at each successive appearance before the same trial judge is redundant.

The formalistic waiver requirement of MCR 6.005(E), which dictates a new waiver at each successive stage of the prosecution does not serve to further any obvious policy. To be sure, some defendants may change their minds about wanting to proceed pro se and request counsel. There is nothing in our case law that prevents a trial judge from readvising a defendant on the right to counsel if the circumstances require and permit it, just as there is nothing requiring a trial judge to readvise a pro se defendant on the right to counsel.

II

Applying the nonformalistic approach employed by the majority of federal courts and this Court in *Anderson* to the particular facts in *People v Jones,* defendant Jones made a knowing and intelligent waiver of his right to counsel,[11] and therefore his conviction should be affirmed.

[10] Neither the court rule nor the lead opinion explain exactly what the trial judge is required to do to obtain a new waiver of the right to counsel pursuant to MCR 6.005(E). If, as the commentary to MCR 6.005(D) hints, the litany is only required when procuring the defendant's initial waiver, and if, as the lead opinion states, the *Anderson* litany is also only required at the initial waiver, then I calculate that in the average case involving five proceedings a trial judge must go through approximately seventeen steps to live up to the commands of the lead opinion.

This is a conservative estimate, and it is likely that the number of steps a trial judge will go through will be much higher. Simply informing a defendant that he has the right to an attorney and then asking him to waive it hardly resembles the intelligent and knowledgeable waiver of the right to an attorney that most judges are accustomed to receiving. Moreover, because such a perfunctory waiver itself may create a new appellate issue, trial judges might attempt to obtain a full waiver per MCR 6.005(D) and *Anderson* to protect the record.

[11] Voluntariness is not an issue on these facts. Although the defendant expressed dissatisfaction with the performance of appointed

To begin with, Jones, like the defendant in *Anderson,* had a history of personal involvement with the criminal justice system consisting of six prior felonies and four misdemeanors. Jones was fully apprised of his right to counsel at the first arraignment and the preliminary examination and exercised this right by asking for and receiving appointed counsel.

Additionally, defendant Jones was represented by counsel during the motion when he asked to proceed pro se. Jones and counsel conferred before the motion was granted, and counsel confirmed that Jones wished to proceed pro se and that, in his opinion, Jones had the intelligence and competence to do so. Jones' performance in motions and at trial, including knowledge of the criteria considered in setting bond, knowledge of the 180-day rule, and detailed discovery requests, confirm this assessment.

Moreover, Jones' statement at the motion hearing that he would "appear in pro per" but would have "no objection" to standby counsel providing clerical assistance, suggests that his level of sophistication regarding representation pro se included an understanding that counsel's participation might constitute an interference with the pro se right in the eyes of the law. Whether or not Jones' understanding of the complexity of representation pro se was in fact so sophisticated, his clear understanding that he could waive or assert the right to counsel at each subsequent proceeding is shown in his penultimate exchange with the

counsel, defendant chose to proceed pro se because he wanted the trial to start on the scheduled date, and substitute counsel would not, in defendant's mind, have sufficient time to prepare. This is not a case in which it can be argued that the trial judge coerced the defendant into choosing to proceed pro se. See, generally, *Maynard v Meachum,* 545 F2d 273, 278 (CA 1, 1976).

trial court when, after having confirmed his desire to proceed with counsel at sentencing, he objected to not having been permitted to personally examine the file in this matter. In these circumstances, it is abundantly clear that Jones fully understood his right to be represented by counsel and knowingly relinquished it.

Defendant Jones had a high school education, some college education, and was described by both counsel and the court as extremely intelligent. Given the totality of circumstances, "it is 'inconceivable that defendant did not know what he was doing.' " *People v Mack,* 190 Mich App 7, 16; 475 NW2d 830 (1991). Jones knowingly waived the right to counsel.[12]

Finally, although not briefed or argued, and therefore not decided, I observe that even if Jones had not validly waived his right to counsel, it is a distinct question whether error arising from the lack of full representation would be prejudicial.[13]

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[12] This waiver was also unequivocal. Although I agree with the lead opinion that a request to proceed with standby counsel is not unequivocal as a matter of law, I do not agree that it can "never be deemed to be an unequivocal assertion of defendant's rights." *Ante* at 446.

When read in its entirety, the colloquy between defense counsel, the defendant, and the court suggests that Jones was assenting to Mr. Narragan's appointment as standby counsel, not equivocating on his desire to proceed pro se.

While discussion of standby counsel should be postponed until after the defendant fully waives his right to counsel and is proceeding pro se, when the subject does arise, as in this case, it is the trial judge who is in the best position to decide whether or not the defendant is equivocating with respect to his desire to proceed pro se. In the waiver context, Sixth Amendment rights do not turn on the expression of magic words, but on the understanding of the accused. That understanding is best determined as a question of fact by the trial judge, see *Adams v Carroll, supra* at 1445.

[13] A denial of the right to proceed pro se can never be harmless error. See *McKaskle v Wiggins, supra,* 465 US 177, n 8. However, where, as here, the issue is whether a trial court obtained a valid waiver of counsel before allowing a defendant to proceed pro se, federal circuit courts have found a defective waiver to be harmless error when an examination of the whole record indicates no reason-

CONCLUSION

Accordingly, I would hold that a defendant may proceed pro se "provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle, supra* at 173. Whether a waiver is knowing and intelligent is to be assessed in a nonformalistic manner. *Anderson, supra* at 370. Because a review of the record indicates that the defendant in *People v Jones* waived his right to counsel, I would reverse the decision of the Court of Appeals in that case and remand for consideration of the other issues raised and not addressed below.

RILEY, J., concurred with BOYLE, J.

able possibility that the defendant would have been found not guilty had he been represented by counsel. *United States v Gipson,* 693 F2d 109, 112 (CA 10, 1982), cert den 459 US 1216 (1983); *Richardson v Lucas,* 741 F2d 753, 757 (CA 5, 1984). The harmless error approach seems especially appropriate in cases such as the present, in which a defendant receives advice throughout the trial from standby counsel, the same counsel who would have represented the defendant had he not asserted his desire to proceed pro se.

A review of the record indicates that the defendant, in fact, was rather successful representing himself; "his conduct prior to and during trial demonstrated more than a passing sophistication in criminal matters." *McQueen v Blackburn,* 755 F2d 1174, 1178 (CA 5, 1985). Even at sentencing, Jones was actively preserving objections made at trial.

MICHIGAN BELL TELEPHONE COMPANY v DEPARTMENT OF TREASURY

Docket Nos. 95347-95349. Argued December 3, 1993 (Calendar No. 12). Decided June 21, 1994. Rehearing denied 446 Mich 1201. Certiorari denied by the Supreme Court of the United States on November 28, 1994, 513 US — (1994).

Michigan Bell Telephone Company challenged the State Board of Assessors valuation of its property subject to taxation under 1905 PA 282, MCL 207.1 *et seq.*; MSA 7.251 *et seq.*, as improperly including intangible property in the valuations for tax years 1984, 1985, and 1986. The Tax Tribunal modified the assessment for each year and concluded that its consideration of the intangible elements under the unit valuation method was consistent with the constitution and statutes. The Court of Appeals, HOOD, P.J., and WAHLS and MCDONALD, JJ., affirmed in an unpublished memorandum opinion (Docket Nos. 127402, 131780, 133117). The petitioner appeals.

In a unanimous opinion by Justice GRIFFIN, the Supreme Court *held:*

The petitioner's intangible personal property appropriately was taken into account for purposes of assessment and taxation under 1905 PA 282.

1. 1905 PA 282 provides that the term "property" includes all property, real or personal, belonging to a public service company such as the petitioner that is subject to taxation under the act. The usual and customary meaning of property includes intangibles, and the Legislature did not limit application to tangible personal property. Thus, "all property" conveys an unambiguous meaning and provides authority for inclusion of both tangible and intangible property in the valuation and assessment of property under 1905 PA 282.

2. The intangibles tax act, 1939 PA 301, does not preclude consideration of intangibles in valuing and assessing property for purposes of taxation under 1905 PA 282. Rather, § 3(10) of

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REFERENCES

Am Jur 2d, State and Local Taxation § 197.

See ALR Index under Intangible Hereditaments or Property; Taxes; Telecommunications.

the intangibles tax act expressly exempts intangible personal property from general property taxes, not a selective tax like 1905 PA 282.

3. Nor is taxation of intangible property unconstitutional under Const 1963, art 9, § 5. Art 9, § 5 does not distinguish between tangible and intangible property, and its language is consistent with the treatment historically accorded public service companies under 1905 PA 282.

Affirmed.

TAXATION — TELEPHONE COMPANIES — INTANGIBLE PROPERTY.

The intangible personal property of a telephone company may be taken into account for purposes of assessing and taxing its property under 1905 PA 282 (1905 PA 282, MCL 207.1 *et seq.*; MSA 7.251 *et seq.*).

Honigman, Miller, Schwartz & Cohn (by *Michael B. Shapiro, James K. Robinson,* and *Gerard Mantese*) for the petitioner.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Russell E. Prins* and *Ross H. Bishop,* Assistant Attorneys General, for the respondent.

GRIFFIN, J. This appeal requires us to determine whether intangible personal property of the petitioner, Michigan Bell Telephone Company (MBTC), was properly considered in the valuation and assessment of its property subject to taxation under 1905 PA 282, MCL 207.1 *et seq.*; MSA 7.251 *et seq.* Because we conclude that intangibles were appropriately taken into account for purposes of assessing and taxing petitioner's property under Act 282, we affirm the decisions of the Michigan Tax Tribunal and the Court of Appeals.

I

Act 282 requires an annual assessment by the State Board of Assessors of the property of certain public service businesses, including telephone com-

panies, and the levy each year of taxes thereon.[1] At issue in this case is the value determination of property in Michigan owned by petitioner as an operating telephone system and the extent to which it is taxable under Act 282 for the tax years 1984, 1985, and 1986.[2]

Challenging the board's assessments for those years, petitioner appealed to the Tax Tribunal.[3] After hearing twenty days of testimony, including each party's expert appraisal witnesses, the tribunal issued an opinion and judgment that culminated in modifications of the assessments for the years in question.[4] In reaching its decision, the

[1] The title of Act 282 reads:

> An act to provide for the assessment of the property, by whomsoever owned, operated or conducted, of railroad companies, union station and depot companies, telegraph companies, *telephone companies,* sleeping car companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight companies and all other companies owning, leasing, running or operating any freight, stock, refrigerator, or any other cars, not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this act, over or upon the line or lines of any railroad or railroads in this state, and for the levy of taxes thereon by a state board of assessors, and for the collection of such taxes, and to repeal all acts or parts of acts contravening any of the provisions of this act. [Emphasis added.]

[2] The tribunal noted that before January 1, 1984, MBTC was owned by American Telephone and Telegraph, that on that date, consistent with a federal consent decree requiring divestiture by AT&T of certain operating telephone companies, seven regional holding companies were established, one of which was American Information Technologies Corporation (Ameritech), and that MBTC became a wholly owned subsidiary of Ameritech.

[3] Petitioner claimed that the assessment of its property pursuant to Act 282 for each of the tax years 1984, 1985, and 1986 was in excess of fifty percent of the property's true cash value. See Const 1963, art 9, §§ 3 and 5.

[4] The 1984 assessment of $1,695,500,000 was reduced by $138,616,850; the 1985 assessment of $1,590,000,000 was reduced by $200,610,200; and the 1986 assessment of $1,650,000,000 was increased by $56,061,300. (Docket No. 90553, March 13, 1990, p 66.)

tribunal determined, in accord with what it described as the "generally accepted mode of valuation for utility property," that petitioner's property should be assessed as a "unit" to reflect its "going concern" value. (Docket No. 90553, March 13, 1990, p 4.)

The tribunal explained:

> The exemplification of the going concern concept is found in the telephone pole, which is of very little intrinsic worth without the franchise to operate it legally. The value of that franchise, in large part, brings value to that pole, not the pole itself; a so-called "synergy" occurs. It therefore follows that the franchise and other unquantifiable intangibles are essential and valuable components of certain real and personal tangible property (e.g., poles/wires) and, unless otherwise prohibited, must be included in the valuation of the tangible property. [Docket No. 90553, March 13, 1990, p 7.]

The tribunal concluded that its consideration of "the intangible elements of the going concern under the unit valuation method [is] consistent with the Michigan constitutional and statutory framework." *Id.,* p 13.

Petitioner appealed in the Court of Appeals and argued, inter alia, that the tribunal had improperly included intangible property in its valuations for the three years at issue. Adopting the opinion of the tribunal as its own, the Court of Appeals affirmed in an unpublished memorandum opinion, issued November 6, 1992 (Docket Nos. 127402, 131780, and 133117).

We then granted leave to appeal, "limited to whether the tax provided for under 1905 PA 282, MCL 207.1 *et seq.*; MSA 7.251 *et seq.,* permits the valuation of intangible personal property for assessment and taxation purposes." 443 Mich 884 (1993).

II

A brief history of Michigan's taxation of telephone companies was provided by the United States Supreme Court in *Citizens' Telephone Co of Grand Rapids v Fuller,* 229 US 322, 325; 33 S Ct 833; 57 L Ed 1206 (1913):

> Prior to 1909 telephone companies were taxed under Act No. 179 of the Public Acts of Michigan . . . at the rate of 3% on their gross receipts for the year in which the tax was laid. . . . The taxes paid were in lieu of all other taxes.
>
> Act No. 282 of the Public Acts of 1905 . . . provided for the assessment of the property of railroads and certain other companies and for the levying of taxes thereon by a State Board of Assessors. The act did not include either telephone or telegraph companies.
>
> In 1909 the legislature passed Act No. 49 . . ., which amended the title and certain sections of the Act No. 282 and provided for the assessment by the State Board of Assessors of the property of telephone companies on an ad valorem basis instead of a tax on their gross earnings, as provided by the act of 1899.

As petitioner has correctly explained, most of the property in Michigan that is subject to ad valorem (i.e., value based) taxation is valued and taxed by local units of government pursuant to the General Property Tax Act, 1893 PA 206, MCL 211.1 *et seq.*; MSA 7.1 *et seq.* However, certain public service businesses, including railroad and telephone companies, which typically have property interests that extend through several taxing districts or states, are taxed separately under Act

282 "in lieu of all taxes for state and local purposes . . . ."[5]

Under this statutory arrangement, all of the property of a telephone company "used in carrying on [its] business"[6] is assessed each year—not by a local township supervisor or assessor, but rather—by a central authority, i.e., the State Board of Assessors.[7] Act 282 requires that such property be assessed at fifty percent of its true cash value, and taxed "at the average rate of taxes for state, county, township, school, municipal and other purposes levied through this state during the preceding year . . . ."[8]

Although petitioner challenges the amount of the assessment for each of the years in question, it does not dispute the tribunal's use in this case of the "capitalization of income" method of valuing its property.[9] Moreover, petitioner states that the valuation of its real and personal property as a "unit," reflecting its use as a "going concern," is "not at issue here." According to petitioner, the "sole issue" is the "incorporation of intangibles" in the determination of the value of its property for Act 282 purposes.

In support of its position that the tribunal improperly included intangible property, rather than valuing and taxing only the real and *tangible* personal property of the company, petitioner ad-

[5] Act 282, § 14.

[6] Act 282, § 10.

[7] Act 282, § 1 provides: "The board of state tax commissioners . . . together with the governor, shall ex officio, constitute a state board of assessors . . . ."

[8] Act 282, § 14.

[9] As this Court explained in *Antisdale v City of Galesburg,* 420 Mich 265, 276; 362 NW2d 632 (1984), the "income" or "capitalization of income" approach is one of three basic techniques used in determining the true cash value of property that have been recognized by the Tax Tribunal and the courts. The other two are (1) the market approach, and (2) the cost-less-depreciation approach.

vances three arguments. It contends, first, that Act 282 does not authorize taxation of intangible personal property; second, that the intangibles tax act[10] exempts its intangibles from Act 282 taxation; and, finally, that taxation of its intangible property is unconstitutional in light of Const 1963, art 9, § 5.

Before addressing each of these arguments, we take note of the applicable standard of appellate review. In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. *Continental Cablevision v Roseville,* 430 Mich 727, 735; 425 NW2d 53 (1988).

III

According to the petitioner, its "basic argument" is "that Act 282 does not authorize the taxation of intangible property . . . ."

Section 4 of Act 282 provides in pertinent part that the State Board of Assessors shall "make an annual assessment . . . of the *property* . . . [of] telephone companies . . . ." Thereafter, § 5 of the act provides in pertinent part:

> The term *property,* as used in this act, shall be deemed to include *all property,* real or personal, belonging to . . . companies . . . subject to taxation under this act, including . . . telephone poles, wires, conduits, switchboards, *and all other property* used in carrying on their business and owned by them respectively, and *all other real and personal property,* and all franchises, said franchises not to be directly assessed, but to be taken into

[10] 1939 PA 301, MCL 205.131 *et seq.*; MSA 7.556(1) *et seq.*

> consideration in determining the value of the other property . . . . [Emphasis added.]

Petitioner argues for its interpretation of the act by pointing to a tenet of statutory construction recently restated by this Court in *Molter v Dep't of Treasury,* 443 Mich 537, 543; 505 NW2d 244 (1993), i.e., the authority to impose a tax must be expressly authorized by law; it will not be inferred. Moreover, ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer. *In re Dodge Bros,* 241 Mich 665, 669; 217 NW 777 (1928).

When the case of *In re Brackett Estate,* 342 Mich 195, 204; 69 NW2d 164 (1955), came before this Court, we were required to consider the meaning of the word "property" within the context of the inheritance tax act.[11] There, we determined that an employee's interest in a profit-sharing plan established by his employer fell within the ambit of "property" as defined by the Legislature. Noting that the language used in the statute was "broad" and sweeping,[12] we said, "It is clearly within the competence of the legislature to sweep within its taxable orbit all kinds of property and any and all kinds of interests therein." *Id.,* p 205. We also observed:

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[11] 1899 PA 188, MCL 205.201 *et seq.*; MSA 7.561 *et seq.* The act was recently amended by 1993 PA 54.

[12] The inheritance tax act in effect at the time this Court decided *Brackett* defined property as follows:

> The word . . . "property" as used in this act . . . shall include *all property* or interest therein whether situated within or without this state and including all property represented or evidenced by note, certificate, stock, land, contract, mortgage or other kind or character of evidence thereof, and regardless of whether any such evidence of property is owned, kept or possessed within or without this state. [1948 CL 205.221; MSA 7.582. Emphasis added.]

> Nor will it be forgotten, in any question of statutory tax interpretation, that taxing is a practical matter and that the taxing statutes must receive a practical construction. While they will not be extended by implication, . . . neither will the words thereof be so narrowly interpreted as to defeat the purposes of the act. [*Id.*]

In construing the meaning of language of Act 282, we are cognizant of the principle that, in the absence of contrary direction by the Legislature, words used in a statute are to be given their ordinary meaning. *Sanchick v State Bd of Optometry,* 342 Mich 555, 559; 70 NW2d 757 (1955). ("Words will be given their usual and customary meanings, *save as otherwise defined* . . . ." [Emphasis added.])

In the course of considering whether the term property is "otherwise defined" in Act 282, we take note of its usual and customary meaning as reflected in Black's Law Dictionary. There, the word "property" is defined as denoting "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal . . . ." 6th ed, p 1216. Another common definition of property is "[s]omething tangible or intangible to which its owner has legal title." *The American Heritage Dictionary* (2d college ed), p 993.

As earlier indicated, § 5 of Act 282 states that the term property "shall be deemed to *include all property,* real or personal" belonging to the business service companies subject to taxation under the act. Of course, the statutory definition of a term is controlling, but only to the extent that it provides instruction with regard to proper construction. We note that § 5 gives guidance regarding what is to be *included* in the assessment—but only by referring to "property" repeatedly

throughout the section without providing a separate definition of the word "property." Because "property" is not "*otherwise* defined" in § 5, we do not find it necessary to discard the usual and customary meaning of the word.

Moreover, as one authority has explained, where a term is defined by declaring what it "includes," it is susceptible to extension of meaning by construction. 2A Singer, Sutherland Statutory Construction (5th ed), § 47.07, pp 151-156. When used in a statutory definition, the word "includes" is a term of enlargement, not of limitation. It "conveys the conclusion that there are other items includable, though not specifically enumerated . . . ." *Id.,* p 152. Such a definition suggests, if not requires, a construction broad enough to encompass other items not explicitly mentioned.

As we read the language of § 5 of Act 282, we find that the Legislature left no doubt that it intended a broad construction of the word property. Its definition in the first sentence of that section includes no less than three separate references to *all* property:

> The term property . . . include[s] *all property,* real or personal . . . *and all other property* used in carrying on their business . . . *and all other real and personal property* . . . . [Emphasis added.]

Given that the usual and customary meaning of property includes intangibles, and noting that the Legislature deliberately chose not to use the limiting term "*tangible* personal property" (cf. Const 1963, art 9, § 3), we conclude that the Legislature intended intangible as well as tangible property to be covered by its § 5 definition of "property." We find that the Legislature's use of the words "all

property" conveyed a meaning that is unambiguous and provides authority for inclusion of both tangible and intangible property in the valuation and assessment of property for purposes of taxation under Act 282.[13]

Our interpretation of the words "all property" is not only justified by the arrangement and use of language in Act 282, but we observe that it also comports with the "unit concept" of valuing utility property used by the Tax Tribunal in this case. This method of valuing utility property has been recognized by courts for more than one hundred years. In *Adams Express Co v Ohio State Auditor,* 165 US 194, 220; 17 S Ct 305; 41 L Ed 683 (1897), the United States Supreme Court stated:

> As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines extended, might be *valued as a unit* for purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State . . . . [Emphasis added.]

The appropriateness of the unit method of valuing utility property was first recognized by this Court at the turn of the century. *Detroit Citizen's Street-Railway Co v Detroit Common Council,* 125

[13] Our construction is reinforced by the reference in § 5 of Act 282 to a franchise as property. While providing that a franchise is not to be directly assessed, Act 282 explicitly requires that this intangible property interest is to "be taken into consideration in determining the value of the other property." See *Duluth, SS & A R Co v Corp & Securities Comm,* 353 Mich 636, 666; 92 NW2d 22 (1958).

Mich 673; 85 NW 96 [86 NW 809] (1901).[14] Moreover, it has long been established that the assessment of utility property as a unit requires consideration of intangibles. For example, in *Adams Express Co v Ohio State Auditor (After Rehearing),* 166 US 185, 219; 17 S Ct 604; 41 L Ed 965 (1897), the United States Supreme Court stated:

> Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, *intangible* though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this *intangible* property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property? [Emphasis added.]

Intangible assets are included in the valuation on the basis of the theory that a total operating system is integrated through a "unity of use." See Amdur, *Property taxation of regulated industries,* 40 Tax Lawyer 339, 347 (1987). See also *Pullman Co v Richardson,* 261 US 330; 43 S Ct 366; 67 L Ed 682 (1923); *Detroit Citizen's Street-Railway v Detroit Common Council, supra; ITT World Communication v San Francisco,* 37 Cal 3d 859; 693 P2d 811 (1985); *Michigan Wisconsin Pipe Line Co v Iowa State Bd of Tax Review,* 368 NW2d 187 (Iowa, 1985).

Valuing the company's property as an integrated system (i.e., "unity of use") requires including intangible elements that affect the property's

[14] In *Consumers Power Co v Port Sheldon Twp,* 91 Mich App 180; 283 NW2d 680 (1979), the Court of Appeals noted that in Michigan, the unit method is used to value properties that, by statute, require central assessment, such as telephone, telegraph, and rail companies.

value. As one respected authority on Michigan law has explained:

> The value of the tangible property of a telephone company is not, alone, a proper valuation, nor is the cost price of a telegraph company, with deductions for deterioration. A requirement that telegraph lines shall be assessed at their cash value means valuation as a whole, plus the intangible value as a system. [2 Cooley, Taxation (4th ed), § 965, pp 1945-1946. Citations omitted.]

See also *Soo Line R Co v Michigan* (Docket Nos. 2068, 2069, December 5, 1977), wherein the Tax Tribunal opined:

> The unitary valuation approach allows a determination of the true cash value of a particular segment of an interstate business by valuation of the entire system with subsequent value allocation to the taxing jurisdiction by a percentage factor representative of the value of the portion of the total system attributable to the taxing jurisdiction. [*Id.,* pp 2-3.]

It is noteworthy that use of the unit concept in valuing utility property does not always or necessarily result in an increase in the assessment. The effect of appraising the property as a unit—including intangibles—can either enhance or diminish the value of the tangible property.[15]

In assessing the operating real and personal property of petitioner located in Michigan,[16] as required by Act 282, the Tax Tribunal employed the unit method of valuation and determined that

[15] See Bertane, *The assessment of public utility property in California,* 20 UCLA L R 419 (1973).

[16] Because all the operating property of MBTC was located in Michigan during the tax years in question, this case involved no issue of apportionment of value between states.

"intangibles were properly included as adding value to that property." *Id.,* p 13. We conclude that in doing so the tribunal did not err.

IV

Next, we turn to petitioner's contention that the state is precluded by the intangibles tax act, 1939 PA 301, MCL 205.131 *et seq.*; MSA 7.556(1) *et seq.,* from including intangibles in the valuation of its property under Act 282.

Petitioner points to § 3(b)(10) of the intangibles tax act, which expressly exempts from taxation under that act the intangible personal property of telephone companies and other businesses "paying the tax assessed and levied under Act No. 282 . . . ." Petitioner then calls attention to § 2(e) of the intangibles tax act, which in pertinent part provides:

> Intangible personal property subject to tax under this act *or expressly exempt from the tax hereunder* shall be exempt from all *general* property taxes under the laws of this state. [Emphasis added.]

Upon the basis of the wording of §§ 2(e) and 3(b)(10) of the intangibles tax act, petitioner advances the circular reasoning that because it is "paying the tax assessed and levied under Act No. 282," its intangible personal property is exempt from taxation under § 3(b)(10) of the intangibles tax act, and because it is "expressly exempt," the same intangible property is also rendered exempt by § 2(e) from taxation under Act 282.

We reject this reasoning for two reasons. First, we believe it is clear that the Legislature provided the § 3(b)(10) exemption for telephone and other

public service companies precisely because their intangible property is subject to taxation under Act 282. The obvious and reasonable purpose was to avoid double taxation of such assets.

Second, the petitioner's position has no validity unless the Act 282 tax is a "general" property tax. We are persuaded by respondents' argument that the tax assessed under Act 282, unlike the General Property Tax Act, is more appropriately characterized as a selective tax imposed upon a relatively small number of companies whose property is centrally assessed, and whose businesses are public service in nature. Having in mind that the Legislature referred specifically to Act 282 when it granted the exemption in § 3(b)(10) of the intangibles tax act, we are not convinced that it intended, through the use of general terms in another section of the same act, to turn around and exempt the same intangibles of the same public service companies from any and all taxation under Act 282.

We conclude that the intangibles tax act does not preclude consideration of intangibles in valuing and assessing property for purposes of taxation under Act 282.

V

Finally, we consider petitioner's contention that in light of Const 1963, art 9, § 5, taxation of its intangible personal property is unconstitutional.

This provision of the constitution specifically refers to those public service businesses that were taxed under Act 282 before the current constitution became effective. It directs the Legislature to

> provide for the assessment by the state of the *property* of those public service businesses assessed

> by the state at the date this constitution becomes effective, and of other property as designated by the legislature, and for the imposition and collection of taxes thereon. [Emphasis added.][17]

It will be noted that this language recognizes no distinction between tangible and intangible property. Further, a convention comment that accompanied § 5 suggests that the word "property" was chosen for reasons rooted in the history of earlier constitutions of this state. The comment states:

> This is a new section directing the legislature to continue the present system of state assessment and collection of property taxes on the properties of certain utilities (notably telephone companies and railroads) . . . .

In the light of these guideposts, it is instructive to examine and compare pertinent language in § 3 of the same art 9 of the current constitution. It relates to the subject of general ad valorem taxation of property:

> The legislature shall provide for the uniform general ad valorem taxation of real and *tangible*

[17] Following is the full text of Const 1963, art 9, § 5:

> The legislature shall provide for the assessment by the state of the property of those public service businesses assessed by the state at the date this constitution becomes effective, and of other property as designated by the legislature, and for the imposition and collection of taxes thereon. Property assessed by the state shall be assessed at the same proportion of its true cash value as the legislature shall specify for property subject to general ad valorem taxation. The rate of taxation on such property shall be the average rate levied upon other property in this state under the general ad valorem tax law, or, if the legislature provides, the rate of tax applicable to the property of each business enterprise assessed by the state shall be the average rate of ad valorem taxation levied upon other property in all counties in which any of such property is situated.

personal property not exempt by law. [Emphasis added.][18]

Clearly, § 3 *does* distinguish between tangible and intangible property, and it limits the application of the general ad valorem property tax to real and *tangible* personal property. We are urged by petitioner to construe the meaning of "property" in § 5 by reading it as though it were modified by the word "tangible," as in § 3. We reject this suggestion.

When construing a constitution, words are to be given their natural and ordinary meaning. *People v Nash,* 418 Mich 196; 341 NW2d 439 (1983). "The object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it." 1 Cooley, Constitutional Limitations (8th ed), p 124. "Often, however, '[w]e cannot understand these provisions unless we understand their history . . . .'" *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 253; 507 NW2d 422 (1993) (RILEY, J., dissenting), quoting Cooley, *supra,* p 132.

A review of some of the history of the 1850 and 1908 Constitutions throws light on the meaning of words now at issue. In 1900, Governor Pingree

[18] Following is the full text of Const 1963, art 9, § 3:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates.

proposed and successfully pushed to ratification an amendment to the 1850 Constitution. Appearing before a joint session of the houses of the Legislature, he explained the need for such an amendment:

> Under our Constitution, as construed by the Supreme Court of Michigan, it is practically impossible to frame a law by which property of railroad, telegraph, telephone and express companies can be taxed upon its true value . . . . [Journal of the House, October 10, 1900, p 10.]

He continued at length, arguing the advantages of taxing the property of these companies, rather than their earnings. He contended that such a change in the method of taxing such companies would greatly benefit the school system.

Pointing to railroads as an example, Governor Pingree asserted, "Without franchises to operate their roads in Michigan, they would not enjoy the profits from 'through traffic.' " *Id.,* p 12. Acknowledging concern expressed that "no valuation has been made of railroad, telegraph, telephone and express companies' property," he explained that it would be the duty of the Board of State Tax Commissioners to "ascertain the valuation of the property of [these] corporations . . . ." *Id.,* p 13.

Leaving no doubt that his concept of property included intangibles, the Governor noted that the board had employed Prof. Henry C. Adams of the University of Michigan

> to investigate the subject of franchise values, and to determine the value of immaterial or intangible property, including the franchises, of these corporations. The addition of the value of the tangible property to the value of the intangible property, including franchises, will give the total valuation

according to one method of appraising the property. [*Id.*, p 13.]

He concluded this portion of his address to the Legislature as follows:

> Many of the statements herein made with reference to railroad, apply with equal force to telegraph, telephone and express companies, which pay taxes upon their earnings. In the case of the latter corporations, it will be found that the properties of greatest value which they possess are their franchises. [*Id.*, p 15.]

Although, as adopted, the amendment of the 1850 Constitution (art 14, § 10) mentioned only corporations to be designated by the Legislature,[19] it laid the foundation for the fundamental change in Michigan taxation of public service businesses, such as railroads, telegraph and telephone companies, which occurred with enactment in 1905 of Act 282. Later, when the 1908 Constitution was ratified, art 10, § 5 specifically referred to public service companies, including those that transmitted "messages by telephone or telegraph."[20]

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[19] Const 1850, art 14, § 10 provided:

> The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value by a state board of assessors and for the levying and collection of taxes thereon.

[20] Const 1908, art 10, § 5 provided:

> The legislature may provide by law for the assessment at its true cash value by a state board of assessors, of which the governor shall be ex-officio a member, of the property of corporations and the property, by whomsoever owned, operated or conducted, engaged in the business of transporting passengers and freight . . . transmitting messages by telephone or telegraph . . . and for the levy and collection of taxes thereon.

In light of this background, we find it particularly significant that neither the 1850 nor the 1908 Constitutions reflected any intention to distinguish between tangible and intangible property. Indeed, history strongly suggests that the word "property" was understood to include intangible, as well as tangible property.

Not until 1939, when the intangibles tax act was enacted, did intangibles become exempt from taxation under the General Property Tax Act and subject to separate taxation.[21] Thus, when the 1963 Constitution was drafted and ratified, art 9, § 3 relating to the general ad valorem property tax, recognized in the constitution for the first time a distinction between tangible and intangible property. Application of the general property tax was limited to "real and *tangible* personal property."

However, similar language was not used by the drafters of Const 1963, art 9, § 5, which refers to Act 282 taxation. Because intangibles of the affected public service companies are not, and never have been, exempt from Act 282 taxation, art 9, § 5 of the current constitution, like its counterpart in the 1908 Constitution, provides for "assessment by the state of the *property*" of certain public service companies.

Obviously, if they had so intended, the framers of the 1963 Constitution could have altered the treatment historically accorded public service companies taxed under Act 282. They could have done so by inserting the modifier "intangible" in art 9, § 5, just as they did in art 9, § 3. That they chose not to do so persuades us that Const 1963, art 9, § 5 is not a bar to the inclusion of intangibles in the assessment of property under Act 282.[22]

[21] MCL 205.132(e); MSA 7.556(2)(e).

[22] Petitioner sought in this appeal to argue also that Act 282

VI

For the reasons set forth, we affirm the decisions of the Michigan Tax Tribunal and the Court of Appeals.

CAVANAGH, C.J., and LEVIN, BRICKLEY, BOYLE, RILEY, and MALLETT, JJ., concurred with GRIFFIN, J.

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violates equal protection guarantees in the federal and state constitutions. However, because this issue clearly falls outside the limits of our order granting leave to appeal, we do not address it.

PEOPLE v LEMCOOL (AFTER REMAND)

PEOPLE v MAUSOLF (AFTER REMAND)

Docket Nos. 96887, 96888. Argued January 11, 1994 (Calendar Nos. 3-4). Decided June 24, 1994.

Terry L. Lemcool and Jean Marie Mausolf were charged in the Alpena Circuit Court with possession of less than 25 grams of cocaine. Lemcool additionally was charged with being an habitual offender, second offense. The prosecutor, after disclosing the witnesses intended to be called and providing copies of a laboratory report and police reports, moved for reciprocal discovery. The court, John F. Kowalski, J., ordered the defendants to disclose their witnesses and to list any physical evidence that they were planning to introduce. The Court of Appeals, TAYLOR, P.J., and MICHAEL J. KELLY, J. (SHEPHERD, J., dissenting), denied leave to appeal (Docket Nos. 150538, 150539). The Supreme Court remanded the cases to the Court of Appeals, 440 Mich 871 (1992). The cases were consolidated on remand, and the Court, MARILYN J. KELLY, P.J., and NEFF, J. (MACKENZIE, J., dissenting), reversed, holding that, in the absence of specific authority, the better policy is for trial courts to exercise judicial restraint and refuse to permit prosecutorial discovery (Docket Nos. 154860, 154861). The prosecutor appeals.

In a unanimous opinion per curiam, the Supreme Court *held:*

The circuit court did not abuse its discretion.

The question of discovery in a criminal case has long been entrusted to the discretion of the trial court. Because, in this case, the prosecution had already disclosed its witnesses and laboratory reports, and had provided copies of police reports, it was not error for the circuit court to order the defendants to provide names and addresses of expert and lay witnesses and a list of the physical evidence that they intended to use at trial.

Reversed.

200 Mich App 77; 504 NW2d 7 (1993) reversed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Dennis P. Grenkowicz,* Prosecuting Attorney, and *Robert A. Reuther,*

Chief Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Ronald J. Bretz*) for the defendants.

Amici Curiae:

Margaret M. Chiara, William A. Forsyth, and *Timothy K. McMorrow* for the Prosecuting Attorneys Association of Michigan.

David M. Lawson for the Criminal Defense Attorneys of Michigan.

PER CURIAM. This is an interlocutory appeal in a drug case. After the prosecuting attorney disclosed the names of the witnesses he intended to call at trial and provided a copy of the laboratory report, the circuit court ordered the defendants to disclose their witnesses and to list any physical evidence that they were planning to introduce.

The Court of Appeals reversed the order of the circuit court. However, we find that the circuit court did not abuse its discretion, and we therefore reverse the judgment of the Court of Appeals and reinstate the order of the circuit court.

I

Sergeant Thomas G. Mullaney of the Alpena Police Department was working undercover in Alpena on September 14, 1990.[1] While watching the parking lot of the Dry Dock Bar, he saw defendants Terry Lemcool and Jean M. Mausolf enter a pickup truck, together with a codefendant

[1] Because this case has not been tried, we are drawing the facts from the testimony given by the prosecution witnesses at the preliminary examination.

named David Sommerfeld. Mr. Sommerfeld was in the driver's seat and Mr. Lemcool was sitting on the passenger side. Ms. Mausolf sat between them.

Sergeant Mullaney approached the truck because the three appeared to be using a controlled substance. When he walked up to the vehicle, he saw a tray with white powder and a rolled dollar bill. A search of Mr. Lemcool produced a pack of Zigzag papers and a piece of metal that Sergeant Mullaney believed would be used to separate cocaine into lines.[2]

The defendants are charged with possessing less than 25 grams of cocaine.[3] MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Codefendant Sommerfeld evidently was also charged with the same offense, but his case is not before us on appeal.

Before the preliminary examination, counsel for defendants Lemcool and Mausolf filed in district court a December 11, 1990, appearance that included a demand for "[c]opies of complaint, warrant, statements, police reports" and a demand "[t]hat witness names and statements be provided, in compliance with MCL 767.40a *et seq.* [MSA 28.980(1) *et seq.*]." The file indicates that the prosecutor sent the police report to counsel the next day.

On January 2, 1991, defense counsel wrote to the prosecutor to say that, while he had received the police report, he did not have a copy of the laboratory report. Two days later, the prosecutor sent a copy of that report to defense counsel.

After the defendants were bound over to circuit

[2] The defendants initially refused to get out of the truck, and did so only after Sergeant Mullaney threatened to break the window. All three initially were charged with resisting and obstructing a police officer. MCL 750.479; MSA 28.747. However, the district judge ruled that there was insufficient evidence to bind them over on that charge.

[3] Defendant Lemcool is also charged as an habitual offender. MCL 769.10; MSA 28.1082.

court, the circuit judge prepared a November 18, 1991, "Arraignment Summary." It stated that the "prosecutor has given defendant copy of statement(s)" and that the "prosecutor has or will disclose physical evidence and will allow examination of same upon a reasonable request made within 3 days."

On December 6, 1991, the prosecutor filed a "Motion for Reciprocal Discovery." The motion recited that the prosecutor had complied with his statutory[4] obligation to disclose the names of witnesses that he intended to call at trial, and that he had provided the defendants with copies of the police reports.

In his discovery motion, the prosecutor requested "the names and addresses of all witnesses the defendant intends to call at trial, any written or recorded statements of the witnesses, any reports or statements of experts made in connection with the case and any real or tangible evidence the defendant intends to offer at trial." In support of the motion, the prosecutor cited *People v Richard P Johnson,* 168 Mich App 581, 583-585; 425 NW2d 187 (1988), and *People v Tronti,* 176 Mich App 544, 547-550; 440 NW2d 62 (1989).

In their written response to the prosecutor's motion, the defendants admitted that "the trial court has the authority to grant discovery," but urged that the prosecutor's request be denied.

The circuit court granted the prosecutor's motion, in part:

> THIS MATTER having come on for hearing and the Court being fully advised on the premises,
>
> IT IS HEREBY ordered that within twenty (20) days from the entry of this order the People will be furnished the following:

[4] MCL 767.40a(3); MSA 28.980(1)(3).

1. Names and addresses of the witnesses the defendant intends to call at trial.

2. Names and addresses of expert witnesses the defendant intends to call at trial.

3. A list of tangible physical evidence the defendant intends to introduce at trial.

IT IS FURTHER ordered that the defendant disclose to the People any additional names and addresses and any additional tangible physical evidence in a reasonable time after the twenty (20) days as they become known.

IT IS FURTHER ordered that the motion is denied as to furnishing any written reports or statements or any recorded statements of the witnesses in the possession of the defendant.

In an order denying the defendants' motions for reconsideration, the circuit court added this explanation:

> Finally, the Court notes Defendant's claim that reciprocal discovery would tend to lead to revelation of the theory of the defense, but is not persuaded by it in this instance. If Defendant's argument is valid, then any mere assertion by defense that discovery would reveal their theories would prohibit a Court granting discovery. This Court cannot believe such was the intention of the Legislature, Court of Appeals and Court Rules.

The defendants appealed.[5] Reversing the circuit court's discovery order, the Court of Appeals held that, "in the absence of specific authority [from a statute or court rule], the better policy is for trial courts to exercise judicial restraint and refuse to permit such prosecutorial discovery in light of

[5] The defendants' interlocutory applications initially were denied by the Court of Appeals. Unpublished orders of the Court of Appeals entered May 8, 1992 (Docket Nos. 150538, 150539). However, we remanded the case to the Court of Appeals for consideration as on leave granted. 440 Mich 871 (1992).

potential and far-reaching effects on fundamental constitutional principles and rights." 200 Mich App 77, 80-81; 504 NW2d 7 (1993). The majority went on to call on the Legislature and this Court "to define the scope of criminal discovery in Michigan." *Id.* at 82.

In dissent, Judge MACKENZIE wrote that the circuit court did not abuse its discretion in this case:

> As noted by the majority, there is at present a split of authority in this Court regarding whether general discovery may be ordered in favor of the prosecution. In *People v Paris,* 166 Mich App 276; 420 NW2d 184 (1988), this Court concluded that, in the absence of a court rule, the prosecution does not have a right to discovery except where statutorily mandated. In *People v* [*Richard P*] *Johnson,* 168 Mich App 581, 584; 425 NW2d 187 (1988), and *People v Tronti,* 176 Mich App 544, 550; 440 NW2d 62 (1989), however, this Court held that trial courts have inherent discretionary power to grant the prosecution discovery despite the absence of specific authorization by statute or court rule.
>
> Because the trial court's discovery orders are reviewed for abuse of discretion, *Tronti, supra,* defendants must establish that an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Watkins,* 176 Mich App 428, 430; 440 NW2d 36 (1989). Here, the trial court was entitled to follow the [*Richard P*] *Johnson* line of authority, see *In re Bay Co Prosecutor,* 102 Mich App 543, 549; 302 NW2d 225 (1980), and defendants offered only their unsupported allegation that discovery would tend to reveal their defense theory and strategy. Under these circumstances, I would find no abuse of discretion in the trial court's order and accordingly would affirm. [200 Mich App 82-83.]

The prosecutor filed applications for leave to appeal, which we granted "limited to [the issue] whether the trial court properly ordered the defendants to provide discovery to the prosecution." 444 Mich 866 (1993).

II

We have long entrusted the question of discovery in criminal cases to the discretion of the trial court. *People v Herbert L Johnson,* 356 Mich 619; 97 NW2d 739 (1959); *People v Maranian,* 359 Mich 361, 368; 102 NW2d 568 (1960); *People v Wimberly,* 384 Mich 62, 66, n 1; 179 NW2d 623 (1970); *People v Pearson,* 404 Mich 698, 731; 273 NW2d 856 (1979) (opinion of LEVIN, J.); *People v Freeman (After Remand),* 406 Mich 514, 516; 280 NW2d 446 (1979).

However, panels of the Court of Appeals have reached differing conclusions with regard to whether the prosecutor may discover information known to the defense. Compare *Richard P Johnson* and *Tronti, supra,* with the opinions issued by the Court of Appeals in the present case and in *People v Paris,* 166 Mich App 276, 278-280; 420 NW2d 184 (1988).

Extensive efforts also have been undertaken to formalize satisfactory rules of discovery in criminal cases. See, generally, proposed Subchapter 6.200 of the Michigan Court Rules, 422A Mich 65-106 (1985). In particular, proposed MCR 6.205 would have treated disclosure of information known to the defense. 422A Mich 79-87.

After lengthy discussions, we decided not to adopt proposed Subchapter 6.200. Rather than promulgate a set of fixed rules, we were persuaded to allow some further development of this area through the resolution of appellate cases.

A recent example of this case-by-case approach is *People v VanderVliet,* 444 Mich 52, 89; 508 NW2d 114 (1993). There, we held that, to aid in the resolution of issues concerning "similar acts" evidence under MRE 404(b), a trial judge may require disclosure of the defendant's theory:

> These considerations underscore the wisdom of embracing an approach to discovery, undertaken by many state courts and the federal judiciary, which promotes reliable decision making. To assist the judiciary in this extraordinarily difficult context and to promote the public interest in reliable fact finding, we intend to adopt a modification to Rule 404(b). We require the prosecution to give pretrial notice of its intent to introduce other acts evidence at trial,[51] and *authorize the trial judge, consistent with the law in ten other states,*[52] *to require the defendant to articulate his theory or theories of defense.*[53]
>
> [51] A notice requirement prevents unfair surprise and offers the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice.
>
> [52] 2 LaFave & Israel, Criminal Procedure, § 19.4(e), pp 519-520.
>
> [53] Michigan recognizes the broad power of the trial court to prevent ambush and surprise through the use of discovery, *People v Freeman (After Remand),* 406 Mich 514, 516; 280 NW2d 446 (1979); *People v Maranian,* 359 Mich 361; 102 NW2d 568 (1960); *People v [Herbert L] Johnson,* 356 Mich 619; 97 NW2d 739 (1959), limited only by a defendant's right not to incriminate himself. See *Williams v Florida,* 399 US 78; 90 S Ct 1893; 26 L Ed 2d 446 (1970).
>
> [444 Mich 89. Emphasis supplied.]

As indicated above, the question of discovery in a criminal case is committed to the discretion of the trial court. Thus, the question is whether the circuit judge in this case abused his discretion. We are satisfied that he did not.

Before making any request for discovery, the

prosecutor provided defense counsel with police reports and laboratory reports. He then asked for:

1. Defendant's expert witnesses, their names and addresses, and any reports or statements of experts made in connection with the case.
2. Defendant's witnesses, their names and addresses, and any written or recorded statements.
3. Any real or tangible evidence the defendant intends to offer at trial.

Properly exercising discretion, the circuit court ordered disclosure of the names and addresses of lay and expert witnesses, and a list of tangible physical evidence that the defendants will introduce at trial. The court denied the motion insofar as the prosecutor sought production of the written reports or statements of the defense witnesses.

There are many potential issues in this area, but we need not address them all today.[6] We are satisfied to say that the discovery order in this

[6] The Legislature has enacted 1994 PA 113. It adds the following language, to be compiled as MCL 767.94a; MSA 28.1023(194a), and it takes effect on October 1, 1994:

> (1) A defendant or his or her attorney shall disclose to the prosecuting attorney upon request the following material or information within the possession or control of the defendant or his or her attorney:
>
> (a) The name and last known address of each witness other than the defendant whom the defendant intends to call at trial provided the witness is not listed by the prosecuting attorney.
>
> (b) The nature of any defense the defendant intends to establish at trial by expert testimony.
>
> (c) Any report or statement by an expert concerning a mental or physical examination, or any other test, experiment, or comparison that the defendant intends to offer in evidence, or that was prepared by a person, other than the defendant, whom the defendant intends to call as a witness, if the report or statement relates to the testimony to be offered by the witness.

case was not an abuse of discretion.[7] Where the prosecution had already disclosed its witnesses and laboratory reports, and had provided copies of police reports,[8] it was not error for the circuit court to order the defendant to provide names and addresses of expert and lay witnesses and a list of

(d) Any book, paper, document, photograph, or tangible object that the defendant intends to offer in evidence or that relates to the testimony of a witness, other than the defendant, whom the defendant intends to call.

(2) The defendant or his or her attorney shall comply with the disclosure provisions of subsection (1) not later than 10 days before trial or at any other time as the court directs.

(3) A defendant shall not offer at trial any evidence required to be disclosed pursuant to subsection (1) that was not disclosed unless permitted by the court upon motion for good cause shown. A motion under this subsection may be made before or during trial.

We offer no opinion with regard to this measure.

[7] We have also considered the defendant's constitutional arguments, and find that they lack merit. In this regard we note the willingness of the United States Supreme Court to enforce sanctions imposed for violation of a reciprocal discovery order. *Taylor v Illinois,* 484 US 400; 108 S Ct 646; 98 L Ed 2d 798 (1988), reh den 485 US 983; 108 S Ct 1283; 99 L Ed 2d 494 (1988). The petitioner in *Taylor* did not contest the underlying discovery order, 484 US 413, and the Court noted that "[t]here may be cases in which a defendant has legitimate objections to disclosing the identity of a potential witness," 484 US 415, n 20. Nevertheless, it is clear that the Court saw the Illinois discovery rule as beneficial:

> The defendant's right to compulsory process is itself designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose. Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The "State's interest in protecting itself against an eleventh hour defense" is merely one component of the broader public interest in a full and truthful disclosure of critical facts. [484 US 411-412. Citation omitted.]

[8] In the circuit court, the parties disputed whether certain other police records existed and whether they should be turned over to the defense. Those questions are not before us.

the physical evidence that the defendants intended to use at trial.

For these reasons, we reverse the judgment of the Court of Appeals and reinstate the orders of the circuit court.

CAVANAGH, C.J., and LEVIN, BRICKLEY, BOYLE, RILEY, GRIFFIN, and MALLETT, JJ., concurred.

PASCHKE v RETOOL INDUSTRIES

Docket No. 96276. Argued January 12, 1994 (Calendar No. 6). Decided July 5, 1994.

Raymond R. Paschke sought worker's compensation benefits, alleging total disability arising out of his employment with Retool Industries. Soon after, he relocated to Florida. Thereafter, he sought and obtained unemployment compensation. A worker's compensation hearing referee denied benefits. The Worker's Compensation Appeal Board reversed. The Court of Appeals, WEAVER, P.J., and WAHLS and TAYLOR, JJ., reversed in an opinion per curiam, finding that the claim of total disability was barred by the doctrine of judicial estoppel because it was inconsistent with previous assertions made to the Michigan Employment Security Commission that he was willing and able to work (Docket No. 131280). On rehearing, the Court further explained that under the doctrine of judicial estoppel only wholly inconsistent claims are prohibited and that the receipt of unemployment benefits would not preclude a claim of partial disability for the same period. The claimant appeals.

In an opinion by Justice MALLETT, joined by Chief Justice CAVANAGH, and Justices LEVIN and BOYLE, the Supreme Court *held:*

A representation made before the Michigan Employment Security Commission in order to secure unemployment benefits that a person is willing and able to work may not be used to preclude a subsequent worker's compensation claim of total disability during the same period.

1. The doctrine of judicial estoppel precludes the assertion of inconsistent positions; however, the mere assertion of inconsistent positions is not sufficient to invoke estoppel. Rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. To apply, the claims must be wholly inconsistent. In this case, there is neither

REFERENCES

Am Jur 2d, Workers' Compensation §§ 381, 413.

Application for, or receipt of, unemployment compensation benefits as affecting claim for workmen's compensation. 96 ALR2d 941.

statutory nor judicial support for the Court of Appeals determination that the plaintiff's representation before the MESC that he was ready and available for work, was wholly inconsistent with his subsequent claim of total disability during the same period.

2. A comparison of the Worker's Disability Compensation Act and the Employment Security Act provides no support for the conclusion that the plaintiff's receipt of unemployment benefits estops his worker's compensation claim of total disability for the same period. Nor do the statutes provide that a claim that a person is ready and able to work is inherently inconsistent with a subsequent claim of total disability for the same period. Further, the worker's compensation offset provision suggests that the Legislature contemplated the simultaneous recovery of worker's compensation and unemployment benefits.

3. Representations made before the MESC generally may not be used to estop claims in other forums in which the MESC is not a party. Long delays in pursuing worker's compensation claims can make interim measures a vital necessity. The use of MESC determinations in other forums not only may disadvantage the parties to such litigation, but actually may impede the objectives of the unemployment compensation system itself.

Justice BRICKLEY, concurring in the result, stated that because MCL 418.358; MSA 17.237(358) provides a specific legal remedy for the situation presented in this case, it absolutely precludes the application of equitable principles. Thus, the Court of Appeals erred in invoking, sua sponte, the equitable doctrine of judicial estoppel, requiring remand for a determination whether the WCAB applied the correct legal standard, i.e., whether being disabled from particular previous employment suffices to establish disability in the employee's general field of employment pursuant to MCL 418.301(4); MSA 17.237(301)(4).

Reversed and remanded.

Justice GRIFFIN, joined by Justice RILEY, dissenting, stated that, under the particular circumstances of this case, the plaintiff, by seeking and obtaining unemployment compensation benefits, is judicially estopped from claiming that, for the same period, he was totally disabled and entitled to worker's compensation benefits.

Under the doctrine of judicial estoppel, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. Use of the doctrine depends on the facts and circumstances of each case. In this case, the plaintiff

tried to get back his former job from the defendant, refused the offer of a different job by the defendant out of an apparent lack of desire to work under a former subordinate, represented to the Michigan Employment Security Commission that he was able and available to work full-time in his usual line of work, sought employment in Michigan and in Florida, yet claims that he is totally disabled, i.e, that his wage-earning capacity in his general field of employment has been foreclosed for the same periods. The doctrine of judicial estoppel goes to the heart of the plaintiff's eligibility for benefits. The Court of Appeals properly applied the doctrine.

198 Mich App 702; 499 NW2d 453 (1993) reversed.

WORKER'S COMPENSATION — UNEMPLOYMENT COMPENSATION — TOTAL DISABILITY — JUDICIAL ESTOPPEL.

A representation made before the Michigan Employment Security Commission in order to secure unemployment benefits that a person is willing and able to work may not be used to preclude a subsequent worker's compensation claim of total disability during the same period.

Goodman, Eden, Millender & Bedrosian (by *Roderick V. MacNeal*) for the plaintiff.

Lacey & Jones (by *Gerald M. Marcinkoski*) for the defendants.

Amici Curiae:

Conklin, Benham, Ducey, Listman & Chuhran, P.C. (by *Martin L. Critchell*), for Michigan Self-Insurers' Association.

Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C. (by *Theodore Sachs, Andrew Nickelhoff,* and *Granner S. Ries*), for Michigan State AFL-CIO.

MALLETT, J. This worker's compensation case comes to us following a reversal of an award by the Court of Appeals. The Court of Appeals found that plaintiff was judicially estopped from assert-

ing his claim of total disability by previous assertions made to the Employment Security Commission that he was willing and able to work.

We reverse the decision of the Court of Appeals and find that plaintiff was not judicially estopped from advancing his claim. A representation made before the MESC that one is willing and able to work, in order to secure unemployment benefits, may not be used to preclude a subsequent claim that one was totally disabled during that same period.

I

There being no showing of fraud, we take the factual findings of the Worker's Compensation Appeal Board as conclusive. Const 1963, art 6, § 28, MCL 418.861; MSA 17.237(861).

Plaintiff Raymond R. Paschke was employed by defendant Retool Industries from 1956 until 1983. During that twenty-seven year span, Mr. Paschke worked in the capacity of office manager. As office manager, he was in charge of funding, client development, payroll, and similar matters. He testified that he spent the majority of his time in customer relations.

In 1981, the owner of Retool Industries sold his interest to Herman Wilson, previously the company foreman. Within less than a month after taking over the business, Mr. Wilson discharged assistant office manager Nelson Nettie, despite admitted discussions before the takeover that he would keep on both Mr. Nettie and plaintiff. While Mr. Wilson testified that he had discharged Mr. Nettie for stealing from the company, he also stated that he had been aware of that stealing before his promise to keep him on. Mr. Nettie denied that he was discharged for stealing. After

terminating Mr. Nettie, Mr. Wilson replaced him as assistant office manager with Carolyn Wilkerson, Mr. Wilson's live-in girl friend.

After the first year of Mr. Wilson's ownership, in late 1982 and early 1983, plaintiff began to experience physical problems such as inability to sleep, chest pains, and headaches. He attributed these ailments to troubling conditions at work. Specifically, he felt that Ms. Wilkerson was given preferential treatment in the form of a relaxed workday schedule and pay increases, while he and other employees received no increased benefits, but actually had their vacation pay benefits cut. Further, he had seen Mr. Nettie discharged, despite Mr. Wilson's promise to keep him on, and plaintiff feared that he might be next to go. He also testified that he felt anxiety regarding his dealings with creditors, who had loaned funds to the company largely on the basis of their past dealings with and trust of him. The company was increasingly unable to satisfy those debts because of financial difficulties, and plaintiff felt that he could not deal honestly with those creditors, because Mr. Wilson refused to discuss workplace finances with him and also refused to deal with the creditors himself.

On March 22, 1983, plaintiff stayed home from work, on the advice of his wife, and sought medical treatment from their family doctor, Robert Tam. Dr. Tam prescribed antidepressants and blood pressure and water pills. He also recommended that plaintiff not return to work.

By June, 1983, plaintiff had begun to feel better, and he contacted Mr. Wilson about resuming his former position as office manager. By registered letter, Mr. Wilson informed plaintiff that he could return to work, but not in his former position. Instead, he offered plaintiff the assistant office

manager position, in which plaintiff would serve as subordinate to his former underling, Ms. Wilkerson, at a corresponding cut in pay. The letter acknowledged that plaintiff's "hypertension and nerves" might be related to work and stated that the board felt a lessening of responsibility might alleviate plaintiff's ailments.

Plaintiff testified that he was "[s]hocked" by this response, that it caused his physical condition to worsen, and that he rejected the offer of reemployment. For the next six months, he received company health and accident benefits. In August, 1983, plaintiff petitioned for worker's compensation benefits, alleging total disability, and soon thereafter relocated to Florida, where he and his wife purchased a home. In November, 1983, he sought and obtained unemployment compensation, over Mr. Wilson's objection.[1]

At the worker's compensation hearing before a hearing referee, plaintiff testified, without objection, to the fact that he had previously received unemployment compensation and that, in order to receive that benefit, he had represented to the MESC that he was ready and able to return to work at some place other than Retool Industries. He also testified that he had unsuccessfully sought work since leaving Retool. His wife testified that he had sent out twenty-five to thirty résumés, primarily in Florida.

The referee found that plaintiff had failed to establish any disability arising out of the course of employment. The ruling was reversed by the WCAB. By order dated June 29, 1990, the WCAB awarded plaintiff total disability benefits on the basis of his hypertension and psychiatric claims.

[1] The WCAB reported that plaintiff received unemployment benefits until November, 1983. However, plaintiff's testimony established that he began receiving unemployment compensation in November, 1983. His last payment was received on July 14, 1984.

Defendants appealed in the Court of Appeals, which found, sua sponte, that plaintiff's worker's compensation claim was barred by the doctrine of judicial estoppel. 197 Mich App 650; 496 NW2d 804 (1992). The Court held that plaintiff's claim was inconsistent with claims earlier made to the MESC that he was willing and able to work.[2]

Following a petition for rehearing, the Court of Appeals clarified its brief holding in the case. 198 Mich App 702; 499 NW2d 453 (1993). While maintaining that plaintiff was judicially estopped from asserting his worker's compensation claim, the Court limited its decision to the facts of plaintiff's case, i.e., a claim for total disability. The Court explained that under the doctrine of judicial estoppel only "wholly inconsistent" claims are prohibited, and that the receipt of unemployment benefits would not preclude a claim of *partial* disability for the same period. *Id.* at 709. Dual recovery might also be allowed if claimant's disability consisted of a latent condition that was not discovered

[2] The sum of the Court of Appeals explanation was contained in the following paragraph:

> In applying for and receiving unemployment benefits, plaintiff asserted that he was able to continue to engage in gainful employment. The Court will not allow a party to assert a position and receive a benefit on one side of the ledger, then make a contrary assertion on the other. *Allen v Zurich Ins Co,* 667 F2d 1162 (CA 4, 1982); *SCA Services, Inc v General Mill Supply Co,* 129 Mich App 224; 341 NW2d 480 (1983); *Murdock v Michigan Health Maintenance Organization,* 434 Mich 851; 450 NW2d 264 (1990). [*Id.* at 652.]

There is no indication that plaintiff's representations were *themselves* inconsistent. According to testimony, plaintiff advanced both his unemployment and worker's compensation claims on the premise that he was ready and able to work, although at some place other than Retool Industries. Therefore, the Court of Appeals decision must be read as implying that it was the nature of his claims that was inconsistent, i.e., a claim that one is able and available for work is inherently inconsistent with a claim of total disability for the same period.

until after claimant had sought and received unemployment benefits.

This Court granted leave to appeal. 444 Mich 866 (1993). We reverse.

II

The doctrine of judicial estoppel first emerged in the mid 1800s, in a Tennessee case, *Hamilton v Zimmerman,* 37 Tenn (5 Sneed) 39 (1857). Comment, *Judicial estoppel—Beating shields into swords and back again,* 139 U Pa L R 1711, 1719 (1991). In *Hamilton,* the court determined that the plaintiff was estopped from maintaining a position inconsistent with one he had asserted under oath in an earlier judicial proceeding. Sometimes described as the doctrine against the assertion of inconsistent positions, Comment, *supra* at 1711, judicial estoppel is widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play "fast and loose" with the legal system. Bigelow, Estoppel (6th ed), p 783. Since *Hamilton,* the doctrine has been adopted by most state and federal courts, in slightly varying forms.[3]

In the context of the administrative proceedings at issue, we adopt the "prior success" model of judicial estoppel:

> Under this doctrine, a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. [*Lichon v American Univ Ins Co,* 435 Mich 408, 416; 459 NW2d 288 (1990), citing *Edwards v Aetna Life Ins Co,* 690 F2d 595, 598 (CA 6, 1982). Emphasis added.]

[3] It is questionable, however, whether the doctrine has been adopted by the United States Supreme Court. See, generally, Comment, *supra.*

Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true.[4] Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent.

While the Court of Appeals correctly stated that only wholly inconsistent claims were precluded, we find that the panel's application of that standard to the facts in this case was clearly error. There exists neither statutory nor judicial support for the Court of Appeals determination that plaintiff's representation that he was ready and available for work, made before the MESC, was wholly inconsistent with his subsequent claim of total disability during the same period.

A

This Court and the lower courts of Michigan have devoted considerable time and energy to the examination of both statutes involved in this dispute: the Worker's Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*, and the Employment Security Act, MCL 421.1 *et seq.*; MSA 17.501 *et seq.* In the course of this exploration, a number of guiding principles has emerged that might be helpful in evaluating the interrelation of the two statutes in the present case.

We have previously explained that the WDCA is in derogation of the common law, and its terms

[4] In contrast to the *Hamilton* test, the "prior success" model is more narrowly tailored to allow for alternative pleadings in the same or different proceedings. As such, it may be seen as focusing less on the danger of inconsistent claims, than on the danger of inconsistent rulings. See, e.g., note, *Judicial estoppel: The refurbishing of a judicial shield,* 55 Geo Wash L R 409, 426 (1987); comment, *Precluding inconsistent statements: The doctrine of judicial estoppel,* 80 NW U L R 1244, 1253 (1986).

should be literally construed without judicial enhancement.

> The workmen's compensation law is a departure, by statute, from the common law, and its procedure provisions speak all intended upon the subject. *Rights, remedies, and procedure thereunder are such and such only as the statute provides.* If the statute is short of what it should contain in order to prevent injustice, the defects must be cured by future legislation and not by judicial pronouncement. [*Luyk v Hertel,* 242 Mich 445, 447; 219 NW 721 (1928). Emphasis added.]

Where the statutory language is clear, the courts should neither add nor detract from its provisions. Nevertheless, where ambiguity exists, and judicial interpretation is needed, the act should be liberally construed to grant rather than to deny benefits. *Bower v Whitehall Leather Co,* 412 Mich 172, 191; 312 NW2d 640 (1981).

Like the WDCA, the Employment Security Act is a legislative construct intended to "provide relief from the hardship caused by involuntary unemployment . . . ." *Storey v Meijer, Inc,* 431 Mich 368, 377; 429 NW2d 169 (1988). Accordingly, this Court will not "broaden or extend the disqualifications fixed, in plain language, by the legislature." *Thomas v Employment Security Comm,* 356 Mich 665, 669; 97 NW2d 784 (1959). We will, however, keep in mind the legislative purpose of the statute, "to get 'money into the pocket of the unemployed worker at the earliest point that is administratively feasible.' " *Storey,* 431 Mich 377, quoting *California Dep't of Human Resources Development v Java,* 402 US 121, 135; 91 S Ct 1347; 28 L Ed 2d 666 (1971).

This Court has also had occasion to examine the interplay of the worker's compensation and unem-

ployment compensation systems, and, in doing so, has emphasized the distinct character and objectives of the two institutions. In *Bartels v Ford Motor Co,* 292 Mich 40; 289 NW 322 (1939), the defendant argued that it should be relieved of making partial disability payments to the claimant during a period in which the claimant was also receiving unemployment compensation. In rejecting the defendant's claim, we explained:

> The legislative intent was to set up two independent organizations for the administration of two kinds of compensation, payable from different funds or sources. Until the unemployment compensation act became the law of this State there could be no question of plaintiff's right to compensation for the disputed period; and *to permit a setoff by the department of labor and industry would in effect extend relief to the employer beyond the express terms of the workmen's compensation act.* The contingency which has arisen in this case has come about by reason of the passage of the unemployment compensation act. The remedy lies with the legislature.[5] [*Id.* at 46. Emphasis added.]

The Legislature has since passed a WDCA provision that allows for a dollar-for-dollar setoff between worker's compensation and unemployment benefits.[6] However, the underlying premise of *Bartels* remains valid, and we will not sanction the denial or diminution of otherwise available worker's com-

[5] See also *Henry v Ford Motor Co,* 291 Mich 535, 541; 289 NW 244 (1939), in which we stated, in regard to the simultaneous receipt of unemployment benefits and worker's compensation:

> Both awards are purely statutory and, while there is no question about some incongruity in the provisions, nevertheless we are bound by the wording of the statutes. The remedy is with the legislature who alone can provide for deductions or denial of compensation under one act or the other.

[6] MCL 418.358; MSA 17.237(358).

pensation benefits because of claims cognizable only under the Employment Security Act, absent legislative authorization.

B

Turning to the statutes in question, we can find no support for the Court of Appeals conclusion that plaintiff's receipt of unemployment benefits estops his total disability claim for the same period. Unlike several states,[7] the Michigan Legislature has not explicitly prohibited the receipt of total disability payments for a period in which unemployment was received.[8] Nor is there evidence that, under the statutes, a claim that one is ready and able to work is inherently inconsistent with a subsequent total disability claim for the same period.

Professor Larson explored the latter point in his treatise on worker's compensation law, in which he explained:

> At first glance the two positions may appear mutually exclusive; but the inconsistency disappears when the special meaning of disability in workmen's compensation is remembered, involving, as we have seen, the possibility of some physical capacity for work which is thwarted by the inability to get a job for physical reasons. Thus, the injured claimant may honestly represent to the Employment Security office that he is able to do some work, and with equal honesty tell the

[7] See 4 Larson, Workmen's Compensation, § 97.20, pp 18-11 to 18-19. Further, we note that the temporary suspension measures applied in those states are far less severe than the potentially permanent forfeiture advocated here by defendants.

[8] The Employment Security Act does prohibit the receipt of unemployment compensation during a period of continuous disability, MCL 421.28a(5); MSA 17.530(1)(5). However, there is no indication that the reverse is true, and we decline to read a reciprocal provision into the WDCA, given the differing objectives and mechanisms of the two acts.

> Compensation Board later that he was totally disabled during the same period since, although he could have done some kinds of work, no one would give him a job because of his physical handicaps. [1C Larson, Workmen's Compensation, § 57.65, p 10-492.50.]

Further, the offset provision of the Michigan worker's compensation statute suggests that the Legislature contemplated the simultaneous recovery of worker's compensation and unemployment benefits. MCL 418.358; MSA 17.237(358). As previously discussed, this provision allows a dollar-for-dollar setoff between unemployment benefits and benefits sought under worker's compensation. Importantly, it specifically references not only the partial disability section of the statute, but the section concerning total disability as well, implicitly acknowledging that the Legislature envisaged instances in which both unemployment and total disability benefits would be recoverable.

In rejecting the estoppel theory applied by the Court of Appeals and urged by defendants, we act in concert with numerous other jurisdictions faced with the same question, within the context of similar legislation.[9] We also act in accordance with past case law[10] and with policy considerations that require us to interpret liberally both the WDCA and

[9] See 1C Larson, *supra,* § 57.65, p 10-492.51, n 62. As of its 1992 publication, Larson pointed to seventeen jurisdictions that had refused, absent legislative authorization, to deny or diminish worker's compensation benefits on the basis of representations made for unemployment compensation purposes that claimant was ready and able to work. Several of those jurisdictions were faced, as are we, with reconciling unemployment claims with claims for total disability. See, e.g., *Wells v Jones,* 662 SW2d 849 (Ky App, 1983); *Dolbow v Holland Industrial, Inc,* 64 NC App 695; 308 SE2d 335 (1983); *Crow's Hybrid Corn Co v Industrial Comm,* 72 Ill 2d 168; 380 NE2d 777 (1978); *Utica Mutual Ins Co v L J Pioda,* 90 Ga App 593; 83 SE2d 627 (1954).

[10] See, e.g., *Henry,* n 5 *supra,* finding that an award of total disability was not precluded by receipt of unemployment benefits during the same period.

the Employment Security Act, in order to fulfill their remedial objectives.[11]

C

We further find persuasive plaintiff's assertion that even were the claims inconsistent, representations made before the MESC may not generally be used to estop claims in other forums, where the MESC is not a party to the proceeding.[12] The Employment Security Act provides in pertinent part:

> Information obtained from any employing unit or individual pursuant to the administration of this act, and determinations as to the benefit rights of any individual shall be held confidential and shall not be disclosed or open to public inspection other than to public employees in the performance of their official duties pursuant to this act in any manner revealing the individual's or the employing unit's identity. However, any information in the commission's possession that may affect a claim for benefits or a charge to an employer's rating account shall be available to interested parties. *Except as provided in this act, such information and determinations shall not be used in any action or proceeding before any court or administrative tribunal unless the commission is a party to or a complainant in the action or proceed-*

[11] In a wage-loss system, in which disability is phrased in terms of a limitation of the worker's earning capacity, rather than the degree of physical impairment, physical disability is only one factor of the equation. See St. Antoine, Workers' Compensation in Michigan: Costs, Benefits, and Fairness, pp 24-26. The fact that the MESC may have adjudged plaintiff able and available to perform some work for which he was qualified by training and experience simply does not foreclose the possibility that, during that same period and thereafter, plaintiff actually suffered a limitation of his earning capacity, even one rising to the level of total disability. See dissent, pp 531-532.

[12] In reaching this determination, we do not pass upon the possible evidentiary uses of such representations. See *Murdock v Michigan Health Maintenance Organization,* n 2 *supra* (remanding the case to the WCAB for reconsideration of its factual finding of disability in light of the plaintiff's receipt of unemployment compensation benefits).

> *ing, or unless used for the prosecution of fraud, civil proceeding, or other legal proceeding pursuant to subdivision (2).* Any report or statement, written or verbal, made by any person to the commission, any member of the commission, or to any person engaged in administering this law shall be a privileged communication, and a person, firm, or corporation shall not be held liable for slander or libel on account of a report or statement. Such records and reports in the custody of the commission shall be available for examination by the employer or employee affected. [MCL 421.11(b)(1); MSA 17.511(b)(1). Emphasis added.]

In *Storey v Meijer, Inc, supra,* we interpreted the above provision to prohibit the use of factual determinations of the MESC to collaterally estop the litigation of issues in a subsequent civil proceeding. We determined that application of collateral estoppel to such determinations would be contrary to legislative intent as well as public policy considerations that support expeditious and nonadversarial unemployment proceedings. Were MESC determinations to have binding effect upon subsequent and more consequential civil actions, employers would be more likely to contest their comparatively minor unemployment liability, thus significantly delaying the recovery of unemployment benefits. *Id.* at 378. Further, the binding effect of unemployment compensation determinations might cause a potential claimant to forgo those benefits, otherwise available, in order to preserve a later claim for civil damages. It might also cause one who pursued unemployment benefits, ignorant of their effect on future civil claims, to unknowingly and permanently forfeit his right to recovery. *Id.* at 378-379.

The same policy considerations that governed in *Storey* are applicable where unemployment bene-

fits are balanced against worker's compensation. We have previously acknowledged that long delays in pursuing worker's compensation claims can make interim measures a vital necessity for those suffering from involuntary unemployment.[13] As in *Storey,* we have no desire to impede those who would otherwise take advantage of such interim measures, particularly when a statutory offset provision precludes dual recovery by claimants.[14]

Defendants argue that judicial estoppel is appropriate here because, unlike in *Storey,* it is plaintiff's *statements,* not the determinations of the MESC, that are being used to estop him. Accordingly, defendants claim that the protections afforded under § 11(b)(1) are not implicated by the facts of this case.

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[13] In *Bower v Whitehall Leather Co, supra* at 193, we determined that the plaintiff's refusal of favored work was reasonable because he had subsequently moved to Florida to accept a new position. In reaching that decision, we relied partly on the economic necessity of a claimant securing a means of support pending resolution of his disability claim:

> Further, it is important to recognize that if the employer does not pay compensation voluntarily, the employee may be without any means of support until an award of benefits is made by the referee at the hearing. In the instant case, the hearing did not take place until nine months after the claim was filed, regrettably only a short time in the life of a court proceeding, but a long time in the economic existence of an individual. Yet the threat of denial of benefits would discourage the worker from seeking, and another employer from offering, a substitute job the claimant may need to survive.

Since the Court's 1981 decision in *Bower,* the delay in pursuing a worker's compensation claim has, if anything, increased. In plaintiff's case, his petition for hearing was received by the WCAB on August 9, 1983, and his case was not heard until July 15 and 16, 1985, nearly two years later.

[14] These findings apply with equal or greater force to the argument advanced by amicus curiae, Michigan Self-Insurers' Association, that res judicata should apply to bar plaintiff's claim. This contention runs counter to the Court's decision in *Storey,* and, amicus curiae has failed to provide any relevant case law to support its argument. No cases cited by amicus curiae involved previous claims made before the MESC.

We disagree. As discussed above, our theory of judicial estoppel differs from the original *Hamilton* formulation in that it requires a party to have *successfully* asserted an inconsistent position in an earlier proceeding in order for estoppel to apply. A finding of estoppel is inextricably linked to the MESC findings regarding plaintiff's unemployment claims. Moreover, the same policy considerations that we found persuasive in *Storey* are applicable here. It would be counter to the objectives of both unemployment and worker's compensation either to increase the litigiousness of unemployment claims or to discourage workers from seeking unemployment benefits altogether.

Lastly, defendants argue that by voluntarily testifying about the substance of his representations made before the MESC, plaintiff waived any privilege attached thereto. This argument fails because the Employment Security Act provision, as interpreted by this Court, provides for an *absolute privilege:*

> We find that § 11(b)(1) clearly and unambiguously prohibits the use of MESC information and determinations in subsequent civil proceedings *unless the MESC is a party or complainant in the action.* [*Storey,* 431 Mich 376. Emphasis added.]

See also *Wojciechowski v General Motors Corp,* 151 Mich App 399, 406; 390 NW2d 727 (1986). There is no indication that this privilege is subject to waiver by the parties.[15]

[15] Defendants' attempt to analogize § 11(b)(1) to the attorney-client privilege is inapposite. As described by this Court, the attorney-client privilege is personal to the client and hence may be waived by that client:

> There is a privilege of secrecy as to what passes between attorney and client, but it is the privilege of the client and he

The rationale for the bright-line test provided by the Legislature is clear from a policy standpoint. As discussed above, use of MESC determinations in other forums may not only disadvantage the parties to that litigation,[16] but may actually impede the objectives of the unemployment compensation system itself. We will not read a waiver provision into § 11(b)(1) when it is not evident from the language that one was intended, and when the effect of a waiver would be to impede legislative objectives.

III

We find that the Court of Appeals clearly erred in determining, sua sponte, that plaintiff's total disability claim was judicially estopped by earlier representations before the MESC that he was ready and able to work. Neither the language nor the policy objectives of the Worker's Disability Compensation Act or the Employment Security Act support that result. Accordingly, we reverse the decision of the Court of Appeals. We remand this case to the Court of Appeals to consider those

> may waive it if he so chooses. . . . It is not the privilege of the court or of any third party. [*Passmore v Passmore Estate,* 50 Mich 626, 627; 16 NW 170 (1883), quoted in *In re Dalton Estate,* 346 Mich 613, 621; 78 NW2d 266 (1956).]

In contrast, § 11(b)(1) is constructed less as a personal privilege than a systemic policy. There is no indication in the language of the section that the action of either party is necessary to give it effect, or that the action of either party can obviate its effect.

[16] Under the facts of this case, we have focused primarily on the negative effect that judicial estoppel would have upon the potential *claimant.* Nevertheless, it seems clear that employers might also be disadvantaged by the binding effect of MESC proceedings. For instance, an employer who succeeds in defeating an unemployment claim on the ground that claimant was *not* ready and able to work, could be held bound by that assertion in later worker's compensation or civil proceedings.

issues previously raised by the parties but not addressed by that Court.

CAVANAGH, C.J., and LEVIN and BOYLE, JJ., concurred with MALLETT, J.

BRICKLEY, J. (*concurring*). While I agree with the majority's conclusion that plaintiff's total disability claim is not barred by judicial estoppel, and that the Court of Appeals erred by holding otherwise, I do not subscribe to the rationale offered for this resolution and, accordingly, am compelled to write separately. I also write separately to expressly align myself with the dissenting position for a remand to the Court of Appeals so that it may ultimately address the merits of plaintiff's total disability claim, and specifically the issue whether the WCAB applied the correct legal standard.

I

It is well established that "equity follows the law," and that where legislation provides an adequate legal remedy, the judiciary may not create additional relief by invoking equitable doctrines.[1] The Legislature has devised a specific remedy—i.e., an offset provision—for the situation presented here. MCL 418.358; MSA 17.237(358). The availability of this legal remedy absolutely precludes the application of equitable principles, and, accordingly, the Court of Appeals clearly erred by invoking, sua sponte, the equitable doctrine of judicial estoppel in this case.

I believe that the majority fails to adequately

[1] *Hoffman v Burkhammer*, 373 Mich 187; 128 NW2d 503 (1964); *Schantz v Ruehs*, 348 Mich 680; 83 NW2d 587 (1957); *Ramirez v Bureau of State Lottery*, 186 Mich App 275; 463 NW2d 245 (1990).

capitalize upon this preclusion argument. While some discussion of MCL 418.358; MSA 17.237(358) is offered, see *ante* at 514, this solitary paragraph does not discuss the statutory provision as creating a legal remedy, but instead focuses upon the provision as "suggest[ing] that the Legislature contemplated the simultaneous recovery of worker's compensation and unemployment benefits." *Id.* This failure to focus upon the *remedial* nature of MCL 418.358; MSA 17.237(358), combined with an in-depth discussion of why judicial estoppel does not deny worker's compensation benefits in this case,[2] sends an erroneous message that judicial estoppel is somehow relevant to the issue presented here. It is not—the Legislature has spoken.

II

The majority ultimately remands this case to the Court of Appeals for consideration of those issues "previously raised by the parties but not addressed by that Court." *Ante* at 520. I agree with this remand, but write separately to reiterate an important point made by the dissent: namely, that on remand the Court of Appeals must determine "whether the WCAB applied the correct legal standard—i.e., whether being disabled from one's previous particular employment suffices to establish 'disability' in the employee's 'general field of employment' pursuant to § 301(4)." *Post* at 534, n 6 (GRIFFIN, J., dissenting).

Defendant's appeal from the WCAB decision specifically challenged the board's finding of a total disability. While at this juncture I cast no opinion regarding the appropriateness or accuracy of the WCAB's total disability conclusion, it seems clear that this important issue, like most issues properly

[2] See *ante* at 513-515.

raised on an appeal, deserves the full attention of the Court of Appeals on remand.

For these reasons, I concur in the result reached by the majority.

GRIFFIN, J. I respectfully dissent. I agree with the Court of Appeals that, under the particular circumstances of this case, plaintiff Raymond Paschke, by seeking and obtaining unemployment compensation benefits, is judicially estopped from claiming that, for the same period, he was totally disabled and entitled to worker's compensation benefits.

Under the doctrine of judicial estoppel, "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Lichon v American Universal Ins Co,* 435 Mich 408, 416; 459 NW2d 288 (1990). The underpinnings of the doctrine were explained by the court in *Edwards v Aetna Life Ins Co,* 690 F2d 595, 599 (CA 6, 1982):

> The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery. . . . Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled. See *Konstantinidis v Chen* [200 US App DC 69, 74] 626 F2d [933] 938 [1980].
>
> In light of the policies underpinning judicial estoppel, the rule can not be applied in a subsequent proceeding unless a party has successfully asserted an inconsistent position in a prior proceeding. . . . Absent judicial acceptance of the inconsistent position, application of the rule is

unwarranted because no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected; the perception that either the first or the second court was misled is not present.

The doctrine of judicial estoppel is to be applied with caution. As the court explained in *Allen v Zurich Ins Co,* 667 F2d 1162, 1166-1167 (CA 4, 1982),

> The circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle, but they may be found where neither collateral estoppel nor equitable estoppel . . . nor any requirements of election of remedies or theories . . . would apply. Its essential function and justification is to prevent the use of "intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano v Central R Co,* 203 F2d [510] 513 [CA 3, 1953].

The instant case involves interpretation of statutes governing two different compensation systems, the Michigan Employment Security Act and the Worker's Disability Compensation Act. As a condition precedent to the receipt of unemployment benefits, the MESA requires:

> An unemployed individual shall be eligible to receive benefits with respect to any week *only if* the commission finds that . . . [*t*]*he individual is able and available to perform suitable full-time work* of a character which the individual is qualified to perform by past experience or training, which is of a character generally similar to work for which the individual has previously received wages, and for which the individual is available, full time, either at a locality at which the individ-

ual earned wages for insured work during his or her base period or at a locality where it is found by the commission that such work is available. [MCL 421.28(1)(c); MSA 17.530(1)(c). Emphasis added.]

The definition of "disability" for worker's compensation purposes at the time of the plaintiff's alleged injuries provided:

As used in this chapter, "disability" means a *limitation of an employee's wage earning capacity in the employee's general field of employment* resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss. [MCL 418.301(4); MSA 17.237(301)(4). Emphasis added.][1]

Plaintiff in the case at bar sought and was awarded unemployment benefits following a hearing contested by his employer, defendant Retool Industries. He subsequently filed for worker's compensation benefits, alleging that he suffered total disability during that same period. He ultimately received the desired benefits from the Worker's Compensation Appeal Board. While the MESA prohibits the receipt of unemployment compensation benefits during a period of continuous disability, MCL 421.28a(5); MSA 17.530(1)(5),[2] the converse is

[1] A different standard took effect in June 1987, defining "disability" as "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training . . . ." MCL 418.301(4); MSA 17.237(301)(4), as amended by 1987 PA 28. However, this definition applies solely to those injured on or after its effective date. *Turrentine v General Motors Corp,* 198 Mich App 572; 499 NW2d 411 (1993).

[2] MCL 421.28a(1), (5); MSA 17.530(1)(1), (5) provides in pertinent part:

(1) Notwithstanding any other provision of this act, an unemployed individual who has a benefit year in effect and who has not exhausted benefit entitlement may have unused credit

not statutorily proscribed. The WDCA does not explicitly address the present situation—where a claimant who professes to be "able and available" to work so as to receive unemployment benefits subsequently seeks worker's compensation benefits for alleged total disability during the same period on the basis of his claim that he was unable to return to work for his specific former employer, not necessarily the general field of available employment.

Plaintiff maintains that his successful assertion of his ability to work for purposes of unemployment compensation eligibility is not irreconcilably inconsistent with his claim of disability as defined in the WDCA. Because entitlement to unemployment compensation benefits compares the claimant against a different field of labor than does entitlement to worker's compensation benefits, plaintiff alleges that there is no inconsistency in the assertion that there is some work that a claimant such as himself "is qualified to perform by past experience or training," MCL 421.28(1)(c); MSA 17.530(1)(c), so as to qualify for unemployment compensation benefits, but that is not within his general field of employment in which he was employed by defendant under MCL 418.301(4); MSA 17.237(301)(4) for purposes of worker's compensation. Simply put, "[he] was entitled to unemployment compensation benefits because there was some work he could perform, and also entitled to worker's com-

weeks preserved during a period of continuous involuntary disability if a written request from the individual to preserve the unused credit weeks is received by the commission . . . .

* * *

(5) As used in this section, a period of "continuous disability" means a period continuing for more than 14 consecutive days during which an unemployed individual is not able and available to perform full-time work, as described in section 28(1)(c), due to injury, illness, or hospitalization.

pensation benefits because there is some work he cannot perform."

Supporting this point of view, the majority in the instant case cites Professor Larson for the proposition that

> "[a]t first glance the two positions may appear mutually exclusive; but the inconsistency disappears when the special meaning of disability in workmen's compensation is remembered, involving, as we have seen, the possibility of some physical capacity for work which is thwarted by the inability to get a job for physical reasons. Thus, the injured claimant may honestly represent to the Employment Security office that he is able to do some work, and with equal honesty tell the Compensation Board later that he was totally disabled during the same period since, although he could have done some kinds of work, no one would give him a job because of his physical handicaps. [1C Larson, Workmen's Compensation, § 57.65, p 10-492.50.]" [*Ante,* pp 513-514.]

Use of the doctrine of judicial estoppel is fact specific and depends on the facts and circumstances of each case. The particular facts now before us differ significantly from the situation described by Larson, *supra,* and the situation involved in *Henry v Ford Motor Co,* 291 Mich 535; 289 NW 244 (1939), also cited by the majority.

First, as already indicated, plaintiff, by the mere fact of his application for and acceptance of unemployment benefits,[3] represented to the MESC that

[3] It is unnecessary to rely upon plaintiff's representations made to the MESC and elicited at the worker's compensation hearing (including the attendant evidentiary issues that accompany the use of these statements, see majority opinion, *ante,* pp 515-519; *Storey v Meijer,* 431 Mich 368; 429 NW2d 169 [1988]), in order to find irreconcilable inconsistency here. The relevant statutory standards for the MESA and the WDCA set forth above, when applied to the record before the Court (independent of any testimony given to the MESC) provide a sufficient basis for the application of judicial estoppel.

he was

> able and available to perform suitable full-time work of a character which [he] is qualified to perform by past experience or training, which is of a character generally similar to work for which [he] has previously received wages, and for which [he] is available, full time . . . . [MCL 421.28(1)(c); MSA 17.530(1)(c).]

Plaintiff was qualified by his past experience to be an office manager. Plaintiff's testimony indicates that he began receiving unemployment compensation in November 1983, and received his last payment on July 14, 1984. On August 5, 1983, plaintiff filed a petition for hearing, claiming disability of

> [h]ypertension, nervousness, depression and gout. Aggravation of pre-existing conditions, known and unknown and the complications, developments and sequelae thereof.

He based his claim on an occupational disease date of March 22, 1983, linked to

> [p]ressures of companies [sic] financial problems and trouble shooting for the company and having burden shifted to him and being demoted from office manager to assistant to the manager and perceptions of being discriminated against due to age caused him to get upset, be tense and nervous and; all arising out of and in the course of the employment.

A hearing referee denied plaintiff's claim. On appeal, plaintiff claimed that he sustained his burden of proof in proving psychiatric or hypertension disabilities of a continuing nature. The WCAB

agreed, and in an opinion dated June 29, 1990, ordered

> that the decision of the [hearing referee] in this cause shall be and it hereby is reversed. Plaintiff is found to be totally disabled as of March 22, 1983, subject to a personal injury of a psychiatric nature and hypertension. Defendant shall pay weekly benefits of $280.19 per week from March 23, 1983, to July 15, 1985, and until further order . . . .

At the worker's compensation hearing, plaintiff testified that as of June 1983 he was able to resume full-time unrestricted work following his medical leave:

> *Q.* Did you want to return to work?
> *A.* Yes.
> *Q.* Did you communicate that to your employer?
> *A.* Yes.
> *Q.* Now, what was told to you at the time that you requested to be reemployed?
> *A.* I believe it was in June. I told him that I was going to the doctor and I was going to try to get him to give me a release to go back to work, and if so, I would wait until after the Fourth of July.
>
> * * *
>
> *Q.* Now, during this time you were off up until June, how were you feeling?
> *A.* I was getting to feel better gradually. I would have periods of blood pressure and so on, go up or, like I say, I didn't sleep quite as good. *But I felt I was coming around and saw no reason that I shouldn't try to get back to work.* [Emphasis added.]

Plaintiff testified that he was "[s]hocked" upon learning that he could not resume his regular job but would have to accept what was in effect a demotion. The reason plaintiff gave for not return-

ing to work for defendant was the personalities involved, not the inability to do the job. Plaintiff testified:

> *A.* I couldn't work under those relationships, under those conditions.
>
> *Q.* What about them can't you do? Can't you handle?
>
> *A.* The environment primarily, and knowing what I had gone through. I couldn't go back there and work with Carolyn Wilkerson or under Mr. Wilson.
>
> *Q.* What specifically about the environment?
>
> *A.* I just couldn't tolerate it. I don't think there would be a close relationship between us in life anymore. Not under the circumstances.
>
> *Q.* But you have to really describe what exactly about that environment made you get the way you were.
>
> *A.* Well, the treatment I got or, let's say the cold shoulder, the good term, the conditions of the shop, the relationships with the customers. And I couldn't feel I could—you know, I would be dishonest trying to protect the company towards them. I couldn't protect the company anymore.

Plaintiff really wanted to return to his usual office manager job for defendant, and he admitted:

> *Q.* You wanted to go back to your full, regular job duties? You didn't want to be what you say was demoted? You didn't want any pay or benefit cut; is that correct?
>
> *A.* Right.
>
> *Q.* Okay. So you applied for Unemployment Compensation, didn't you?
>
> *A.* Yes.

After he stopped working at defendant's business, plaintiff looked for other employment. He testified, for example, that he applied for more

than twelve office manager positions in Michigan. He sought office manager jobs from "[a] dozen at least" other employers in Florida after moving there. At the time of trial, plaintiff was still looking for a position with companies like the defendant.

Plaintiff's wife corroborated this testimony, stating that she and plaintiff prepared his résumé and contacted "between twenty-five and thirty" companies in Florida seeking employment for plaintiff in his field. She testified that plaintiff was applying for the same type of office manager position that he had held with defendant in Michigan and that at the time of trial plaintiff was still seeking employment in Florida.

The Court of Appeals succinctly characterized plaintiff's claim, and he does not now dispute it, that

> if he had any disability at all, it was an inability to continue to work for Herman Wilson with Carolyn Wilkerson as office manager. Plaintiff claims that he could do the same managerial work he had been doing for Retool Industries, provided his job environment excluded Carolyn Wilkerson as coworker and Herman Wilson as employer. [198 Mich App 702, 705; 499 NW2d 453 (1993).]

By virtue of plaintiff's acceptance of unemployment benefits from the MESC, plaintiff averred that he met the condition precedent to the receipt of those benefits, namely, that he was "able and available to perform suitable full-time work [for which he] is qualified to perform by past experience or training . . . ." MCL 421.28(1)(c); MSA 17.530(1)(c). Plaintiff prevailed in this regard following a contested hearing. Yet given the factual background, plaintiff subsequently convinced the WCAB that he was totally disabled in his "general

field" of employment. MCL 418.301(4); MSA 17.237(301)(4).

This is not a situation in which partial disability has been alleged, or even in which the possibility of some physical capacity for work is thwarted by the inability to get a job for physical reasons, as described by Larson, *supra.* The present facts are likewise distinguishable from *Henry v Ford Motor Co, supra.* In *Henry,* the injured plaintiff was given favored work and was then laid off. He applied for unemployment benefits. The Court recognized that "one permanently disabled to continue the work that he was engaged in when the accident occurred may nevertheless be able to do some light work of a different nature than that in which he was previously engaged." *Id.,* p 538. The Court found no paradox:

> The finding that the employee is totally disabled so far as returning to his pre-injury work is not necessarily inconsistent with a finding that he is able to do, and is available for, the favored or rehabilitating work, so long as he still is in the labor market despite the injury. [*Id.,* p 540.]

However, the Court of Appeals in the instant case appropriately noted,

> Here, in contrast to *Henry v Ford Motor Co, supra,* plaintiff did not forthrightly seek unemployment compensation benefits, indicating a disability-based limitation on the positions he was capable of accepting. Rather, plaintiff indicated an unrestricted ability to continue in managerial employment, in blatant opposition to his subsequent claim of psychiatric and hypertensive disability in precisely the same employment for exactly the same time frame. [198 Mich App 707.]

The instant case presents a plaintiff who tried to

get his former job back from defendant, refused a different job from defendant out of an apparent lack of desire to work under a former subordinate, represented to the MESC that he was "able and available" to work full-time in his usual line of work (office managerial work), sought (and continues to seek) employment in Michigan and now in Florida, yet claims that he is totally disabled, i.e., that his wage-earning capacity in his general field of employment has been foreclosed for the same periods. The absurdity of such double recovery in this particular situation should be acknowledged by the Court.[4]

Plaintiff lastly submits that there is no need to invoke the doctrine of judicial estoppel because the WDCA contains an express provision that reduces a claimant's worker's compensation benefits, dollar for dollar, by the amount of any unemployment compensation previously received. MCL 418.358; MSA 17.237(358).[5] Plaintiff argues that because

[4] The unique circumstances of this case should forestall any notion that the doctrine of judicial estoppel is to be applied with a broad brush. On the contrary, as the Court of Appeals recognized,

> Judicial estoppel bars only wholly inconsistent claims; it does not penalize an employee on the basis of information that only belatedly contradicts a factual claim. For example, if an employee claims unemployment compensation on the basis of no disability, but subsequently is diagnosed as suffering from some hitherto unsuspected work-related disabling disease, again, coordination is the proper response. Or, for an employee receiving unemployment compensation, upon discovery of a disability or compensable restriction on prospective employment, nothing compels the application for or acceptance of further unemployment benefits. [198 Mich App 709-710.]

[5] Net weekly benefits payable under section 351, 361, or lump sum benefits under section 835, shall be reduced by 100% of the amount of benefits paid or payable to the injured employee under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, as amended, being sections 421.1 to 421.67a of the Michigan Compiled Laws, for identical periods of time and chargeable to the same employer. [MCL 418.358; MSA 17.237(358).]

§ 358 specifically references not only the partial disability section of the WDCA, but the section concerning total disability as well (§ 351), the Legislature has implicitly acknowledged instances in which both unemployment and total disability benefits would be recoverable. However, § 358 presupposes an entitlement to worker's compensation benefits. It would apply to the "favored" work situation described in *Henry, supra,* where an employee claims and receives worker's disability compensation benefits from the employer first, resumes "favored" work, and then is involuntarily terminated. In such a situation, the employer would be responsible to reinstate disability compensation benefits and also pay for unemployment insurance benefits for the same period. Section 358 manages this special problem by providing for a setoff adjustment.

In the case at bar, the doctrine of judicial estoppel goes to the very heart of plaintiff's eligibility for benefits. A setoff is irrelevant if the plaintiff should not have been allowed to advance inconsistent positions in the first place.

In conclusion, although the principle of judicial estoppel is one to be applied with caution, I believe that the Court of Appeals properly applied it under the particular circumstances of this case. The record demonstrates that the plaintiff earlier successfully asserted a position respecting his employability that is antagonistic to the position asserted before the WCAB. I would affirm the Court of Appeals decision reversing the WCAB's award of total disability benefits to the plaintiff for the same period that he was receiving unemployment benefits.[6]

[6] The matter of judicial estoppel aside, the crux of the instant case is the issue whether the inability to work for one's former employer, and a claim of total psychiatric disability in this regard, limits an

RILEY, J., concurred with GRIFFIN, J.

employee's "wage earning capacity" in his "general field of employment" under the statutory standard in effect at the time of plaintiff's injury. MCL 418.301(4); MSA 17.237(301)(4).

In *Kidd v General Motors Corp,* 414 Mich 578, 591-592; 327 NW2d 265 (1982), the Court discussed the standard to be used in determining disability:

> It is well-established that the standard to be used in general disability cases is whether there is an impairment in wage-earning capacity. This is determined by comparing post-injury with pre-injury ability to compete with the able-bodied for jobs *within the type of work in which the injury occurred.* [Emphasis added, see also *Dressler v Grand Rapids Die Casting Corp,* 402 Mich 243, 251; 262 NW2d 629 (1978); *Kaarto v Calumet & Hecla, Inc,* 367 Mich 128; 116 NW2d 225 (1962); *Adair v Metropolitan Bldg Co,* 38 Mich App 393, 403; 196 NW2d 335 (1972).]

The Legislature codified this judicial definition of disability when it amended the WDCA, 1981 PA 200, in § 301(4), and defined "disability" as "a limitation of an employee's wage earning capacity in the employee's general field of employment . . . ."

Because the Court of Appeals in the case at hand disposed of the case on the issue of judicial estoppel, raised sua sponte, it did not reach the merits of plaintiff's total disability claim. Thus, I would alternatively remand this matter to the Court of Appeals for consideration of whether the WCAB applied the correct legal standard—i.e., whether being disabled from one's previous particular employment suffices to establish "disability" in the employee's "general field of employment" pursuant to § 301(4).

PEOPLE v GRANT

Docket No. 96686. Argued January 13, 1994 (Calendar No. 14). Decided July 12, 1994.

Andre L. Grant was convicted by a jury in the Detroit Recorder's Court, Daphne M. Curtis, J., of first-degree murder and possession of a firearm during the commission of a felony. The Court of Appeals, JANSEN, P.J., and CAVANAGH and P. D. SCHAEFER, JJ., reversed in an unpublished opinion per curiam and remanded for a new trial because of the trial court's failure to give a preliminary jury instruction on the issue of insanity (Docket No. 138577). The people appeal.

In an opinion by Justice RILEY, joined by Justices BRICKLEY, BOYLE, GRIFFIN, and MALLETT, the Supreme Court *held:*

A trial court's failure to give a preliminary instruction on insanity before an offer of testimony on insanity is made, as required by MCL 768.29a(1); MSA 28.1052(1)(1), does not require automatic reversal.

1. Under MCL 768.29a(1); MSA 28.1052(1)(1), if a defendant asserts a defense of insanity in a criminal action tried before a jury, the court must instruct the jury on the definitions of mental illness, mental retardation, and legal insanity immediately before the commencement of testimony, especially expert testimony. The instruction must be given in all cases and not simply when a trial court believes that it would be useful. The failure in this case to give a preliminary instruction on insanity was error regardless of the defendant's failure to request it. However, the failure does not require automatic reversal. Automatic reversal, in presuming a miscarriage of justice, would conflict with MCL 769.26; MSA 28.1096, which provides that judgments or verdicts are not to be reversed absent a miscarriage of justice. Further, proper final instructions are subject to harmless-error analysis, and there is no indication that the error involved in this case requires different treatment.

2. Under Michigan law, plain unpreserved error may not be considered for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases in which prejudice is presumed or reversal is automatic. In this case, the error involved was not decisive of the outcome. Thus, the defendant failed to establish the form of

prejudice necessary to preserve an issue that was not raised in the trial court, making it unnecessary to address the standard of reversal.

Justice LEVIN, joined by Chief Justice CAVANAGH, concurring, stated that under Michigan law an appellate court should not reverse a conviction unless it is determined that prejudicial error occurred. There is no need to incorporate into Michigan jurisprudence the holding of *United States v Olano,* 507 US —; 113 S Ct 1770; 123 L Ed 2d 508 (1993), that while the government has the burden of showing that preserved error was not prejudicial, the defendant has the burden of showing that unpreserved or forfeited error claimed to have been plain was both plain and prejudicial. This case can be adequately resolved on the basis that even if there was error, it may not have been clear or obvious, and that whether the burden is on the prosecution, because the error is deemed to have been preserved, or on the defendant, because it was not preserved, the instructional omission at issue was harmless.

The adoption of the meaning expressed in *Olano* concerning the federal plain error rule ignores the significant difference between the federal judicial power and the judicial power confided to the Michigan Supreme Court. While Congress, consistent with the federal constitution, provides federal courts of appeal through the federal plain error rule with a limited power to correct errors forfeited because not timely raised, the Michigan Constitution confides judicial power to the Supreme Court, and it is beyond the power of the Legislature to define, limit, or control the exercise of that power. Because the power of the Michigan Supreme Court is plenary, it should recognize in the Michigan Court of Appeals a wide measure of discretion in the supervision of litigation.

Reversed.

People v Mikulin, 84 Mich App 705; 270 NW2d 500 (1978), overruled.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, and *Timothy A. Baughman,* Chief, Research, Training, and Appeals, for the people.

State Appellate Defender (by *Kristina Larson Dunne*) for the defendant.

RILEY, J. The issue in this case involves the question whether a trial court's failure to give a preliminary instruction before an offer of testimony on insanity, as required under MCL 768.29a(1); MSA 28.1052(1)(1), requires automatic reversal. We conclude that it does not. Moreover, we find that defendant failed to preserve the error for appellate review. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

I

Defendant was charged and thereafter convicted of first-degree murder[1] and possession of a firearm during the commission of a felony[2] following a jury trial. The trial court sentenced defendant to mandatory life without parole for the murder conviction and to a two-year term for the felony-firearm conviction.

Before trial, defendant gave notice of his intent to assert the defenses of legal insanity and diminished capacity. By order of the court, defendant's competence to waive his *Miranda*[3] rights was assessed by a clinical psychologist. Later, defendant moved the court for the appointment of an independent psychiatrist to determine his criminal responsibility and the possibility of diminished capacity at the time of the killing. Defendant asserted a combination of longstanding mental problems, which allegedly included the hearing of voices that told him what to do, and drug and alcohol abuse on the date of the killing constituted

[1] MCL 750.316; MSA 28.548.

[2] MCL 750.227b; MSA 28.424(2).

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

legal insanity or, at the least, a diminished capacity that negated the intent element of murder.

Immediately preceding jury voir dire on the first day of trial, the court denied defendant's motion to suppress his confession for lack of capacity to understand his *Miranda* rights. Next, the prosecutor reminded the court that defendant had filed a notice of insanity defense.[4] Accordingly, the

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[4] [*Prosecutor*]: Your Honor, there is another issue that I guess I want to see if we can clarify. The defense has filed a notice of diminished capacity or insanity. He has been evaluated by the clinic, I understand there is no expert witness that can testify for the defense at this time. Mr. Kincaid wasn't sure if his client would take the stand somehow raise it, therefore, I have filed a notice of rebuttal if it should come up. The law is once the issue is joint [sic], the jury has been informed. I understand until the People rest, that is not an issue. We can reserve those kinds of instructions although there is some voir dire, the defense request that area but I have no problem with it but the instructions and issue itself is [sic] reserved until the defense, or something we are sure we are going to do instruct [sic] the jury from the outset.

[*Defense counsel*]: Your Honor, I need a moment, just a moment. Your honor, in my interest, I have advised my client that at this point I have no expert testimony to assist him in this defense of insanity. That the state has expert testimony to assist the state in its rebuttal of any defense of insanity. I have also advised my client that it is possible to lay testimony to establish some defense of insanity, however, that may not be sufficient given the nature of the expert testimony.

The Court: Do I need to address the issue in the preliminary instructions or just wait to see how the trial testimony develops . . . ?

[*Defense counsel*]: From my conversation of my client, I think it should be addressed. Is that correct, [defendant]?

Defendant: Yes.

The Court: Well in voir dire?

[*Defense counsel*]: Yes.

The Court: Well what I intend to address with respect to the issue of insanity or diminished capacity simply tell [sic] the jury during the course of this trial and during the course of any trial certain defenses might be raised or may be raised. The defense of insanity or diminished capacity might be raised. For example, do any of you believe any time someone says that they are, they were suffering from insanity or some mental defect or illness that it is just an excuse and can't be true. Or do you understand that it can be a complete defense. Something to that effect is what I would give unless either of you have phrased it more artfully.

court incorporated this possibility in its voir dire of the jury. After the prosecution rested its case and the court denied a motion for directed verdict, defense counsel indicated defendant's intent to testify regarding the defenses of legal insanity or diminished capacity.[5] Defendant testified to long-term drug abuse, to hearing voices during stressful periods, and to having ingested drugs and alcohol on the date of the shooting.[6]

In rebuttal, the prosecutor offered the testimony of the clinical psychologist who had conducted the independent examination of defendant's criminal responsibility or diminished capacity. After the close of proofs, the court instructed the jury regarding intoxication as a defense to a specific intent crime,[7] mental illness,[8] mental retardation,[9]

[*Prosecutor*]: Sounds like a good presentation, your Honor.
[*Defense counsel*]: Sounds good.

[5] The exact details of the defense were never clearly outlined. Defense counsel stated:

> I think I should make appoint [sic] now before we go on the record that as I understand it, that my client we just talked about his sanity. In my opening statement he wishes me to discuss his sanity and not being insane to some extent. I don't know how I plan on working that in in great specificity, he wishes me to raise this issue. I don't have an expert to testify to support my client. He would be putting insanity in if he takes the stand comment [sic] on his sanity which he may or may not do. He would be putting his sanity into issue that's why I would be raising the point . . . .

[6] Defendant also admitted fabricating a story to tell his uncle soon after the shooting, fearing retribution for taking crack without paying for it, and initially lying to police the next morning until "the voice told [him] to . . . tell them what happened . . . ."

[7] The court gave an instruction in substantial compliance with CJI2d 6.2.

[8] MCL 330.1400a; MSA 14.800(400a) defines mental illness as "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

[9] MCL 330.1500(h); MSA 14.800(500)(h) defines mentally retarded as

legal insanity,[10] a mixture of intoxication and mental illness or retardation as a defense,[11] and the guilty but mentally ill verdict.[12] The instructions were in substantial compliance with the applicable Michigan Criminal Jury Instructions.[13] A unanimous jury convicted defendant of first-degree murder and of illegal possession of a firearm during a felony.

"significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior."

[10] MCL 768.21a(1); MSA 28.1044(1)(1) provides:

> A person is legally insane if, as a result of mental illness as defined in [MCL 330.1400a; MSA 14.800(400a)] or as a result of mental retardation as defined in [MCL 330.1500(h); MSA 14.800(500)(h)] that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

[11] MCL 768.21a(2); MSA 28.1044(1)(2) provides that "[a] person who is under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his alleged offense shall not thereby be deemed to have been legally insane."

Section 21a(2) has been interpreted to allow proof of insanity caused by long-term effects of drug or alcohol abuse, but the defense must focus on a mental condition caused by such abuse and not on incapacity from voluntary ingestion of drugs or alcohol immediately preceding an offense. See, e.g., *People v Chapman,* 165 Mich App 215; 418 NW2d 658 (1987); *People v Conrad,* 148 Mich App 433; 385 NW2d 277 (1986). But see *People v Savoie,* 419 Mich 118, 129-130 and n 4; 349 NW2d 139 (1984) (mere assertions that a substance abuse problem indicated legally cognizable insanity were insufficient to rebut the presumption of sanity).

[12] MCL 768.36(1); MSA 28.1059(1) provides:

> If the defendant asserts a defense of insanity . . ., the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:
>
> (a) That the defendant is guilty of an offense.
>
> (b) That the defendant was mentally ill at the time of the commission of that offense.
>
> (c) That the defendant was not legally insane at the time of the commission of that offense.

[13] See CJI2d 3.9, 6.2, 7.6, 7.10, 7.11, and 7.12.

Defendant appealed his conviction on two grounds. First, he asserted that the failure to give a preliminary jury instruction on insanity was error requiring reversal. Second, he alleged error in the trial court's denial of his motion for directed verdict concerning whether he could be guilty of first-degree murder where his own confessions, the only direct evidence offered on the point, could not establish an intent to rob the decedent before the shooting.

Relying on the mandatory language of MCL 768.29a(1); MSA 28.1052(1)(1) and on *People v Mikulin,* 84 Mich App 705; 270 NW2d 500 (1978), the Court of Appeals reversed defendant's conviction because of the trial court's failure to give a preliminary jury instruction on the issue of insanity. The Court of Appeals also held that defendant's second issue did not "independently require reversal."[14] Unpublished opinion per curiam, decided May 12, 1993 (Docket No. 138577).

This Court granted the prosecutor's application for leave to appeal.[15]

II

A

MCL 768.29a(1); MSA 28.1052(1)(1) provides:

> If the defendant asserts a defense of insanity in a criminal action which is tried before a jury, *the judge shall, before testimony is presented on that issue, instruct the jury on the law* as contained in [MCL 330.1400a; MSA 14.800(400a)] and [MCL

[14] This holding was not pursued on appeal in this Court. Therefore, we express no opinion on this issue.

[15] 443 Mich 882 (1993).

330.1500(g); MSA 14.800(500)(g)][16] and in [MCL 768.21a; MSA 28.1044(1)] of chapter 8 of this act. [Emphasis added.]

Clearly, this statutory language directs our courts to instruct on the definitions of mental illness, mental retardation, and legal insanity immediately *before* the commencement of testimony on insanity in a jury trial. See *Achtenberg v East Lansing,* 421 Mich 765, 770; 364 NW2d 277 (1985) ("When the language of a statute is clear, courts must apply it as written"). Furthermore, use of the term "shall" rather than "may" indicates mandatory rather than discretionary action. *Browder v Int'l Fidelity Ins Co,* 413 Mich 603, 612 and n 7; 321 NW2d 668 (1982); *Matheson v Secretary of State,* 170 Mich App 216, 219; 428 NW2d 31 (1988).

It cannot be gainsaid that the purpose behind MCL 768.29a(1); MSA 28.1052(1)(1) is other than to establish the framework of an insanity defense in the minds of the jury *before* testimony begins, in light of the highly technical and esoteric nature of testimony, especially expert testimony, that often obtains in matters of insanity. The statute's clear language evidences the purpose to ensure that the preliminary instruction is given in all cases and not simply when a trial court believes that it would be useful. See *Achtenberg, Browder* and *Matheson, supra.* Indeed, the mandatory nature of the preliminary instruction language has already been recognized. See *People v Cramer,* 201 Mich App 590, 593; 507 NW2d 447 (1993); *People v Girard,* 96 Mich App 594, 596; 293 NW2d 639 (1980); *Mikulin, supra* at 708.

Accordingly, we agree with the Court of Appeals

[16] The definition of mental retardation, to which the statute refers as subsection (g), is now found in subsection (h). The statute was amended to add a new subsection by 1986 PA 264, which altered the numbering format.

that the failure to give the preliminary instruction on insanity was error regardless of defendant's failure to request it. In fact, the prosecutor does not argue that this did not constitute some form of error. However, whether this error required automatic reversal of defendant's conviction as the Court of Appeals held is another question.

We conclude that the failure to give a preliminary instruction on insanity does not require automatic reversal for several reasons. First, automatic reversal would come into direct conflict with MCL 769.26; MSA 28.1096, which orders that judgments or verdicts shall not be reversed absent a miscarriage of justice. Automatic reversal would presume a miscarriage of justice, and this presumption is far from evident in the terms of MCL 768.29a(1); MSA 28.1052(1)(1). Second, other important concerns such as proper *final* instructions to the jury are the subject of harmless-error analysis and are therefore *not* susceptible to automatic reversal.[17] Absent a clear legislative directive, we cannot consider the preliminary jury instruction involved here to avoid the more generalized requirement that no judgment or verdict may be reversed absent a miscarriage of justice. Third, rules of automatic reversal are disfavored. *People v Mosko,* 441

[17] See, e.g., *People v Johnson,* 128 Mich App 618, 622; 341 NW2d 160 (1983) (failure to properly define consent in a case involving criminal sexual conduct); *People v Peery,* 119 Mich App 207, 214; 326 NW2d 451 (1982) (an erroneous intent instruction in an armed robbery case); *People v Crawford,* 89 Mich App 30, 37; 279 NW2d 560 (1979) (erroneous instructions on insanity and involuntary intoxication). See also *People v Mosko,* 441 Mich 496; 495 NW2d 534 (1992) (failure to instruct the jury on a lesser included offense despite a request by the defendant). We are unaware of any precedent that considers a preliminary instruction on insanity any more important than a similar instruction to be given just before a jury retires for deliberation.

But cf. *Girard, supra* (an erroneous preliminary instruction on insanity and an erroneous insanity instruction after the close of proofs caused sufficient confusion so as to preclude consideration of the combination of errors as harmless).

Mich 496, 502-503; 495 NW2d 534 (1992). Finally, the error at issue in this case does not resemble cases that have historically been the subject of automatic reversal in the federal system. Thus, we are unable to discern any state or federal basis for treating errors surrounding MCL 768.29a(1); MSA 28.1052(1)(1) any differently than the myriad of trial errors subject to harmless error analysis. For these reasons, we overrule the *Mikulin* decision.

B

Guidelines for correcting trial errors are described in three places: MCL 769.26; MSA 28.1096, MCR 2.613, and MRE 103(a) and (d).[18] The specific terms differ in each source, and courts appear to have used them interchangeably. It is therefore important to determine whether there are any substantive differences in the terms as used.

MCL 769.26; MSA 28.1096 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a *miscarriage of justice.* [Emphasis added.]

[18] The Court's general authority is set forth in article 6 of the 1963 Constitution. Pursuant to this authority, this Court has created certain limitations to appellate review as provided in MCR 2.613(A) and MRE 103. See Const 1963, art 6, § 4. MCL 769.26; MSA 28.1096 represents the Legislature's proclamation against reversal of trial court verdicts for minor errors. We are not called upon to determine whether this statute is a legislative usurpation of judicial discretion because the Court has developed its own standards in the court rule and the evidentiary rule that are notably similar to the statute.

Similarly, MCR 2.613(A) provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court *inconsistent with substantial justice.* [Emphasis added.][19]

Finally MRE 103, which applies only to evidentiary matters, states:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a *substantial right* of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or,
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> * * *
>
> (d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting *substantial*

[19] Technically, this court rule governs a trial court's own review of its orders or judgments for correction of error. There is no similar court rule in chapter six of the court rules, which concerns criminal procedure generally, nor is one found in chapter seven on appellate rules. However, MCR 2.613(A) is generally accepted as the appellate standard. 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 571. See, e.g., *Henson v Veterans Cab Co of Flint,* 384 Mich 486, 494; 185 NW2d 383 (1971).

rights although they were not brought to the attention of the trial court. [Emphasis added.][20]

Clearly, only MRE 103 specifically addresses the concept of issue preservation. However, the courts of this state have long recognized the importance of preserving issues for the purpose of appellate review. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. See, e.g., *Napier v Jacobs,* 429 Mich 222, 235; 414 NW2d 862 (1987) (failure to raise a claim of insufficiency of the evidence); *Moskalik v Dunn,* 392 Mich 583, 592; 221 NW2d 313 (1974) (failure to object to an erroneous jury instruction); *People v DerMartzex,* 390 Mich 410, 416-417; 213 NW2d 97 (1973) (failure of the defendant to request a limiting instruction on admissibility of prior-acts evidence); *People v Farmer,* 380 Mich 198, 208; 156 NW2d 504 (1968) (failure to raise the issue of the involuntariness of a confession). Indeed, the United States Supreme Court has recognized a state's right to develop procedural rules that lead to issue forfeiture even where the procedural rules implicate constitutional protections if the rules serve a legitimate

[20] The Michigan rule is borrowed word for word from FRE 103.

The federal courts also have at least two other harmless error rules. FR Crim P 52 provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

In addition, 28 USC 2111 provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record *without regard to errors or defects which do not affect the substantial rights of the parties.*" (Emphasis added.)

state interest. *Henry v Mississippi,* 379 US 443; 85 S Ct 564; 13 L Ed 2d 408 (1965).[21]

As alluded to previously, this preservation rule is not without exceptions. For example, appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome. See, e.g., *People v Degraffenreid,* 19 Mich App 702, 716; 173 NW2d 317 (1969); *People v Merchant,* 86 Mich App 355, 358; 272 NW2d 656 (1978); *People v Catey,* 135 Mich App 714, 722; 356 NW2d 241 (1984); *People v Bushard,* 444 Mich 384, 439; 508 NW2d 745 (1993) (opinion of BRICKLEY, J.). However, the instant case does not involve a constitutional right. Rather, it is concerned with the violation of a statutory provision requiring a trial court to give a preliminary instruction to the jury immediately preceding the submission of insanity testimony. See MCL 768.29a(1); MSA 28.1052(1)(1). We now turn to the questions whether the unpreserved, nonconstitutional plain error in this case may nonetheless be considered as an exception to the preservation rule, and if so, whether reversal is required.

C

The federal courts' approach to nonconstitutional plain error, especially in regard to the subject of issue preservation, is highly instructive. A recent pronouncement of the federal standard for unpreserved, nonconstitutional error is found in *United States v Olano,* 507 US —; 113 S Ct

[21] In *Henry,* the United States Supreme Court upheld a Mississippi court rule requiring contemporaneous objection to the admission of evidence, alleged to have been illegally seized in violation of the Fourth Amendment, in order to prevent forfeiture of the argument for purposes of appeal. Such rules of trial procedure that could affect federal constitutional rights, of course, must serve a legitimate state interest in order to withstand a challenge to their validity. *Id.* at 447.

1770; 123 L Ed 2d 508, 519-520 (1993).[22] In *Olano,* the majority distinguished FR Crim P 52(a), regarding preserved harmless error, from rule 52(b), plain, unpreserved error.[23]

> When the defendant has made a timely objection to an error and Rule 52(a) applies, the Court of Appeals normally engages in a specific analysis of the District Court record—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. *Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, the Court of Appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial.* [*Id.,* 123 L Ed 2d 519-520. Emphasis added.]

On the issue whether a specific, unpreserved, nonconstitutional plain error could be addressed by an appellate court in light of possible forfeiture, the *Olano* Court developed a three-step test.

> The first limitation on appellate authority under Rule 52(b) [plain, unpreserved error] is that there indeed be an "error." Deviation from a legal rule is "error" unless the rule has been waived.
>
> * * *
>
> The second limitation on appellate authority

[22] The facts in *Olano* involve permitting alternate jurors who were properly dismissed at the close of proofs to remain with the jury during deliberations in contravention of FR Crim P 24(c). The basis of the error in *Olano* was therefore statutory rather than constitutional in nature.

[23] See also *United States v Caputo,* 978 F2d 972, 974 (CA 7, 1992). We also acknowledge the possible existence of a subcategory in this context, to wit: unpreserved error that is not plain. Under these facts, the failure to give the preliminary jury instruction despite the mandate of MCL 768.29a(1); MSA 28.1052(1)(1) clearly constitutes plain error. Accordingly, we leave for the appropriate case a discussion of this issue.

> under Rule 52(b) is that the error be "plain." "Plain" is synonymous with "clear" or, equivalently, "obvious."
>
> * * *
>
> The third and final limitation on appellate authority . . . is that the plain error "affec[t] substantial rights." This is the same language employed in Rule 52(a), and *in most cases it means that the error must have been prejudicial: It must have affected the outcome of the . . . proceedings.* [*Id.*, 123 L Ed 2d 518-519. Emphasis added; citations omitted.][24]

The *Olano* majority concluded that the presence of alternate jurors did not affect substantial rights *independent* of any prejudicial effect and that there was neither a specific showing of prejudice nor a reason to presume any prejudice. *Id.*, 123 L Ed 2d 521-522. Thus, the defendant's claim was held to have been forfeited, which prevented the need for a determination whether reversal was required. Moreover, *Olano* clearly placed the burden of proving the prejudice of a plain forfeited error on the appealing party because the grant of relief under FR Crim P 52(b) is permissive rather than mandatory. See *id.*, 123 L Ed 2d 520.[25] Presuming that the test for avoiding forfeiture is met, the *Olano* majority provided a separate test for reversal: a federal appellate court may reverse a plain forfeited error (1) where a miscarriage of justice would result because the defendant is actu-

[24] In *Olano*, the majority recognized the possibility of a special category of forfeited errors that could be corrected regardless of prejudicial effect, i.e., their effect on the outcome. *Olano, supra*, 123 L Ed 2d 520. However, the *Olano* majority did not fully address the issue.

> We are convinced that the types of cases that require automatic reversal, or in which prejudice would be presumed, are not implicated under these facts, and leave for another time their consideration.

[25] See also *People v Johnson*, 427 Mich 98, 115, n 14; 398 NW2d 219 (1986) (opinion of BOYLE, J.).

ally innocent or (2) if the error "seriously affects" the fairness, integrity, or public reputation of judicial proceedings. *Id.,* 123 L Ed 2d 521. It is important to note that the specific language of the federal rules themselves, and of the *Olano* majority's formulation from earlier precedent, make no distinction between constitutional and nonconstitutional error. Accordingly, we conclude that it is the forfeiture aspect and not the actual constitutional status that drives the federal standard.[26]

D

The rationale underlying the distinction between preserved and unpreserved error is strongly supported by history as well as by policy. At the beginning of this century, legislative reformers around the country advocated the adoption of the harmless error doctrine in response to an ever-increasing number of reversals in criminal cases on the basis of perceived minor errors occurring at trial.[27] Many years ago, Dean Pound stated that "[n]othing is so subversive of the real purposes of legal procedure as individual vested rights in procedural errors . . . ."[28] More recently, writing for the majority in *United States v Mechanik,* 475 US 66, 72; 106 S Ct 938; 89 L Ed 2d 50 (1986), Justice Rehnquist stated:

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[26] We find it interesting that the *Olano* Court utilized FR Crim P 52(a) and (b) rather than 28 USC 2111. Theoretically, 28 USC 2111 would also be applicable to the case because it is found in chapter 133 of the code, which contains rules that specifically apply to *review* cases. However, 28 USC 2111 does not contain the same clear dichotomy between preserved and plain errors as is found in the criminal procedural rules. Rather, it forbids appellate reversal "without regard to errors or defects which do not affect the substantial rights of the parties." Clearly, the procedural rule provides a stronger semantic basis for the decision reached by the majority.

[27] For a history of the harmless error doctrine, see, generally, 3 LaFave & Israel, Criminal Procedure, § 26.6.

[28] Pound, *The canons of procedural reform,* 12 ABA J 541, 543 (1926).

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," and thereby "cost the society the right to punish admitted offenders." [Citations omitted.]

A forfeiture rule, then, serves the important " 'need to encourage all trial participants to seek a fair and accurate trial the first time around . . . .' " *United States v Young,* 470 US 1, 15; 105 S Ct 1038; 84 L Ed 2d 1 (1985), quoting *United States v Frady,* 456 US 152, 163; 102 S Ct 1584; 71 L Ed 2d 816 (1982).[29] See also *Michigan v Tucker,* 417 US 433, 446; 94 S Ct 2357; 41 L Ed 2d 182 (1974) ("[T]he law does not require that a defendant receive a perfect trial, only a fair one"). Accordingly, the United States Supreme Court has recognized the importance of an incentive for criminal defendants to raise objections at a time when the trial court has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights. Failure to timely raise error thus requires defendants to

[29] See also *Yakus v United States,* 321 US 414, 444; 64 S Ct 660; 88 L Ed 834 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it").

establish prejudice in order to avoid the forfeiture of an issue.[30]

We now turn to an analysis of the appropriate state standard for assessment of unpreserved, nonconstitutional plain error.

III

Review of state law on the issue of harmless error leads us to the conclusion that the distinction between issue preservation and harmless error has not been clearly defined.[31] We are persuaded that *Olano,* which first requires assessing the merits of an issue presented for the first time on appeal, is instructive in this regard. As in *Olano,* in this case there was error and it was plain, to wit: the violation of the statute mandating that a preliminary jury instruction on insanity be given before testimony on insanity. Although defendant failed to properly request the instruction, the language of MCL 768.29a(1); MSA 28.1052(1)(1) does not require a defendant to make a specific request. The question then becomes whether the error affected defendant's substantial rights.

The *Olano* majority defined the term " 'affect[ing] substantial rights' " as an error that was "prejudicial: It must have affected the out-

[30] Except, of course, in the class of cases in which prejudice is presumed. See n 24.

[31] The requirement of timely objection to trial errors in order to preserve an issue for appellate review is well established in Michigan jurisprudence. For example, in *Moskalik, supra* at 592, the majority stated:

> The requirement of a timely objection is not an arbitrary one. Its purpose is to avoid improper instruction and, if perchance an improper instruction which can be corrected has been given, to facilitate its correction before verdict, thereby avoiding costly new trials.

come of the . . . proceedings." *Olano, supra,* 123 L Ed 2d 519. We believe that the proper interpretation of the term "prejudice" in the context of issue preservation for plain error may be equated with the longstanding state precedent of outcome determination. See *Degraffenreid, Catey,* and *Merchant, supra.* In other words, a plain, *unpreserved* error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic. Cf. *Napier, Moskalik, DerMartzex,* and *Farmer, supra.* Under the facts of this case, we are persuaded that the error involved here was not decisive of the outcome.

Although our review of the facts on the record indicates that defense counsel raised the matter of an insanity defense before voir dire of the jury, no reference was made to MCL 768.29a(1); MSA 28.1052(1)(1) and its requirement of an instruction to be given immediately before expert testimony on insanity. Thus, the error was unpreserved. In addition, the trial court asked jurors during voir dire whether they could conceptualize the nature of the insanity defense and the fact that, if successful, it would support a verdict of not guilty. Moreover, the jury instructions given at the conclusion of proofs were straight from an instruction manual and therefore presented the appropriate standards. Finally, the only witnesses to testify regarding the issue of insanity were one expert witness and defendant. Because we are not convinced that the error in this case led to significant confusion regarding an insanity defense, we conclude that the error was not decisive of the outcome. Thus, defendant failed to establish the form of prejudice necessary to preserve an issue that

was not raised before the trial court. Accordingly, it is unnecessary to address the standard of reversal in this case of unpreserved, plain error.

The Court of Appeals decision is reversed and the jury verdict reinstated.

BRICKLEY, BOYLE, GRIFFIN, and MALLETT, JJ., concurred with RILEY, J.

LEVIN, J. I concur in the result of the majority opinion, and join in part in the opinion.[1]

I

The majority adverts to a distinction between constitutional error and nonconstitutional error, and to a distinction between preserved and unpreserved error, now dubbed forfeited error, and then expounds on the recent decision of the United States Supreme Court in *United States v Olano,* 507 US —; 113 S Ct 1770; 123 L Ed 2d 508, 519-520 (1993), concerning unpreserved, forfeited, so-called "plain" nonconstitutional error, and where the Court said that, while the government has the burden of showing that preserved error was not prejudicial, the defendant has the burden of showing that unpreserved or forfeited error claimed to have been plain was both plain and prejudicial.

Justice Kennedy in a separate concurring opinion expressed his belief that had there been a specific objection, to allowing alternate jurors to be present during the jury's deliberation, it would have been "most difficult for the government to show the absence of prejudice." Justice Stevens,

[1] Specifically, I join in the introductory paragraph, in part I, in so much of subpart A of part II as precedes the concluding paragraph of subpart A, and agree generally with the concluding paragraph, beginning with the words "[a]lthough our review," of part III of the majority opinion.

with whom Justices White and Blackmun concurred, said that he could not agree that "errors may be deemed to 'affect substantial rights' only when they have a prejudicial impact on a particular defendant."[2]

Justice Stevens also observed:

> The Courts of Appeals are, however, allowed a wide measure of discretion in the supervision of litigation in their respective Circuits. [Citations omitted.] Certainly, the Courts of Appeals are better positioned than we are to evaluate the need for firm enforcement of a procedural rule designed to protect the integrity of jury deliberations, and to weigh the interest in such enforcement against other relevant consideration. Because I am not persuaded that the Court of Appeals here abused its broad discretion, I would affirm its judgment. [*Id.*, 123 L Ed 2d 527.]

Michigan does not have a counterpart to FR Crim P 52(b), although the concept of plain error has been adverted to in a few opinions of this

[2] Justice Stevens explained:

> At least some defects bearing on the jury's deliberative function are subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects "undermine the structural integrity of the criminal tribunal itself." *Vasquez v Hillery,* 474 US 254, 263-264; 106 S Ct 617; 88 L Ed 2d 598 (1986) (racial discrimination in selection of grand jury); see also *Gray v Mississippi,* 481 US 648, 668; 107 S Ct 2045; 95 L Ed 2d 622 (1987); *id.* at 669 (Powell, J., concurring) (improper exclusion of juror opposed to death penalty). Whether or not they harm the defendant, errors that call into question the integrity of the jury's deliberations may harm the system as a whole. In that sense, they may be said to "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States v Atkinson,* 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 (1936), making them candidates for reversal under Rule 52. See *United States v Young,* 470 US 1, 15; 105 S Ct 1038; 84 L Ed 2d 1 (1985) (citing *Atkinson, supra*). [*Id.*, 123 L Ed 2d 525-526.]

Court.[3] *Olano,* decided a year ago, was not adverted to in the briefs of counsel. The United States Courts of Appeals are just beginning to expound on this recent decision of the United States Supreme Court.[4]

There is no need in the instant case to incorporate *Olano* into Michigan jurisprudence. This case can be adequately resolved on the basis set forth in part III of the majority opinion, which, as set forth in the last full paragraph of part III, shows that even if there was error, it may not have been clear or obvious, and that whether the burden is on the prosecution, because the error is deemed to have been preserved, or on the defendant, because it was not preserved, the instructional omission in the instant case was harmless.

II

The adoption of the views expressed by the majority in *Olano* concerning the meaning of the federal plain error rule ignores the significant difference between the federal judicial power and the judicial power confided to this Court. As set forth in *Olano,* 123 L Ed 2d 517-518, the federal plain error rule provides "the Court of Appeals a *limited power* to correct errors that were forfeited because not timely raised in the District Court," and "the *authority created*" by that rule "is circumscribed." (Emphasis added.) The federal rule was adopted by or pursuant to the authority of the

[3] *Washburn v Lucas,* 373 Mich 610, 625-626; 130 NW2d 406 (1964); *Moskalik v Dunn,* 392 Mich 583, 592; 221 NW2d 313 (1974); *Javis v Ypsilanti Bd of Ed,* 393 Mich 689, 702, n 4; 227 NW2d 543 (1975); *Napier v Jacobs,* 429 Mich 222, 233, n 2; 414 NW2d 862 (1987). See also *People v Bushard,* 444 Mich 384, 400; 508 NW2d 745 (1993) (LEVIN, J.); see also MRE 103(d).

[4] *United States v Colon-Pagan,* 1 F3d 80 (CA 1, 1993); *United States v Montanye,* 996 F2d 190 (CA 8, 1993).

Congress. It is well established that the "Congress is free to grant or withhold the judicial power . . . ." Wright, Law of Federal Courts (4th ed), § 10, p 38.

In contrast with the federal constitution, the Michigan Constitution confides the judicial power to this Court,[5] and it is beyond the power of the Legislature to define, limit, or control the exercise of that power.

Because this Court's judicial power is plenary, it is not confined by a court rule, and certainly not by a statute. I would follow the approach suggested by Justice Stevens, and recognize in the Court of Appeals a "wide measure of discretion in the supervision of litigation . . . ." 123 L Ed 2d 527. This Court, which does not hesitate to enter peremptory orders of reversal, can correct any excessive recognition of plain error by the Court of Appeals.

CAVANAGH, C.J., concurred with LEVIN, J.

[5] The judicial power of the state is vested exclusively in 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.]

MICHIGAN MILLERS MUTUAL INSURANCE COMPANY v BRONSON PLATING COMPANY

Docket No. 95639. Argued November 4, 1993 (Calendar No. 17). Decided July 12, 1994. Rehearing denied 447 Mich 1202.

Michigan Millers Mutual Insurance Company brought an action in the Branch Circuit Court against Bronson Plating Company, its insured, seeking a declaration that it was not obligated to defend Bronson Plating with respect to a potentially responsible party (PRP) letter from the Environmental Protection Agency informing Bronson of its potential liability for alleged environmental contamination because no suit had been commenced. Bronson counterclaimed, joining its other named insurers as counterdefendants and seeking a declaration that the insurers had a duty both to defend and to indemnify. The court, Michael H. Cherry, J., ruled that the insurers had no obligation under the insurance policies to provide a defense in the absence of a complaint filed in a court. The Court of Appeals, WAHLS, P.J., and MARILYN J. KELLY, J. (REILLY, J., dissenting), reversed, holding that a suit had been brought (Docket No. 123554).

In an opinion by Justice MALLETT, joined by Chief Justice CAVANAGH, and Justices LEVIN and BOYLE, the Supreme Court *held:*

The term "suit," as used in the insurance policies at issue, is ambiguous and capable of application to nontraditional legal actions that are the functional equivalent of a suit brought in a court of law. Under this definition, the PRP letter received by Bronson Plating constituted the initiation of a suit that the insurers were obliged to defend under the terms of their insurance policies.

1. An insurance policy must be enforced in accordance with its terms. A court may not read ambiguities into a policy where none exist. Although the term "suit" was not defined within the policies at issue, that alone is not conclusive evidence of ambiguity. Rather, where no definition is provided, the court must interpret the term according to its commonly used meaning, taking into account the reasonable expectations of the parties. Where ambiguity is found, the term must be construed in the manner most favorable to the insured.

2. In determining what a typical layperson would understand

a particular term to mean, it is customary to consult lay dictionaries. In such publications, the more general definitions of "suit" persuasively suggest the term to apply to proceedings other than a court action initiated by a complaint. Where insurers fail to provide otherwise, that commonly understood meaning must prevail. A broader definition of the term reflects more accurately the modern realities of the legal system. Thus, "suit," as used in the policies at issue, is ambiguous and capable of application to legal proceedings initiated in other than a traditional court setting.

3. In this case, taking into account the various components of the PRP letter and its ramifications, the legal proceeding initiated by receipt of that notice is the functional equivalent of a suit brought in a court of law. Of critical importance is the creation of the administrative record and the role it may play in future litigation. Documentation sought by the EPA that Bronson Plating must produce under the force of law will determine the amount and type of waste generated and discharged onto the site. Given the strict liability stance of the Comprehensive Environmental Response, Compensation, and Liability Act, this information is all that is needed to establish both the fact and proportional share of Bronson's liability at the site. Because the EPA may implement any investigatory and remedial action it deems necessary at the site, subject only to an abuse of discretion review, the total cost of the project will also be determined before litigation is brought. The significant authority given to the EPA in such matters allows it essentially to usurp the traditional role of a court in determining and apportioning liability and may be viewed as coercing the voluntary participation of PRPs.

Affirmed.

Justice GRIFFIN, joined by Justices BRICKLEY and RILEY, dissenting, stated that the word "suit" in the context presented unambiguously refers to court proceedings instigated by the filing of a complaint.

The duty of an insurer to defend its insured may be broader than the insurer's obligation to indemnify. Nevertheless, the duty to defend is contractual, and, if there is no contract to defend, there is no duty to defend. Any delineation of the scope of the duty to defend requires reference to the terms of the insurance contract itself. Where the language of an insurance contract is plain and unambiguous, it must be enforced as written.

The mere assertion of a doubtful meaning in a contract does not give rise to an ambiguity, and a court is not at liberty to

create ambiguity where none exists. Whether terms in an insurance policy are ambiguous is a question for the court, which must examine the words in the contract in which they are used. In common usage, the word "suit" refers to a proceeding in court. That meaning is starkly apparent in the context of the policy language at issue, which draws a clear distinction between "claim" and "suit": the insurer has no obligation to defend against a claim; rather, its duty to defend a suit is engendered by the filing of a complaint, even though the allegations may be groundless, false, or fraudulent. Applying ordinary, common-sense meaning to the policy language, an EPA PRP letter is a claim made, not a suit brought. It is not reasonable for the insured in this case to expect that the contract will be enforced other than according to its terms.

Whether a broader definition of "suit" would more accurately reflect the modern realities of the legal system is irrelevant. The Court must determine the meaning of the term at the time the contract was executed. The majority's holding contravenes settled principles of Michigan insurance law, rewriting unambiguous contract language under the guise of interpretation and ignoring the significance of a complaint in determining the scope of an insured's duty to defend.

197 Mich App 482; 496 NW2d 373 (1992) affirmed.

Willingham & Coté, P.C. (by *John A. Yeager* and *Anthony S. Kogut*), for the plaintiff.

Hickey & Cianciolo, P.C. (by *Steven M. Hickey* and *Mary Lou K. Posa*), for Commercial Union Insurance Company.

Bigler, Berry, Johnston, Sztykiel & Hunt, P.C. (by *Steven C. Berry*), for Hamilton Mutual Insurance Company.

Sullivan, Ward, Bone, Tyler & Asher, P.C. (by *Michelle A. Thomas* and *Thomas M. Slavin*), for Indiana Lumbermens Mutual Insurance Company.

Kitch, Saurbier, Drutchas, Wagner & Kenney, P.C. (by *Mark D. Willmarth, Susan H. Zitterman,* and *Arthur F. Brandt*), for Indiana Insurance Company.

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. (by *Kim V. Marrkand*), for Liberty Mutual Insurance Company.

Law Offices of Beresh & Prokoff (by *Sandra A. Prokoff*) for Liberty Mutual Insurance Company.

Miller, Canfield, Paddock & Stone (by *Michael B. Ortega, James D. Robb,* and *W. Mack Faison*) for Federal Insurance Company.

Morrison, Morrison & Finley (by *Kenneth W. Morrison*) for Great Southwest Fire Insurance Company.

Cummings, McClorey, Davis & Acho, P.C. (by *Marcia L. Howe* and *T. Joseph Seward*), for the Hartford Accident and Indemnity Company.

Howard & Howard Attorneys, P.C. (by *Myra L. Willis*), for Auto-Owners Insurance Company.

Honigman, Miller, Schwartz & Cohn (by *Jay E. Brant, Philip A. Grashoff, Jr., Mark A. Goldsmith,* and *Daniel G. Helton*), for the defendant.

Amici Curiae:

Provizer, Lichtenstein & Phillips, P.C. (by *Marilyn A. Madorsky*); *Wiley, Rein & Fielding,* of counsel (by *Laura A. Foggan, James M. Johnstone,* and *William A. McGrath*), for Insurance Environmental Litigation Association.

Covington & Burling (by *Gregg H. Levy, Eric C. Bosset, Seth A. Tucker,* and *Ronald J. Krotoszynski, Jr.*), and *Warner, Norcross & Judd* (by *Paul T. Sorensen*) for American Petroleum Institute, American Fiber Manufacturers Association, Chem-

ical Manufacturers Association, and Olin Corporation.

Butzel, Long (by *John H. Dudley, Jr.,* and *Jack D. Shumate*) for Hi-Mill Manufacturing Company and Petroleum Specialties, Inc.

MALLETT, J. Defendants appeal the Court of Appeals determination that defendants' duty to defend was triggered by plaintiff Bronson Plating Company's receipt of a letter from the United States Environmental Protection Agency, informing Bronson of its potential liability at the contaminated North Bronson Industrial Area site. Defendants argue that receipt of the notice did not give rise to a duty to defend because the letter did not signal the initiation of a "suit" within the meaning of the subject insurance policies.

We find that the term "suit," as used in the insurance policies at issue, is ambiguous and capable of application to legal actions, other than court proceedings, that are the functional equivalent of a suit brought in a court of law. We further hold that the notice of potential liability received by Bronson in this instance, signaled the initiation of a legal proceeding that was the functional equivalent of a traditional court action, and thereby triggered the insurers' duty to defend. We affirm.

I

The pertinent facts of this declaratory judgment action are not in dispute. Since the 1940s, the Bronson Plating Company has engaged in the electroplating of various metal parts at its facility at the North Bronson Industrial Area in Bronson, Michigan. In its electroplating process, Bronson

has utilized a variety of chemicals and compounds, including nickel, nickel-chrome, lead, caustic soda, sulfuric acid, and hydrochloric acid. The process involved the release of large quantities of waste water, and this waste was identified by the EPA and the Michigan Department of Natural Resources as a possible source of environmental contamination of the North Bronson Industrial Area.

Bronson had purchased comprehensive general liability insurance from Michigan Millers Mutual Insurance Company, and three of its policies were in effect consecutively from January 1970 through January 1977. Each of these policies provided that the insurance company shall have the "duty to defend any *suit* against the insured seeking damages on account of . . . bodily injury or property damage"[1] (emphasis added). In addition to its insurance contracts with Michigan Millers, Bronson was insured under several primary and umbrella/excess policies issued by other insurance compa-

[1] Each of the policies contained the following provision:

I. COVERAGE A—BODILY INJURY LIABILITY
COVERAGE B—PROPERTY DAMAGE LIABILITY

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

A. bodily injury or
B. property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

nies,[2] each of which contained similar language with respect to the insurer's duty to defend.

In April 1986, the EPA, acting under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[3] notified Bronson by letter that it may be liable for contamination of the North Bronson Industrial Area (the "site"). This communication, frequently referred to as a "potentially responsible party" (PRP) letter, advised Bronson that the EPA had "documented the release . . . of hazardous substances . . . at the . . . site, and is planning to spend public funds to control and investigate these releases." In its PRP letter, the EPA, inter alia, requested Bronson's voluntary participation in connection with certain studies, and cautioned that Bronson's failure to do so could result in it being held jointly and severally liable for any costs that were expended. Pursuant to its letter, the EPA also demanded that Bronson supply relevant information, it encouraged good-faith negotiations between Bronson and the agency and with other potentially responsible parties, and it explained that failure to comply "may result in a civil enforcement action being brought against you by EPA."

Although the PRP letter to Bronson was not issued until April 1986, Bronson began notifying its insurers in November 1985 that the EPA considered it to be a possible source of groundwater

[2] The other insurers, which were joined in this action as counterdefendants, are: Federal Insurance Company, one of the Chubb Group of Insurance Companies, Auto-Owners Insurance Company, Commercial Union Insurance Company, Great Southwest Fire Insurance Company (now known as VanLiner Insurance Company), Hartford Accident & Indemnity Company, Indiana Insurance Company, Indiana Lumbermens Mutual Insurance Company, Liberty Mutual Insurance Company, and Hamilton Mutual Insurance Company. Except where otherwise indicated, we refer collectively to Michigan Millers and the counterdefendant insurance companies as the "insurers."

[3] 42 USC 9601 *et seq.*

contamination at the site.[4] Bronson's letter to Michigan Millers was dated March 21, 1986, and demanded

> pursuant to the terms of any applicable policies of insurance issued by you, . . . that you undertake your responsibility to defend, indemnify and hold Bronson Plating harmless from and against any and all damages . . . or any liability . . . arising out of the listing of the North Bronson Industrial Area on the NPL by [the] EPA . . . .

While the other insurers declined to do so, Michigan Millers agreed to provide a defense for Bronson, subject, however, to a reservation of its rights. Michigan Millers then commenced the instant declaratory judgment action, seeking a judicial determination, inter alia, that it was not obligated to defend Bronson because no "suit" had been commenced. Bronson filed a counterclaim and joined the other named insurance companies as counterdefendants. In its countercomplaint, Bronson sought a declaration that its insurers had a duty both to defend and indemnify Bronson.

The trial court then considered cross-motions for summary disposition and, addressing only the duty to defend issue, ruled that the insurers had no obligation under the insurance policies to provide a defense "in the absence of a complaint filed in a Court against Bronson by the EPA or the DNR."

Thereafter, a divided panel of the Court of Ap-

[4] In October 1984, the EPA had proposed that the site be placed on the National Priorities List (NPL), under § 105 of CERCLA, and the listing became final in June 1986. The NPL is a prioritization of contaminated sites compiled and updated annually by the EPA. 42 USC 9605(a)(8)(B). A contaminated site must be included on the NPL if the EPA intends to use public CERCLA funds (the superfund) to finance remedial action in connection with the site. 40 CFR 300.425. The North Bronson Industrial Area was also placed on the Priority List of Contaminated Sites by the DNR pursuant to the Michigan Environmental Response Act, 1982 PA 307, as amended. MCL 299.601 *et seq.*; MSA 13.32(1) *et seq.*

peals reversed.[5] The panel majority registered its agreement with the reasoning and result in *Polkow v Citizens Ins Co of America,* 180 Mich App 651; 447 NW2d 853 (1989), rev'd on other grounds 438 Mich 174; 476 NW2d 382 (1991),[6] and declared: "[W]e hold in this case . . . that a 'suit' has been brought." 197 Mich App 482, 491; 496 NW2d 373 (1992).

We then granted leave to appeal, limited to the question whether the EPA letter notifying Bronson of its potential liability for alleged environmental contamination constitutes a "suit" that gives rise to the insurers' duty to defend under the terms of the applicable insurance contracts.[7] 443 Mich 880 (1993).

II

Defendants argue that the PRP letter received by Bronson did not constitute the initiation of a

[5] Judge REILLY dissented, stating that she would "adopt the reasoning of *City of Evart v Home Ins Co,* unpublished opinion per curiam of the Court of Appeals, decided April 10, 1989 (Docket No. 103621), and *Ray Industries, Inc v Liberty Mutual Ins Co,* 974 F2d 754 (CA 6, 1992), and affirm the trial court's order granting summary disposition." 197 Mich App 482, 496; 496 NW2d 373 (1992).

[6] The panel majority quoted with approval this sentence from the *Polkow* opinion:

> In our view, subjecting the insured to administrative mechanisms mandating an environmental investigation and cleanup, backed by the power to expose the insured to a money judgment in a court of law, amounts to a "suit" for the purposes of invoking the coverage of the policy. [180 Mich App 657.]

[7] The issue whether costs incurred by an insured in response to a letter from an environmental regulatory agency are "damages on account of . . . property damage" has been the subject of extensive litigation. See, e.g., *United States Aviex Co v Travelers Ins Co,* 125 Mich App 579; 336 NW2d 838 (1983). See, generally, Cordes, *Who gets the bill? Determining insurers' duty to defend and indemnify against hazardous waste clean-up costs under general liability policies,* 18 Envtl L 931 (1988). In light of the limitations imposed by the grant order, we do not address that issue.

"suit," triggering their duty to defend. To resolve defendants' claim, we must first determine whether "suit," as used in the subject insurance policies, is an ambiguous term admitting of more than one construction, i.e., whether the term may refer to some legal action other than a court proceeding initiated by a complaint. Second, if the term is ambiguous and capable of broader definition, whether it may reasonably be understood to encompass the PRP letter received by Bronson.

A

When interpreting insurance policies under Michigan law, we are guided by a number of well-established principles of construction. Foremost among those is the maxim that an insurance policy must be enforced in accordance with its terms. *Upjohn Co v New Hampshire Ins Co,* 438 Mich 197, 207; 476 NW2d 392 (1991). A court may not read ambiguities into a policy where none exist. *Auto-Owners Ins Co v Churchman,* 440 Mich 560, 567; 489 NW2d 431 (1992).

Although the term "suit" was not defined within the relevant insurance policies, that fact, alone, is not conclusive evidence that ambiguity exists. *Group Ins Co of Michigan v Czopek,* 440 Mich 590, 596; 489 NW2d 444 (1992). Rather, where no definition is provided, the court must interpret the term according to its "commonly used meaning," *id.,* taking into account the reasonable expectations of the parties. *Vanguard Ins Co v Clarke,* 438 Mich 463, 472; 475 NW2d 48 (1991). Where ambiguity is found, the court must construe the term in the manner most favorable to the insured. *Auto Club Ins Ass'n v DeLaGarza,* 433 Mich 208, 214; 444 NW2d 803 (1989).

There is a division of opinion, both within Michi-

gan and among other jurisdictions, regarding the definition of the term "suit," and its application to nontraditional legal proceedings.[8] Some courts have found that "suit" must refer unambiguously to a court proceeding initiated by a complaint, while others hold that the term may also encompass some nonjudicial proceedings.

In determining what a typical layperson would understand a particular term to mean, it is customary to turn to dictionary definitions. Having canvassed a number of lay dictionaries, we note that most definitions of "suit" do include a reference to some type of court proceeding, e.g., "the act, the process, or an instance of suing in a court of law." *The Random House Dictionary of the English Language* (1987). Nevertheless, "suit" is not defined *exclusively* in those terms. For instance, *Webster's New World Dictionary of the American Language* (2d college ed, 1982), provides the alternative definition, "attempt to recover a right or claim through legal action," while *Webster's Third New International Dictionary of the English Language* (1964), defines suit as "the attempt to gain an end by legal process: prosecution of a right before any tribunal."

The existence of these alternative and more general definitions of a "suit" persuasively suggests that a typical layperson might reasonably

[8] Some courts have found this division of authority to be, itself, conclusive evidence that ambiguity exists. See, generally, anno: *Division of opinion among judges on same court or among other courts or jurisdictions considering same question, as evidence that particular clause of insurance policy is ambiguous,* 4 ALR4th 1253. We do not adopt that view. Nevertheless, we do find the division of authority to be instructive and to at least lend credence to the position that more than one reasonable interpretation of the term exists. *C & J Commercial Driveway, Inc v Fidelity & Guaranty Fire Corp,* 258 Mich 624, 629; 242 NW 789 (1932) (A split of authority demonstrates "at least that [the term] is of doubtful meaning and requires construction").

expect the term to apply to legal proceedings other than a court action initiated by a complaint. *Morrisville Water & Light Dep't v United States Fidelity & Guaranty Co,* 775 F Supp 718, 731-732 (D Vt, 1991). Where the insurers fail to provide otherwise, that commonly understood meaning must prevail.

Furthermore, defendants' suggestion that this Court has previously limited application of the term "suit" to court proceedings is unconvincing. The only Michigan Supreme Court case law interpreting the term in the context of triggering an insurer's duty to defend is inconclusive with regard to the case before us.

In *Patterson v Standard Accident Ins Co,* 178 Mich 288; 144 NW 491 (1913), this Court addressed the question whether a criminal prosecution constitutes a "suit" against which an insurer is obliged to defend. In its opinion, the *Patterson* Court explored the definition of "suit," observing as follows:

> It must be conceded that the word "suit," as applied to legal controversies, both by the legal profession and others, is now used and recognized as a generic term of broad significance, often understood and used, even by legislatures and courts, to designate *almost any proceeding in a court,* even, though rarely, being applied to a criminal prosecution in certain connections. [*Id.* at 292. Emphasis added.]

Despite this observation, focusing on the use of the term with regard to court actions, when the Court proceeded to set forth a definition of "suit," it did so more broadly, stating:

> "Suit," in its general unqualified use in legal

> documents, such as the one before us, naturally means, and should be construed as intended to include, *the mode or manner authorized and adopted by law to redress civil injuries.* [*Id.* Emphasis added.]

On this basis, the *Patterson* Court determined that criminal prosecutions were not covered.

The *Patterson* discussion fails to definitively endorse or reject the application of the term "suit" to nonjudicial proceedings. However, by defining "suit" broadly as the "mode or manner authorized and adopted by law to redress civil injuries," the Court certainly left open the possibility that proceedings occurring outside the courtroom could be encompassed. Accordingly, defendants' reliance upon *Patterson* is misplaced.[9]

We also note that a broader definition of the term "suit" reflects more accurately the modern realities of our legal system. As the legal community and state and federal legislatures struggle to relieve the ever-increasing burdens on our courts and the constantly rising costs of litigation, a gravitation is evident toward less formal and more expeditious means of dispute resolution. This movement has manifested itself in the growing use of arbitration, as well as increased authority given to administrative agencies to resolve disputes, so

[9] We disagree with the dissent's suggestion that *Patterson* must be read to *implicitly* limit application of the term to traditional court proceedings. *Post* at 595-596 ("while resolving the issue of the *type* of court proceedings contemplated by the term 'suit' in the particular contract, the *Patterson* Court necessarily found that the commencement of court proceedings is indispensable to the existence of a 'suit' "). A finding that "suit" refers exclusively to court proceedings was not indicated by the Court's reasoning in that case. Because only judicial proceedings were at issue, application of the term to nonjudicial proceedings was neither necessary nor relevant to the Court's discussion. Therefore, the Court's failure to discuss the term in the context of nonjudicial proceedings should not be read to suggest that an implicit limitation was intended.

that the functional equivalents of suits brought in a court of law have developed.[10] As is discussed in more detail below, this point is particularly valid in the context of CERCLA actions, where the Legislature has deliberately and painstakingly developed a system in which a PRP has every incentive to "voluntarily" cooperate with the EPA, before actual litigation,[11] and where significant legal prejudice may develop if the PRP fails to do so.[12]

Therefore, we find the term "suit" as used in the insurance policies at issue, to be ambiguous and capable of application to legal proceedings initiated in other than a traditional court setting.

B

Having determined that the term "suit" is capable of application to nonjudicial legal proceedings, we must next determine whether the PRP letter received by Bronson did, in fact, constitute the initiation of a suit under the subject insurance

[10] Even outside the environmental arena, courts have defined the term "suit" broadly and found it to encompass arbitration, *Madawick Contracting Co v Travelers Ins Co,* 307 NY 111, 117-119; 120 NE2d 520 (1954), and administrative proceedings. *Solo Cup Co v Federal Ins Co,* 619 F2d 1178, 1188, n 7 (CA 7, 1980), cert den 449 US 1033 (1980); *Campbell Soup Co v Liberty Mutual Ins Co,* 239 NJ Super 488, 496-499; 571 A2d 1013 (1988), aff'd 239 NJ Super 403; 571 A2d 969 (1990); *School Dist No 1, Multnomah Co v Mission Ins Co,* 58 Or App 692, 703-704; 650 P2d 929 (1982); *Community Unit School Dist No 5 v County Mutual Ins Co,* 95 Ill App 3d 272, 278-279; 50 Ill Dec 808; 419 NE2d 1257 (1981).

[11] There is no question that PRPs, as well as the government, could benefit from less litigation in this area. The transaction costs related to ameliorating a CERCLA site can be staggering. In a recently published study, the experiences of 108 PRPs at eighteen superfund sites were examined. It was concluded that those PRPs spent an average of $1.24 million on site-related costs between 1981 and 1991. Of that amount, some twenty-one percent, or $260,000 per PRP was spent on transaction costs, primarily legal fees. Dixon, Drezner & Hammitt, Private-sector cleanup expenditures and transaction costs at 18 superfund sites (RAND, 1993).

[12] See, generally, note, *The best equitable defense is a good offense,* 29 Nat Resources J 849 (1989).

policies. Once again, the jurisdictions are split on this issue.

Some courts have found that a typical PRP letter from the EPA constitutes the initiation of a suit, thereby giving rise to the duty to defend. Those courts have emphasized the particular nature of CERCLA-related actions, and the unique authority given to the EPA to develop an essentially binding record and to design and implement actions that the PRPS may later be held liable for. See, e.g., *Coakley v Maine Bonding & Casualty Co,* 136 NH 402, 416-419; 618 A2d 777 (1992); *Hazen Paper Co v United States Fidelity & Guaranty Co,* 407 Mass 689, 696-699; 555 NE2d 576 (1990).

In contrast, other jurisdictions have declined to impose a duty to defend absent a more definitive and directive EPA action, e.g., an order to undertake site investigation or cleanup. Those courts have tended to focus on the "voluntary" participation sought by the EPA, as well as the lack of certainty that litigation would ensue if the PRP failed to comply. See, e.g., *Ryan v Royal Ins Co of America,* 916 F2d 731, 741 (CA 1, 1990); *Avondale Industries, Inc v Travelers Indemnity Co,* 887 F2d 1200, 1206 (CA 2, 1989), cert den 496 US 906 (1990).

In determining whether a "suit" was initiated in the present case, we must examine the contents of the PRP letter received by Bronson. In pertinent part, that letter informed Bronson that the EPA had identified it as a potentially responsible party for contamination at the North Bronson Industrial Area. Barring an immediate offer from any of the PRPS to conduct a remedial investigation and feasibility study (RI/FS), the EPA would undertake to complete one. If the EPA did so, under the terms of

42 USC 9607(a), Bronson could be held jointly and severally liable for "all costs associated with the removal or remedial action and all other necessary costs incurred in cleaning up the site, including investigation, planning and enforcement." Further, the EPA required Bronson to submit documentation regarding any waste it had released onto the site. Failure to comply with this demand could result in civil action and fines.

Taking into account the various components of this PRP letter and its ramifications, we find that the legal proceeding initiated by the receipt of that notice is the functional equivalent of a suit brought in a court of law.[13] Of critical importance is the creation of the administrative record and the role it may play in future litigation. Documen-

[13] In making this determination, we are cognizant of the concern raised by the insurers that a decision in plaintiff's favor might blur the distinction between "claim" and "suit" evidenced in their insurance policies. While the policies reserve for the insurer the *right* to investigate any *"claim,"* the insurers' *duty to defend* extends only to a *"suit."* In response to this concern, we wish to emphasize that this opinion should in no way be viewed as intimating that every request for relief should be considered the initiation of a suit that the insurers are obliged to defend. Rather, our determination on this issue is made primarily based on the unique aspects of CERCLA actions and the authority given to EPA under the statute. As explained by the Ninth Circuit Court of Appeals in *Aetna Casualty & Surety Co, Inc v Pintlar Corp,* 948 F2d 1507, 1516-1517 (CA 9, 1991):

> Unlike the garden variety demand letter, which only exposes one to a potential threat of future litigation, a PRP notice carries with it immediate and severe implications. Generally, a party asserting a claim can do nothing between the occurrence of the tort and the filing of the complaint that can adversely affect the insureds' rights. However, in a CERCLA case, the PRP's substantive rights and ultimate liability are affected from the start of the administrative process. *Avondale Industries, Inc v Travelers Indem Co,* 697 F Supp 1314, 1321 (SD NY, 1988) ("Adverse consequences can befall an insured during the administrative pollution cleanup process"), aff'd 887 F2d 1200 (CA 2, 1989).

Accordingly, we do not disturb the basic claim/suit distinction contained within the subject insurance policies.

tation sought by the EPA, and which Bronson must produce under the force of law, will determine the amount and type of waste generated by Bronson and discharged onto the site. Given the strict liability stance of CERCLA, this information is all that is needed to establish both the fact and proportional share of Bronson's liability at the site.[14]

Moreover, because the EPA may implement any investigatory and remedial action it deems necessary at the site, subject only to an abuse of discretion review,[15] the total cost of the project will also be determined before litigation is brought. The significant authority given to the EPA in such matters allows it essentially to usurp the traditional role of a court of law in determining and apportioning liability. Such matters are concluded *by the EPA* before the action is ever brought to court.[16]

The EPA's powers may also be viewed as coercing the "voluntary" participation of PRPs. The entire CERCLA scheme revolves around "encouraging" PRPs to engage in voluntary cleanups. Only in so doing may a PRP have a voice in developing the record that will be used against it and in determining the amount of its liability through selection of investigatory and remedial methods and procedures. The significance of these incentives is underscored by the fact that EPA-conducted CERCLA

[14] 42 USC 9607(a). Defenses to CERCLA liability are virtually nonexistent. 42 USC 9607(b).

[15] 42 USC 9613(j)(2) provides that the government's selection of a response action will be upheld "unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law."

[16] See, e.g., *Coakley, supra* at 418 ("One would not expect a traditional tort defendant to concede the 'damages' portion of a case, and it likewise would be myopic to conclude that the Coakleys' rights are not substantially determined by the administrative process described in the PRP notice"), citing *Hazen Paper Co, supra* at 695-697.

actions have historically been considerably and, some would suggest, needlessly more expensive than those actions conducted by PRP groups.[17]

Finally, we note, from a policy perspective, that the position urged by defendants would only increase the litigiousness of this already extensively litigated area of the law. Limiting an insurer's duty to defend to an actual court proceeding preceded by a complaint would merely encourage PRPs to decline "voluntary" involvement in site cleanups, waiting instead for an actual lawsuit to be brought in order to receive insurance coverage. This would have the effect of substantially protracting the cleanup of contaminated sites.

III

We find that the term "suit," as used in the insurance policies at issue, is ambiguous and capable of application to nontraditional legal actions that are the functional equivalent of a suit brought in a court of law. We further hold that, under this definition, the PRP letter received by Bronson constituted the initiation of a "suit" that the insurers were obliged to defend under the terms of their insurance policies.

We affirm.

CAVANAGH, C.J., and LEVIN and BOYLE, JJ., concurred with MALLETT, J.

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[17] Anderson, *Negotiation and informal agency action: The case of superfund,* 1985 Duke L J 261, 302 (1985) ("EPA assessment and cleanup costs might average thirty to forty percent more than equivalent private cleanups"); Babich, *Understanding the new era in environmental law,* 41 SC L R 733, 760, n 118 (1990) (" '[T]he government may spend from 100 percent to 500 percent more than a private client would spend to accomplish essentially the same site study or cleanup' "), quoting Lee, *EPA response action: Contracting and cost recovery under CERCLA,* 4 Toxics L Rep 216, 219, n 41 (1989).

GRIFFIN, J. (*dissenting*). In its opinion today, the majority holds that a "suit," against which the insurer must defend its policyholder under the insurance contract in question, is commenced upon mere issuance by the United States Environmental Protection Agency of a letter informing the policyholder of its potential liability for alleged environmental contamination.[1] I respectfully dissent. Because the word "suit," as used in the contract, unambiguously refers to court proceedings instigated by the filing of a complaint, I would reverse the decision of the Court of Appeals.

I

Our approach to the task presented should be guided by certain fundamental tenets of construction that have particular application in the field of insurance law. It is generally recognized that the duty of an insurer to defend its insured may be broader than the insurer's obligation to indemnify. *Allstate Ins Co v Freeman,* 432 Mich 656, 662; 443 NW2d 734 (1989) (RILEY, J.). Nevertheless, the "duty to defend is contractual and if there is no contract to defend there is no duty to defend." 14 Couch, Insurance, 2d (rev ed), § 51:35, p 444. Any delineation of the scope of the duty to defend requires reference to the terms of the insurance contract itself. *Freeman, supra* at 701 (BOYLE, J.); *Stockdale v Jamison,* 416 Mich 217, 224; 330 NW2d 389 (1982); *Arco Industries Corp v Travelers Ins Co,* 730 F Supp 59, 66 (WD Mich, 1989).

It is well settled that ambiguities in the meaning of the terms of an insurance contract are to be resolved in favor of the insured. *Mays v Ins Co of*

[1] The full text of the letter from the EPA to Bronson is set forth in an addendum.

North America, 407 Mich 165, 172; 284 NW2d 256 (1979); *Wozniak v John Hancock Mutual Life Ins Co,* 288 Mich 612, 615; 286 NW 99 (1939).[2] However, this notion is tempered by the axioms that "[m]eaning should be given to all terms" and "[a]mbiguities should not be forced." *Fresard v Michigan Millers Mutual Ins Co,* 414 Mich 686, 694; 327 NW2d 286 (1982).[3] When the language of an insurance contract is plain and unambiguous, it must be enforced as written. *Eghotz v Creech,* 365 Mich 527, 530; 113 NW2d 815 (1962); *Kingsley v American Central Life Ins Co,* 259 Mich 53, 55; 242 NW 836 (1932).

Although the issue presented is one of first impression in this Court, it has been addressed with mixed results by other courts applying Michigan law. In *City of Evart v Home Ins Co,* unpublished opinion per curiam of the Court of Appeals, decided April 10, 1989 (Docket No. 103621), the panel found that the term "suit," as used in such a

[2] To determine whether an ambiguity exists, this Court has stated:

> If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage.
>
> Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear. [*Raska v Farm Bureau Mutual Ins Co,* 412 Mich 355, 362; 314 NW2d 440 (1982).]

[3] "Contracts . . . are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." [*Farm Bureau Mutual Ins Co v Stark,* 437 Mich 175, 181; 468 NW2d 498 (1991), quoting *Kingsley v American Central Life Ins Co,* 259 Mich 53, 55; 242 NW 836 (1932).]

policy, was "clear and unambiguous, and [that], given its plain and ordinary meaning," it did not encompass a policyholder's receipt of a notice letter issued by the DNR.

Drawing upon the *Evart* ruling, a similar result was reached in several decisions by federal courts applying Michigan law that determined the meaning of "suit" in the context of an insured's receipt of a PRP letter. See *Upjohn Co v Aetna Casualty & Surety Co,* 768 F Supp 1186, 1198 (WD Mich, 1990) ("[T]he PRP letter issued to an insured is not a 'suit' within the meaning of the general liability insurance policies . . . in accord with *City of Evart*"); *Arco Industries Corp v Travelers Ins Co, supra* at 68 ("[T]he PRP letter issued to [the insured] is not a 'suit' within the meaning of the insurance policies and . . . it did not trigger the insurers' duty to defend [the insured] against the EPA").[4]

Notwithstanding the holding in *Evart* and its progeny, a subsequent panel of the Michigan Court of Appeals issued a contrary decision in *Polkow v Citizens Ins Co of America,* 180 Mich App 651; 447 NW2d 853 (1989), rev'd on other grounds 438 Mich 174; 476 NW2d 382 (1991).[5] It concluded that for the DNR to subject an insured to its "administra-

[4] See also *Harter Corp v Home Indemnity Co,* 713 F Supp 231, 233 (WD Mich, 1989) ("The Court finds that a 'suit' in this context plainly means some type of court proceeding").

[5] The *Polkow* panel relied upon *United States Aviex Co v Travelers Ins Co,* 125 Mich App 579; 336 NW2d 838 (1983). However, as explained by Judge Enslen in *Arco, supra,*

> The *Aviex* court did not hold that the DNR's notification letter triggered the insurer's duty to defend. Rather, it held that a justiciable controversy existed, before the DNR filed suit, over whether the insured would be obligated to defend and indemnify the insured *if the DNR later filed suit.* [*Id.* at 68. Emphasis added.]

tive mechanisms" mandating environmental investigation and cleanup, "backed by the power to expose the insured to a money judgment in a court of law, *amounts to a 'suit'* for purposes of invoking the coverage of the policy." 180 Mich App 657 (emphasis added).[6]

More recently, the United States Court of Appeals for the Sixth Circuit rejected the *Polkow* reasoning, and adopted the position reflected in *Evart, Upjohn,* and *Arco,* i.e., that receipt by an insured of a PRP letter from the EPA does not constitute a "suit" within the meaning of such policy language. *Ray Industries, Inc v Liberty Mutual Ins Co,* 974 F2d 754, 764 (CA 6, 1992).

As noted by the majority, the decisions of courts in other jurisdictions are also divided on this issue. A number of courts have held, consistent with *Ray Industries,* that use of the term "suit" in this context contemplates the commencement of court proceedings.[7] Other courts have looked to the extent and nature of administrative activity to deter-

[6] Similarly, in a decision on which the *Polkow* panel relied, an insured's receipt of a PRP letter was found to be a "suit" in *Fireman's Fund Ins Cos v Ex-Cell-O Corp,* 662 F Supp 71 (ED Mich, 1987) (applying Michigan law). See also *Higgins Industries, Inc v Fireman's Fund Ins Co,* 730 F Supp 774, 776 (ED Mich, 1989) (where the insured received a notice letter from the DNR, the court held, under Michigan law, "that insurance companies must defend governmental claims and demands in the environmental context, irrespective of whether those claims are couched in demand letters, administrative procedures, or in formal suits, until it is factually established that the policies do not apply").

[7] Courts which have held that the term "suit" in comprehensive general liability policies contemplates court proceedings include: *City of Edgerton v General Casualty Co of Wisconsin,* 184 Wis 2d 750, 781; 517 NW2d 463 (1994) (the Wisconsin Supreme Court found that a " '[s]uit' denotes court proceedings, not a 'functional equivalent' "); *Harleysville Mutual Ins Co, Inc v Sussex Co,* 831 F Supp 1111 (D Del, 1993) (applying Delaware law, the term suit unambiguously does not include the issuance of a PRP letter), *Patrons Oxford Mutual Ins Co v Marois,* 573 A2d 16 (Me, 1990) (an administrative order compelling cleanup by responsible parties was not a suit seeking damages under Maine law), *A Johnson & Co, Inc v Aetna Casualty & Surety Co,* 741

mine whether and when the functional equivalent of a suit has been reached, and have concluded that the mere issuance by an agency of a PRP-type letter does not constitute a suit.[8] However, in line with *Polkow* and the view urged upon us by Bronson, still other courts have ruled that a suit is commenced when a PRP letter is issued by the EPA.[9]

F Supp 298 (D Mass, 1990), aff'd on other grounds 933 F2d 66 (CA 1, 1991) (applying Maine law, the filing of a civil complaint for injunctive relief arising out of hazardous waste cleanup is not a suit), and *Becker Metals Corp v Transportation Ins Co,* 802 F Supp 235 (ED Mo, 1992) (applying Missouri law, an EPA compliance order under CERCLA is not a suit). In an unpublished opinion, a federal district court applying Colorado law also recognized that a suit requires the existence of court proceedings. *Metro Wastewater Reclamation District v Continental Casualty Co,* unpublished memorandum opinion of the United States District Court for the District of Colorado, decided September 23, 1993 (Docket No. 89-C-895).

[8] Jurisdictions that have adopted this hybrid approach, in which mere receipt of a PRP letter is insufficient, include: Ohio, *Professional Rental, Inc v Shelby Ins Co,* 75 Ohio App 3d 365, 376; 599 NE2d 423 (1991) (holding "that a 'suit' is commenced . . . at the moment the EPA issues an administrative order which the PRP is legally obligated to obey, or otherwise attempts to enforce liability through an injunctive action or cost recovery action filed in a court of law"), New York, *Ryan v Royal Ins Co of America,* 916 F2d 731, 741-742 (CA 1, 1990) (under New York law, a suit is determined by the "coerciveness, adversariness, [and] the seriousness of the effort with which the government hounds an insured, and the gravity of imminent consequences," that does not include a state environmental agency's "implied invitation to voluntary action"), *Avondale Industries, Inc v Travelers Indemnity Co,* 887 F2d 1200 (CA 2, 1989), cert den 496 US 906 (1990), *Borg-Warner Corp v Ins Co of North America,* 174 AD2d 24; 577 NYS2d 953 (1992) (adopting *Ryan* and *Avondale* analysis, a suit did not include administrative proceedings that sought only voluntary participation and negotiation and did not threaten litigation), North Carolina, *CD Spangler Construction Co v Industrial Crankshaft & Engineering Co, Inc,* 326 NC 133; 388 SE2d 557 (1990) (state agency compliance orders mandating remedial action constitute a suit), and Wisconsin, *City of Edgerton v General Casualty Co of Wisconsin,* 172 Wis 2d 518; 493 NW2d 768 (1992), rev gtd sub nom *Edgerton Sand & Gravel v General Casualty,* 497 NW2d 130 (1993) (adopting the analysis of *Ryan, supra*).

[9] Jurisdictions finding the existence of a "suit" upon the issuance of a PRP letter include: Illinois, *United States Fidelity & Guaranty Co v Specialty Coatings Co,* 180 Ill App 3d 378; 535 NE2d 1071 (1989), Iowa, *A Y McDonald Industries, Inc v Ins Co of North America,* 475 NW2d 607 (Iowa, 1991) (an EPA administrative compliance action

Today, a majority of this Court adopts the third of these three approaches. I dissent because the insurance policy language delineates the risk assumed and makes clear that the parties contracted for a defense by the insurer against a lawsuit brought in court, and not for something else that might be regarded by some as the "functional equivalent" thereof.

II

A

The majority finds the term "suit" in the policies before us "to be ambiguous and capable of application to legal proceedings initiated in other than a traditional court setting." *Ante* at 571. I disagree. The mere assertion of doubtful meaning does not give rise to an ambiguity, and a court is not at liberty to create ambiguity in a contract where none exists. *Upjohn Co v Hampshire Ins Co,* 438 Mich 197, 206; 476 NW2d 392 (1991). Whether terms in a policy are ambiguous is a question for the court, which must examine the words in the context in which they are used. *Jones v Farm Bureau Mutual Ins Co,* 172 Mich App 24, 27-28; 431 NW2d 242 (1988).

Here, the language in question reads:

> The Company shall have the right and *duty to defend any suit* against the insured seeking dam-

culminating in a consent order is a suit), Massachusetts, *Hazen Paper Co v United States Fidelity & Guaranty Co,* 407 Mass 689; 555 NE2d 576 (1990), and New Hampshire, *Coakley v Maine Bonding & Casualty Co,* 136 NH 402; 618 A2d 777 (1992). See also *Aetna Casualty & Surety Co, Inc v Pintlar Corp,* 948 F2d 1507 (CA 9, 1991) (applying Idaho law), *Village of Morrisville Water & Light Dep't v United States Fidelity & Guaranty Co,* 775 F Supp 718 (D Vt, 1991) (applying Vermont law), and *Time Oil Co v Cigna Property & Casualty Ins Co,* 743 F Supp 1400 (WD Wash, 1990) (applying Washington law).

ages on account of such bodily injury or property damage, even if any of the allegations of the *suit* are groundless, false or fraudulent, and may make such investigation and settlement of any *claim* or *suit* as it deems expedient, but the Company shall not be obligated to pay any *claim* or *judgment* or to defend any *suit* after the applicable limit of the Company's liability has been exhausted . . . . [Emphasis added.]

In common usage, the word "suit" refers to a proceeding in court, and that meaning is starkly apparent in the context of this policy language, which draws a clear distinction between a "claim" and a "suit." Significantly, no obligation is imposed upon the insurer to defend against a *claim.* However, if a *suit* is brought against the insured, the duty of the insurer to defend is engendered even though the allegations in the complaint may be "groundless, false or fraudulent."

This distinction between a "claim" and a "suit" does not appear in just one place; it is recognized generally in the contract. For example, at another point the policy language instructs:

4. Insured's Duties in the Event of Occurrence, *Claim* or *Suit:*

* * *

(b) If *claim is made* or *suit is brought* against the insured, the insured shall immediately forward to the [insurer] every demand, notice, summons or other process received by him or his representative. [Emphasis added.]

Giving the policy language its ordinary, commonsense meaning, I believe it is apparent that

the EPA's issuance of a PRP letter is a "claim made," and not a "suit brought."[10]

The majority's holding that a PRP letter constitutes a "suit" renders superfluous the language giving the insurer the right to investigate and settle any *claim,* contrary to the tenet that a court must "give effect to all words in an insurance contract if they serve a reasonable purpose." *Allstate Ins Co v Freeman, supra* at 688. Surely, the authority to investigate and settle a *claim,* distinct from a *suit,* undeniably serves a reasonable purpose.

In effect, the majority has imprudently accepted Bronson's argument that we either should ignore altogether the long-recognized distinction between a claim and a suit, see 14 Couch, Insurance, 2d (rev ed), § 51:43, p 457, or that somehow we should say that a very serious claim is a suit. Such an argument amounts to a request that we rewrite the contract between the parties, which we cannot

[10] Another example of the distinct parameters of a "suit" in this context can be found by reference to the "Supplementary Payments" section found in the policies at issue, wherein the insurer agrees to pay

> (a) . . . all costs taxed against the insured in *any suit* defended by the company and all interest *on the entire amount of any judgment therein* which accrues after *entry of the judgment* and before the company has paid or tendered or deposited *in court that part of the judgment* which does not exceed the limit of the company's liability thereon:
>
> (b) premiums *on appeal bonds required in any such suit,* . . . . [Emphasis added.]

Read together, these policy provisions indicate that the parties contemplated a "suit" to include the entry of a judgment, payable into court if adverse to the insured, resulting in a possible appeal. I believe that such a "suit" can only mean one thing: a formal proceeding in a court of law. See also *Ray Industries, supra* at 762 (referring to identical policy language, the court noted that "the policies obviously assume that a 'suit' involves courts, judgments, and possible appeals").

do under the guise of interpretation. *Upjohn Co, supra* at 207. As the *Ray* court observed, "while [the insurer] has the power to investigate any claim, it contracted to defend only suits." *Id.* at 762.

Even without resort to the dictionary, the meaning of the word "suit," in the context of its use in this policy language, is clear and unambiguous. However, this conclusion is strongly fortified by reference to the definitions that are available in the modern lay dictionaries. For example, see:

> *Random House, Webster's College Dictionary* (1991) ("[A]n act or instance of suing in a *court* of law; lawsuit; a petition or appeal"); *Webster's Third New International Dictionary* (1966) ("[A]n action or process in a *court* for the recovery of a right or claim"); *Webster's New World Dictionary of the American Language* (college ed, 1968) ("[A]n action to secure justice in a *court* of law; attempt to recover a right or claim through legal action"); *Webster's II—New Riverside University Dictionary* (1984) ("A *court* proceeding to recover a right or claim"); *Funk & Wagnall's Standard College Dictionary* (1968) ("A proceeding in a *court* of law or chancery in which a plaintiff demands the recovery of a right or the redress of a wrong"); *The American Heritage Dictionary of the English Language* (3d ed) ("[*C*]*ourt* proceeding to recover a right or claim"); *Scott Foresman, Advanced Dictionary* (Doubleday ed, 1979) ("[C]ase in a *court* of law; application to a court for justice"); and *The Random House College Dictionary* (1975) ("[T]he act, the process, or an instance of suing in a *court* of law; legal prosecution; lawsuit").

These definitions are echoed in Black's Law Dictionary (6th ed), which explains that a "suit" is

> A generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others *in a court of law* in which the plaintiff pursues, *in such court,* the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity. [Emphasis added.]

The majority has managed to find several dictionary definitions referring to suit as an "attempt to recover a right or claim through legal action" or an "attempt to gain an end by legal process" (*ante* at 568), and asserts that these "persuasively suggest" ambiguity in the meaning of the term. However, I see no ambiguity in such variations. Rather, I agree with Judge Boggs who, writing for the United States Court of Appeals for the Sixth Circuit, stated:

> [A] "suit," as that term is used both in conversation and in dictionaries, is an attempt to gain an object *in the courts*[,] . . . as opposed to demands and other tactics that, however powerful, are not enforced by a court of law. We reject any attempt to allow phrases that appear in the definitions of "suit," such as "legal process," to expand this term beyond its traditional meaning to include a plethora of quasi-judicial actions from administrative orders to bureaucratic regulations. [*Ray Industries, supra* at 761. Emphasis in original.]

Pointing to an increase in the use of arbitration and other alternative dispute resolution mechanisms, the majority seeks to justify its result by asserting that "a broader definition of the term

'suit' reflects more accurately the modern realities of our legal system." *Ante* at 570. But such an assertion is irrelevant. Our task is to determine the meaning of language used by the parties at the time a contract was executed. Of course, for a higher premium, the parties might have agreed that the insurer would defend the policyholder, not only against suits brought in court but also in arbitration or other out-of-court dispute resolution activities. But that is not the contract of the parties in this case.[11] Instead of giving effect to the language of the insurance policy before us, the majority looks beyond the contract to embark on a hazardous course of rewriting private contracts for the apparent purpose of furthering social policies as they arise.

The most recent rejection of the majority's analysis by the highest court of a sister state was registered by the Supreme Court of Wisconsin. In *City of Edgerton v General Casualty Co of Wisconsin,* 184 Wis 2d 750; 517 NW2d 463 (1994), that court ruled that an insurer did not have a duty to defend against a PRP letter by the EPA or a comparable notification letter by a state agency because a "suit" had not been commenced. Finding "no ambiguity in the term 'suit,' " *id.,* p 781, the court rejected

[11] The language at issue, i.e., the duty to defend a "suit," was developed in comprehensive general liability policies long before 1980, the effective date of CERCLA's enactment. See, generally, Salisbury, *Pollution liability insurance coverage, the standard-form pollution exclusion, and the insurance industry: A case study in collective amnesia,* 21 Envtl L 357, 363-364 (1991); note, *Triggering the liability insurer's duty to defend in environmental proceedings: Does potentially responsible party notification constitute a "suit"?* 67 St John's L R 383, 384, n 3 (1993). Thus, it would have been impossible for the parties to have contemplated the type of responsibility that a PRP letter now commands. Nevertheless, the majority concludes that the type of liability involved here is within the definition of the term "suit," as contemplated by the parties on the date of contracting, with the aid of hindsight.

the argument that such notification letters are the " 'functional equivalent of a suit' ":

> Construing either the EPA's PRP letter or the DNR letters as the "functional equivalent of a suit" would be contrary to present Wisconsin insurance law since (a) the insurer would have to look beyond the four corners of the complaint in order to assess whether a potentially covered claim exists, and (b) the insurer would be put in the position of anticipating a coverage expectation for which it did not contract or receive payment. [*Id.,* p 781.]

Likewise, the majority's holding today contravenes settled principles of Michigan insurance law. It not only rewrites unambiguous contract language under the guise of interpretation, but it ignores the significance of a complaint in determining the scope of an insurer's duty to defend. As this Court recently reiterated in *Protective Nat'l Ins Co of Omaha v City of Woodhaven,* 438 Mich 154, 159; 476 NW2d 374 (1991):

> "*The duty of the insurer to defend the insured depends upon the allegations in the complaint* of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even *arguably* come within the policy coverage. . . . In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. 14 Couch, Insurance, 2d (rev ed), § 51:45, p 538 [now § 51:49, p 489]." [Quoting *Detroit Edison Co v Michigan Mutual Ins Co,* 102

Mich App 136, 141-142; 301 NW2d 832 (1980). Emphasis added.][12]

Thus, the proper construction of the word "suit," rejected today by the majority, comports with the well-established judicial practice of delineating the scope of the duty to defend by analyzing the complaint, which necessarily contemplates the filing of a lawsuit.

It is at least noteworthy, I suggest, that the plain, common-sense meaning that attaches today to the word "suit" has deep roots in the American jurisprudence. In 1821, Chief Justice Marshall considered the meaning of this word, which appears in the Eleventh Amendment to the United States Constitution.[13] Writing for the United States Supreme Court in the seminal decision *Cohens v Virginia,* 19 US (6 Wheat) 264, 407-408; 5 L Ed 257 (1821), he stated:

> What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, *it is the prosecution of some demand in a Court of justice. . . .*
>
> *To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand.* By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, *for the purpose*

[12] See also *Iowa Kemper Ins Co v Ryan,* 172 Mich App 134, 137; 431 NW2d 434 (1988), and *Frankenmuth Mutual Ins Co v Beyer,* 153 Mich App 118, 122; 395 NW2d 36 (1986).

[13] The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. [US Const, Am XI.]

> *of establishing some claim against it by the judgment of a Court;* and the prosecution of that suit is its continuance. [Emphasis added.]

To be sure, much has changed since 1821. However, despite the evolution and empowerment of administrative agencies, such as the EPA and the DNR, the traditionally understood meaning of "suit" has not been altered.

B

In this appeal, Bronson argues that an expansive interpretation of the term "suit" is justified because this Court "has long recognized that coverage under an insurance policy must be determined on the basis of the reasonable expectations of the insured," citing *Zurich Ins Co v Rombough,* 384 Mich 228; 180 NW2d 775 (1970).[14] This "reasonable expectations" argument is completely without merit as applied to the contract language here at issue.[15]

In *Rombough,* our Court quoted with approval from an opinion by Justice Tobriner, of the California Supreme Court, who wrote in *Gray v Zurich Ins Co,* 65 Cal 2d 263, 269-270; 54 Cal Rptr 104; 419 P2d 168 (1966):

> In interpreting an insurance policy we apply the general principle that doubts as to meaning must be resolved against the insurer and that any exception to the performance of the basic underlying

[14] Bronson also cited *Crowell v Federal Life & Casualty Co,* 397 Mich 614, 623; 247 NW2d 503 (1976), in which this Court interpreted the term "confining sickness" in a health insurance policy, and opined that a "technical construction . . . which would defeat a reasonable expectation of coverage is not favored."

[15] It is recognized that the majority chose not to rely on this argument.

obligation must be so stated as to clearly apprise the insured of its effect.

* * *

Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain the meaning of the contract which the insured would reasonably expect.

In *Rombough,* however, this Court left no doubt that it found ambiguity in the terms of the policy under review:

The relationship between the exclusion clause (b) and § II(a) of the policy results in some uncertainty as to the insurer's duties. . . . It is elemental insurance law that ambiguous policy provisions must be construed against the insurance company and most favorably to the premium-paying insured. [*Id.* at 232.]

The policy of insurance involved in this case is sufficiently ambiguous to require [a] defense . . . by [the insurance company]. [*Id.* at 234.]

While Bronson may be correct in asserting that this Court has "recognized" the reasonable expectations theory of insurance contract interpretation, it must be said, at least, that the scope and application of the concept has been the source of considerable controversy. In *State Farm Mutual Automobile Ins Co v Ruuska,* 412 Mich 321; 314 NW2d 184 (1982), the Court considered the meaning of a policy exclusion relating to "non-owned automobiles." Justice WILLIAMS, joined by Justices FITZGERALD and MOODY, opined that the clause was

repugnant to the no-fault act and therefore void. Justice LEVIN disagreed with that reasoning, but concurred in the result on the ground that the exclusion was "unconscionable and contrary to the reasonable expectations of an insured . . . ." *Id.* at 343.

As Justice LEVIN explained, the policy at one point stated that it covered the insured when she drove a "non-owned" automobile. However, in another section of the policy the term was defined to exclude an automobile owned by a relative residing in the same household and made available to the insured on a regular basis. Justice LEVIN observed that there "is no evidence that [the insured] knew of the exclusion. . . . [I]t was not even contained in the list of exclusions but, rather, was embedded in the definition of a term which the average consumer would probably consider clear on its face . . . ." *Id.* at 349.

Chief Justice COLEMAN, joined by Justices KAVANAGH and RYAN, registered disagreement with the result and the reasoning of those holding the policy provision invalid. Finding it "presumptuous to guess what the reasonable expectations of [the insured] may have been," she stated that she was not persuaded by the "reasonable expectations" argument, and added:

> Although the exclusionary language was not ambiguous, the Court [of Appeals] said that it was not set forth obviously enough and so was unenforceable. The reasoning seems to be that because some people do not read the contracts they sign, even if exclusions are explained, the contracts are, in effect, void as to some parts but not as to others. [*Id.* at 353.]

The division within the Court concerning the

reasonable expectations notion was further emphasized by release on the same day of the decision in *Raska v Farm Bureau Mutual Ins Co,* 412 Mich 355; 314 NW2d 440 (1982). Not only are the names of the two cases similar, but the issue, again, involved the validity of an "owned vehicle" exclusion in an automobile insurance policy. However, because the accident giving rise to the suit occurred before the no-fault act, compatibility with that legislation was not a question. In *Raska,* Justice WILLIAMS again wrote for those who would invalidate the exclusion; however, this time his reasoning was based on the reasonable expectations of the insured.

Referring to the particular language in question as "a jigsaw-puzzle statement of coverage," Justice WILLIAMS explained,

> [C]overage is first announced as absolutely unlimited. There is no suggestion whatsoever of any limitation. On the other hand, if one turns to the back side of the page, it is true that there is a section entitled "Exclusions" and by a jigsaw-puzzle search and construction back and forth between the pages, a series of contradictory limitations can be affixed to the previously unlimited coverage. [*Id.* at 374-375.]

Concluding that a reasonable expectation of coverage should not be defeated by the "obscurant drafting" of the policy, Justice WILLIAMS indicated that he would remand for an evidentiary hearing to determine whether the insured reasonably expected coverage without the exclusion. *Id.* at 376. Although he was joined by Justices LEVIN and MOODY, his opinion was a dissent.

A majority of the *Raska* Court, speaking through Justice KAVANAGH, decided that the con-

tract should be enforced as written. Joined by Chief Justice COLEMAN and Justices FITZGERALD and RYAN, Justice KAVANAGH stated that "[t]he only pertinent question . . . is whether the exclusionary clause in this contract is ambiguous . . . ." "[I]f a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear." He then added,

> Plaintiffs also assert that as drafted the policy did not meet their "reasonable expectations." Still the expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. [*Id.* at 362.]

More recently, in *Powers v DAIIE,* 427 Mich 602; 398 NW2d 411 (1986), this Court consolidated and considered five cases, each of which challenged the validity of an "owned vehicle" exclusion in policies of no-fault insurance. Chief Justice WILLIAMS, once again, wrote an opinion for invalidation. Again, he exhaustively reviewed the history and rationale of the reasonable expectation theory, and concluded that "in these cases, the policyholder, upon reading the contract language is led to a reasonable expectation of coverage." *Id.* at 632. While it happened that a majority of the justices agreed with the result in *Powers,* once again, there was no majority support for the reasonable expectations rationale that, in part, undergirded the decision.[16]

[16] Justice ARCHER joined Chief Justice WILLIAMS. Justices BRICKLEY and CAVANAGH concurred in the result only. Concurring in part and dissenting in part, Justice LEVIN wrote separately and expanded his views regarding the reasonable expectations rule as set forth in *Ruuska.* Justice RILEY dissented for the reasons set forth by Chief Justice COLEMAN in her opinion in *Ruuska,* and Justice BOYLE concurred with Justice RILEY.

Even if this Court had taken a different course and had embraced the reasonable expectations theory, such a turn would not support the result reached today by the majority.[17] As Justice LEVIN and Chief Justice WILLIAMS indicated in their writings, the rule primarily addresses concerns stemming from artful definitions, hidden exclusions, and structural arrangements in a contract drafted by the insurer that tend to obfuscate rather than clarify or enlighten the insured. There is nothing of that character or dimension to be found in the provision before us in this case. It is not an exclusion or exception to coverage. The language at issue is "up front" in the policy; there is no separate definition in another section of the contract; the terms are common, ordinary words, and they have been used in insurance contracts with the same meaning for many years.

I conclude, as did the *Raska* Court, that it is not reasonable for the insured in this case to expect that the contract will be enforced other than according to its terms.

C

Bronson also argues that as early as 1913 this Court recognized that a "suit" is not limited to an action in a court of law. In *Patterson v Standard Accident Ins Co,* 178 Mich 288; 144 NW 491 (1913), we were asked to determine the meaning of the word "suit" as that term was used in an automobile insurance policy. Bronson notes that in *Patterson* the Court referred to a suit as "the mode or

[17] See *Vanguard Ins Co v Clarke,* 438 Mich 463, 472; 475 NW2d 48 (1991), in which the Court took note of the "rule of reasonable expectations" as described by Justice WILLIAMS in *Powers, supra* (" '[a]n adjunct to the rules of construction' ") and found that it had been satisfied from an objective standpoint.

manner authorized and adopted by law to redress civil injuries." *Id.* at 292. As Bronson sees it, an EPA administrative proceeding under CERCLA commenced by a PRP letter fits that definition. Embracing Bronson's view of *Patterson,* the majority suggests that "by defining 'suit' broadly . . . the Court certainly left open the possibility that proceedings occurring outside the courtroom could be encompassed." *Ante* at 570. I disagree.

The issue in *Patterson* was whether a "suit," against which the insurer was obligated to defend, included a criminal prosecution or pertained only to civil actions for damages. Finding the word "suits" to mean "*civil* suits which would determine the pecuniary liability of defendant for injury to person or property," *id.* at 293 (emphasis added), this Court observed:

> It must be conceded that the word "suit," as applied to legal controversies, both by the legal profession and others, is now used and recognized as a generic term of broad significance, often understood and used, even by legislatures and courts, *to designate almost any proceeding in a court,* even, though rarely, being applied to a criminal prosecution in certain connections.
>
> * * *
>
> [T]he expression "criminal suit" is unnatural and awkward to the professional ear and is seldom used, even in common parlance. "Suit," in its general unqualified use in legal documents, such as the one before us, naturally means, and should be construed as intended to include, the mode or manner authorized and adopted by law to redress *civil* injuries. [*Id.* at 291-292. Emphasis added.]

It is evident from the above-quoted passage that, while resolving the issue of the *type* of court proceedings contemplated by the term "suit" in

the particular contract, the *Patterson* Court necessarily found that the commencement of court proceedings is indispensable to the existence of a "suit." Thus, rather than contradicting previous case law, as Bronson suggests, the conclusion that a PRP letter does not constitute a suit is consistent with and supported by the reasoning set forth in *Patterson* more than eighty years ago.

III

Although, as the Maine Supreme Court has observed, "our role here is simply to determine the meaning of a private contract between these parties, not to foster or retard environmental goals," *Patrons Oxford Mutual Ins Co v Marois,* 573 A2d 16, 17 (Me, 1990), I am not oblivious to the consequences that may flow from an EPA notice letter. In view of the extraordinary authority vested in the EPA through enactment by Congress of CERCLA, and the financial burdens that can befall a target of its scrutiny, anyone who receives such a letter would be foolish not to take it seriously. Still, that is not sufficient reason for a court to create new coverage and impose risks not assumed or paid for by the contracting parties.[18]

For the reasons stated, I conclude that the term "suit" in the context presented unambiguously refers to court proceedings instigated by the filing

[18] The majority suggests that "from a policy perspective, . . . the position urged by defendants would only increase the litigiousness of this already extensively litigated area of the law." *Ante* at 575. I disagree. My position, and that advocated by defendants, would affirm a bright-line rule that, by clearly delineating the scope of risk, reduces the need for future litigation. Indeed, it is the position taken by the majority that will open the flood gates of litigation by inviting, and requiring, a case-by-case determination whether each new and different letter presenting the claim of an administrative agency is to be deemed the "functional equivalent of a suit brought in a court of law." *Ante* at 575.

of a complaint. Accordingly, I would reverse the decision of the Court of Appeals.

BRICKLEY and RILEY, JJ., concurred with GRIFFIN, J.

ADDENDUM

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

REPLY TO THE ATTENTION OF
5HE-12

Certified mail

Return Receipt Requested

Re: North Bronson Industrial Area
Bronson, Michigan

Dear Sir of [sic] Madam:

The United States Environmental Protection Agency (EPA) has documented the release or threatened release of hazardous substances, pollutants and contaminants at the above-referenced site, and is planning to spend public funds to control and investigate these releases. This action will be taken by EPA pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, unless EPA determines that such action will be done properly by a responsible party. Responsible parties under CERCLA include the current and former owners or operators, and persons who generated the hazardous substances or were involved in transport, treatment, or disposal of them at the site.

Based on data we received during our investigation concerning the hazardous substances at this

site, EPA has information that indicates that you and/or your firm may be a responsible party. Before the government undertakes necessary action at the site, we would like to know if you will voluntarily perform the work required to abate any release or threatened release of hazardous substances, pollutants, and contaminants from the site. You should be aware that under Section 107(a) of CERCLA, where the Agency uses public funds to achieve cleanup of the hazardous substance, you may be liable for all costs associated with the removal or remedial action and all other necessary costs incurred in cleaning up the site, including investigation, planning and enforcement.

EPA is currently planning to conduct the following studies at the above site:

1. Further investigations to identify the local hydrogeological characteristics, and define the nature and extent of soil, air, and surface water contamination at the site, and
2. Feasibility studies to evaluate possible remedial actions to remove or contain hazardous substances, pollutants, and contaminants at the site.

In addition to the above studies, other corrective measures may be necessary to protect public health, welfare or the environment. These corrective [sic] measures may include, but are not necessarily limited to:

1. Implementation of initial remedial measures, e.g., securing the site to prevent contact with any potentially hazardous or toxic materials at the site and/or removal of contaminated material from the surface;
2. Designing and implementing the EPA-approved remedial option for both contaminated groundwater and soil;
3. Providing any monitoring and maintenance necessary after remedial measures have been completed.

EPA will consider an immediate offer from you to conduct the remedial investigations and feasibility studies (RI/FS) described above. You should notify EPA, in writing within 10 calendar days from the receipt of this letter, of your willingness to conduct or participate with other potentially responsible parties in the RI/FS. Otherwise, EPA will assume that you decline any involvement in the RI/FS and will proceed with the appropriate studies and any initial remedial measures needed to secure the site. EPA may later invite you to undertake the design and implementation of the selected remedy upon the Agency's completion of the RI/FS.

Your letter should indicate the appropriate name, address, and telephone number for further contact with you. If you are already involved in discussions with state or local authorities, engaged in voluntary action, or involved in a lawsuit regarding this site, you should continue such activities as you see fit; you should not interpret this letter to advise or direct you to restrict or discontinue any such activities. You should report, however, the status of those discussions or that action in your letter. Please provide a copy of your letter to any other parties involved in those discussions. Also, please indicate if you or your representative plans to attend a meeting between EPA and the potentially responsible parties, to be held in Chicago on June 3, 1986 to discuss this matter and to provide you with more detailed specifications as to the required work.

Your letter should be sent to:

Janet Haff
U.S. EPA - Region V
Waste Management Division
Hazardous Enforcement Branch
CERCLA Enforcement Section
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Haff can also be reached by telephone at (312) 886-6541.

EPA would like to encourage good faith negotiations between you and the Agency and among you and other parties potentially responsible for the site. So that you may schedule meaningful discussions with other potentially responsible parties regarding cleanup efforts, and quickly organize yourselves into a single representative body to facilitate negotiations with the Agency, we are enclosing a list of other potentially responsible parties which have been identified with the above-referenced site.

In addition, EPA is seeking to obtain certain other information from you pursuant to its authority under Section 104 of CERCLA, 42 U.S.C. § 9604, and Section 3007 of the Resource Conservation and Recovery Act (RCRA) as amended, 42 U.S.C. § 6927, for the purpose of enforcing CERCLA and RCRA and for the purpose of assisting in determining the need for response to a release of hazardous substance(s) under CERCLA. The Administrator of the EPA has the authority to require any person who generates, stores, treats, transports, disposes, arranges for the disposal of, or otherwise handles hazardous wastes and hazardous substances, as those terms are defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5) and Section 101(14) of CERCLA, 42 U.S.C. 9601(14), to furnish EPA with information related to such activities. Pursuant to these statutory provisions, you are hereby requested to submit the following information (see definitions below):

1. Copies of any and all information in your possession, or otherwise available to you, regarding the corporate relationship and history between you and any users, owners, and/or operators of

the waste disposal lagoons and connecting sewer systems. Such information shall include, but not be limited to, deeds, contracts, subcontracts, leases, subleases, purchase agreements, partnership agreements, indemnification agreements, and any other correspondence that pertains to the above.

2. Copies of any and all information in your possession, or otherwise available to you, regarding your involvement with the construction, ownership, operation, and/or maintenance of the waste disposal lagoons and connecting sewer systems. Such information shall include, but not be limited to, deeds, contracts, subcontracts, leases, subleases, purchase agreements, partnership agreements, maintenance agreements, maps, blueprints or other documents which indicate construction specifications, and any other information or correspondence that pertains to the above.
3. A detailed description of the generic, common and/or trade name, the chemical composition and the character (i.e. liquid, solid, sludge) of the waste materials offered by you for discharge to the waste disposal lagoons and/or directly to County Drain Number 30.
4. For each hazardous substance identified above, please give the total volume, in gallons for liquids and sludges, and in cubic yards for solids, which you discharged or cause to have discharged to the waste disposal lagoons or directly to County Drain Number 30, and list when discharge occurred.
5. Copies of all records, including analytical results and material safety data sheets which indicate the chemical composition, and/or chemical character of the waste materials you discharged or caused to have discharged to the waste disposal lagoons and/or directly to County Drain Number 30.
6. Copies of any and all information that docu-

ments spills, lagoon overflows, connecting sewer line breaks or leaks, release of waste materials to County Drain Number 30, and/or any direct release of waste materials, contaminants or pollutants to the environment via waste disposal activities in and around the waste disposal lagoons.

7. A list and description of any and all liability insurance coverage that is and was carried by you, including but not limited to any self-insurance provisions, which relate to waste materials or hazardous substances and the above-referenced site. Include copies of all such insurance policies.

For purposes of the information requested, the North Bronson Industrial Area site includes two distinct waste disposal lagoon systems. The first set of lagoons, or "old" lagoons, were constructed in about 1939 and are located northwest of the City of Bronson's wastewater treatment plant, south of County Drain Number 30, and west of the Ruggles Street extension in the NE 1/4, Section 11, Township 7 South, Range 8 West. The second set of lagoons, or "new" lagoons, were constructed in 1949 and are located east of Matteson Street approximately 1500 feet east of the "old" lagoons in the NW 1/4, NW 1/4, Section 12, Township 7 South, Range 8 West. The Bronson Plating Company is located directly southeast of the "new" lagoons. These lagoons are collectively referred to as the "waste disposal lagoons." In your reply distinguish between the two waste disposal lagoon systems and provide the necessary documentation to support the above.

County Drain Number 30 is located directly north of both waste disposal lagoon systems. It flows westerly discharging into Swan Creek approximately 1.5 miles downstream from the "old" waste disposal lagoons. The attached map illustrates the approximate locations of the "old" waste

disposal lagoons, the "new" waste disposal lagoons, and County Drain Number 30.

To assist you in answering this request, the information sought pertains to any and all information in your possession, custody or control relating to the operation of the above-referenced site and to the transportation, storage, and/or disposal of hazardous substances or the generation of hazardous substances which were ultimately disposed of or offered for disposal at the site. The relevant time period for this request is from 1935 through the present.

For purpose of this information request, "shipping documents" shall mean all contracts, agreements, purchase orders, requisitions, pick-up or delivery tickets, customs forms, freight bills, shipping memoranda, order forms, weight tickets, work orders, manifests, shipping orders, packing slips, bills of lading[,] invoices, bills and any other similar documents that evidence discrete transactions involving shipment, or the arrangement for shipment, of waste materials to, through, or from, the above-referenced site. "Waste materials" shall mean hazardous substances, solid wastes and hazardous wastes, and other materials which may or may not contain pollutants or contaminants, and shall include reclaimed and off-specification materials of any kind.

The information sought herein must be sent to EPA within thirty (30) calendar days of your receipt of this letter. Under Section 3008 of RCRA, 42 U.S.C. § 6928, failure to comply with this letter may result in an order requiring compliance or in a civil action for appropriate relief. These provisions also provide for civil penalties. Failure to comply with this request under Section 104 CERCLA, 42 U.S.C. § 9604 may result in a civil enforcement action being brought against you by EPA.

The information requested herein must be provided notwithstanding its possible characterization

as confidential information or trade secrets. You may request, however, that any such information be handled as confidential business information. A request for confidential treatment must be made when the information is provided, since any information not so identified will not be accorded this protection by the EPA. Information claimed as confidential will be handled in accordance with the provisions of 40 C.F.R. Part 2.

The written statements submitted pursuant to this request must be notarized and submitted under an authorized signature certifying that all information contained therein is true and accurate to the best of the signatory's knowledge and belief. Moreover, any documents submitted to Region v pursuant to this information request should be certified as true and authentic to the best of the signatory's knowledge and belief. Should the signatory find, at any time after the submittal of the requested information, that any portion of the submitted information is false, the signatory should so notify EPA. If any answer certified as true should be found to be untrue, the signatory can and may be prosecuted pursuant to 18 U.S.C. 1001.

Your reply to the request for information under Section 104 of CERCLA and Section 3007 of RCRA should be considered separate and distinct from that relating to participation in response activities at the site. It should also be sent to the address listed above.

If you need further information regarding our information request, you may contact Mr. Michael Gifford of our Hazardous Waste Enforcement Branch at (312) 886-7257. If you have any legal questions, contact Mr. T. Leverett Nelson, Assistant Regional Counsel at (312) 886-6852.

Due to the nature of the problem at this site and the attendant legal ramifications, EPA strongly encourages you to submit a written response within the time frame specified herein. We hope

that you will give this matter your immediate attention.

Sincerely yours,

/s/Basil G. Constantelos, Director
Waste Management Division

PEOPLE v TYBURSKI

Docket No. 95719. Argued December 2, 1993 (Calendar No. 6). Decided July 19, 1994.

Leonard Tyburski was convicted by a jury in the Detroit Recorder's Court, Richard P. Hathaway, J., of second-degree murder. The Court of Appeals, MURPHY and L. P. BORRELLO, JJ. (SAWYER, P.J., dissenting), reversed and remanded the case for a new trial, concluding that the trial court abused its discretion in limiting the scope and conduct of voir dire and that the cumulative effect of its refusal to conduct sequestered voir dire, its failure to allow meaningful participation by the defense counsel in the jury selection, and the absence of probing questions during voir dire prevented the defendant from receiving a fair trial (Docket No. 122380). The people appeal.

In an opinion by Justice MALLETT, joined by Chief Justice CAVANAGH and Justice LEVIN, and an opinion by Justice BOYLE, the Supreme Court affirmed the judgment of the Court of Appeals.

Justice MALLETT, joined by Chief Justice CAVANAGH and Justice LEVIN, additionally stated that in cases involving high publicity, a juror's self-assessment of bias should not be accepted without first eliciting information concerning the content and extent of the juror's exposure to publicity so that the court can make its own determination of the juror's impartiality. While it is within the trial court's discretion to select the method for eliciting such information, it is an abuse of discretion to abdicate this responsibility. Because the trial court abused its discretion by failing to conduct a sufficiently probing voir dire to uncover potential juror bias, the defendant was denied a fair trial.

The purpose of voir dire is to elicit sufficient information for development of a rational basis for excluding potential jurors who are not impartial. The trial court has discretion in both the scope and the conduct of voir dire; however, where the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised. A trial court must conduct a thorough and conscientious voir dire

designed to elicit enough information for the court to make its own assessment of bias.

In this case, the superficial and leading questioning by the trial court was an abuse of discretion. The court was put on notice of the high likelihood of media-induced bias, yet its manner of questioning appears to have focused on qualifying jurors, rather than on discerning bias. Its manner of limiting and conducting voir dire and its failure to ask probing questions was prejudicial to the defendant.

Justice LEVIN, writing separately, stated that while a litigant does not always have the right to have counsel conduct the voir dire, in this case, the trial court abused its discretion when it refused to permit the defendant's lawyer at any time to question the jurors individually.

The trial court's method of questioning en masse failed to provide the defendant with a sufficient factual basis to challenge a prospective juror's ability to serve impartially, and prevented informed exercise of peremptory challenges and challenges for cause. In a high-profile case, where the risk of a verdict based on extrajudicial influences is substantial, lawyer participation at some point in the conduct of voir dire is ordinarily essential to an informed exercise of the right of challenge. The extent and nature of pretrial publicity determines the specificity and depth of questioning that should be permitted on voir dire. This necessarily varies, depending on the facts of each case and the nature and extent of pretrial publicity and community passion.

Justice BOYLE, concurring in the result, stated that although potential jurors need not be sequestered during voir dire, in highly publicized cases, special caution is appropriate.

In this case, the record supports the conclusion that counsel asked the court to question venire members about what they heard or remembered from pretrial publicity and that the court did not do so.

Affirmed.

Justice BRICKLEY, joined by Justices RILEY and GRIFFIN, dissenting, stated that the trial court did not abuse its discretion in denying defendant's motions for a sequestered, individualized voir dire and for submission of a questionnaire to prospective jurors. The questions chosen by the trial judge to assess jurors' media exposure were sufficiently probative when considered in the context of defense counsel's motion expressing her belief that questions requiring a prospective juror to expound on the reasons underlying any opinions held served only to taint the panel.

The primary function of voir dire is to elicit from prospective

jurors information that establishes a basis for a challenge for cause. An additional related function is to facilitate the intelligent use of peremptory challenges. Voir dire also can be used by attorneys to educate prospective jurors regarding the merits and theories of the case and to develop a rapport between the jurors and attorneys that may produce a biased instead of an objective jury, thereby serving to negate the purpose of voir dire. For this reason, the trial judge must be given considerable latitude to determine what questions will be submitted to prospective jurors.

There is no right under the federal constitution to ask prospective jurors content-based questions during voir dire that are designed to reveal the nature and extent of their pretrial media exposure in cases involving high publicity. In this case, the trial court's failure to submit defense counsel's questionnaire to the prospective jurors did not violate the defendant's Sixth Amendment right to a fair trial or his Fourteenth Amendment right of due process. The trial court questioned prospective jurors individually concerning whether information to which they were exposed had led them to form opinions that would render them incapable of being impartial. Every prospective juror confessing an opinion that the defendant was guilty or who expressed an inability to be fair was excused for cause. Despite the pervasive pretrial publicity that surrounded the trial, no member of the jury professed a belief in the defendant's guilt before hearing any of the testimony.

Generally, a trial court does not abuse its discretion when it declines to submit questions to prospective jurors that are designed to reveal substantial prejudices, or to develop a rational basis for the exercise of challenges, as long as the trial court employs similar questions that adequately cover the area of potential bias. In this case, the trial court's refusal to submit the defendant's proposed questionnaire to prospective jurors did not constitute an abuse of discretion. The questions propounded by the trial court were sufficiently probative and elicited information similar in kind to information the questionnaire would have provided.

Further, the trial court did not err in allowing juror self-assessment of bias to go unchallenged. The court in fact was cognizant of and attentive to the problems underlying juror self-assessment of bias. Finally, the trial court did not abuse its discretion in denying the defendant's request for a sequestered voir dire. When confronted with prejudicial pretrial publicity, a trial court must be sensitive to the potential taint of the venire engendered by responses during voir dire. In such a situation

sequestered voir dire should be considered. No information prejudicial to the defendant surfaced on voir dire.

196 Mich App 576; 494 NW2d 20 (1992) affirmed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Research, Training and Appeals, and *Janice M. Joyce Bartee,* Assistant Prosecuting Attorney, for the people.

F. Randall Karfonta for the defendant.

Amici Curiae:

Neal Bush, Kenneth M. Mogill, and *Dean Robb* (*Susan L. Stacey,* of counsel), for Criminal Defense Association of Michigan and National Jury Project.

MALLETT, J. The issue presented in this highly publicized murder case is whether defendant is entitled to a new trial because of the manner in which the trial judge conducted voir dire. Because the trial court abused its discretion by failing to conduct a sufficiently probing voir dire in order to uncover potential juror bias, and that, therefore, defendant was denied a fair trial, we affirm the decision of the Court of Appeals and remand the case for a new trial.

I

The Court of Appeals opinion sufficiently summarizes the underlying facts surrounding the murder.

> Following a jury trial, defendant was convicted as charged of second-degree murder, MCL 750.317;

MSA 28.549. He was sentenced to serve twenty to forty years in prison. . . .

This case arises from defendant's killing of his wife on September 28, 1985. This fact is not in dispute. The case has received a great deal of publicity because of the unusual manner in which defendant disposed of the body: he stored it in a chest freezer in his basement for over three years. The body was discovered by his elder daughter on January 2, 1989.

Defendant admits killing his wife, Dorothy Tyburski, but claims that it was not murder but a killing in the heat of passion, thus manslaughter, or that he killed in self-defense. Defendant admitted the killing in his own testimony. He stated that his wife told him that she wanted him to leave for a couple of weeks and that she no longer loved him. Defendant replied that he still loved her and refused to leave. He then asked the victim whether she was having an affair with the eighteen-year-old boyfriend of their elder daughter. The victim refused to answer. She grabbed a knife and fork and went downstairs to get something out of the freezer. Defendant followed her to continue the conversation.

In the basement, the victim took some plastic containers out of the freezer. Defendant again asked her if she was having an affair with their daughter's boyfriend. The victim responded with words to the effect of, "Yes, I am. I love Craig. He's a man. You're not a man. You're a wimp, a punk, a bastard. You're leaving. Get out of here." The victim threw the frozen food containers, along with the knife and fork, at defendant as she said the words.

The victim came at defendant with her hands. Defendant pushed her away. The victim retrieved the knife and lunged at him with it. Defendant stated that he was in shock at this point over learning of the affair and afraid because of the physical attack. After he stopped the victim from stabbing him, he slammed her head into a beam many times. He then flung her into the freezer. He

went upstairs, cleaned up, and returned to the basement a half-hour later. He noticed that the victim was motionless and was not breathing. At this point, he closed the freezer and never opened it again.

* * *

As for the cause of death, the medical examiner testified that the victim died of blunt-force trauma to the head. He testified that the injuries were inflicted by hitting the victim's head into a blunt object, rather than vice versa. The medical examiner described a minimum of eleven blows to the head. Finally, the medical examiner ruled out suffocation as a cause of death. Thus, the victim was dead before defendant closed the freezer. [196 Mich App 576, 577-580; 494 NW2d 20 (1992).]

The details of the voir dire process are important and merit thorough review.

Before voir dire commenced, defense counsel moved for an individual sequestered voir dire and submission of a probing questionnaire to be given to prospective jurors. The trial court denied these requests, informing counsel that the court conducts its own voir dire for all its trials. Defense counsel also asked if the attorneys would be allowed to ask follow-up questions. The court said no, but that if specific follow-up questions came to mind after hearing a potential juror's response to a question, the attorneys could write them down and the court would submit them.

When the questioning began concerning potential jurors' exposure to pretrial publicity, the court gave a brief description of the case and asked how many had heard of it from the media. All the potential jurors initially seated raised their hands.[1]

[1] All but two of the thirty-seven potential jurors eventually called for questioning acknowledged exposure to the media coverage. Of the twelve jurors who decided the case, all but one acknowledged such exposure.

The court then began questioning individual potential jurors. The first colloquy was as follows:

> *The Court:* All right. If you are selected as a juror, what you are going to have to do, Ms. Whitehead [sic], is basically separate what you have heard on TV or on the radio or in the newspaper and judge this case on what you hear in the courtroom. Have you developed any opinions thus far or feelings on this case one way or another as to what you've heard or read?
>
> *Juror Whiteside:* Yes.
>
> *The Court:* What are those feelings?
>
> *Juror Whiteside:* In reading the article on it, I would tend to think that he would be guilty.
>
> *The Court:* All right. Do you believe everything that you read in the newspaper?
>
> *Juror Whiteside:* No.
>
> *The Court:* Okay. Do you think that that is a way to settle disputes as to guilt or innocence by reading the newspaper?
>
> *Juror Whiteside:* No.
>
> *The Court:* Okay. If I were to tell you, Ms. Whitehead [sic], that you have to decide this case based on what you hear in the courtroom, will you be able to set aside your beliefs, set aside your opinions and listen to this case and render a fair decision?
>
> *Juror Whiteside:* No.
>
> *The Court:* No. Do you think what you've read thus far has tainted you to such a degree that you do not think that you could be fair to this defendant?
>
> *Juror Whiteside:* Yes.

With this subtle admonishment of Juror Whiteside, the court had instructed the remaining potential jurors regarding the "correct" answer. Ms. Whiteside was excused for cause.

Likewise, the fourth and eighth potential jurors questioned admitted to having formed opinions against the defendant and that they would have

difficulty setting aside these opinions. Although they were also excused for cause, in the court's questioning of the eighth juror, Ms. Zimmer, the entire pool heard admonitions similar to those given to the first juror.[2]

The first of those initially seated to remain as jurors were the tenth and thirteenth questioned. Number ten, Mr. Gray, was questioned as follows:

The Court: Okay. How about you, Mr. Gray, do

[2] *The Court:* Okay. As a result of what you have heard and read, have you formulated any opinions?

Juror Zimmer: Well, I'm afraid I would have to say I did.

The Court: Okay. And those opinions are not favorable toward Mr. Tyburski?

Juror Zimmer: That's right.

* * *

The Court: You understand, Ms. Zimmer, don't you, as I've discussed earlier that this case is going to be decided in the courtroom; isn't that correct?

Juror Zimmer: Yes.

The Court: You understand that?

Juror Zimmer: Yes.

The Court: And you don't believe that cases should be decided by the media, do you?

Juror Zimmer: No, I don't.

The Court: You don't believe that case[s] should be decided by what you read in the newspaper, do you?

Juror Zimmer: No.

The Court: You don't believe that cases should be decided on what you hear or say [sic] on the TV; isn't that correct?

Juror Zimmer: That's right.

The Court: Okay. But you are telling me that you've developed such a strong opinion that you'd have a hard time being a fair juror; is that correct?

Juror Zimmer: Well, I would have a rough time, I think.

The Court: You'd have a rough time?

Juror Zimmer: Yes, I believe I would.

The Court: Even though you believe that cases shouldn't be decided on what you heard and read in the newspaper?

Juror Zimmer: I realize that . . .

The Court: You don't know if what you've read is accurate, do you? There's no way for you to know that; isn't that correct?

Juror Zimmer: That's true.

you recall hearing or reading anything about this case?

Juror Gray: On the news.

The Court: Okay. As a result of what you've heard or read, did you develop any beliefs or opinions?

Juror Gray: No.

The Court: Okay. Can you think of any reason why you should not sit and be a fair juror?

Juror Gray: No.

The questioning of juror number thirteen, Mr. Traylor, was similar to that of Mr. Gray.

The Court: Okay. How about you, Mr. Traylor? Do you recall hearing about this case?

Juror Traylor: I saw it on the news.

The Court: You saw it on the television?

Juror Traylor: And I started reading an article in the paper, but I can't remember what happened. But I never finished it.

The Court: You never finished the article?

Juror Traylor: No.

The Court: Have you developed any opinions or beliefs?

Juror Traylor: No.

The Court: Okay. Can you think of any reason why you should not sit and be a fair juror?

Juror Traylor: No.

The last potential juror questioned in the morning session admitted to having formed opinions and that she did not believe she could be fair. The court replied:

The Court: You heard me tell some of the other jurors that we are not going to decide this case based on what is in the papers?

Juror Williams: Yes.

The Court: And you don't think that that's the way a society should be run, do you?

Juror Williams: No.

The Court: Based upon what you read in the newspapers, do you think everything is truthful?

Juror Williams: No.

The Court: Okay. But you are telling me that based on what you've read, you don't think you can separate it and be fair?

Juror Williams: Yes. I couldn't.

The court then recessed for a lunch break. During this recess, defense counsel submitted a written objection to the method of questioning used by the court. This objection was overruled.

The first potential juror questioned in the afternoon session, Mr. Rae, who was eventually seated as a juror, was asked to relate his potential bias resulting from pretrial publicity.

The Court: And how is it that you heard about this case?

Juror Rae: I think I recall a television newscast.

The Court: All right. Did you hear my statement that this case will be decided in the courtroom rather than by the media?

Juror Rae: Yes, your Honor.

The Court: Have you developed any opinions that would make you an unfair juror?

Juror Rae: No.

Juror Palmer, the third person questioned in the afternoon session was similarly asked to self-assess her potential bias.

The Court: How is it that you heard about this case?

Juror Palmer: On the news, read the paper.

The Court: Okay. Have you developed any opinions that would make you an unfair juror?

Juror Palmer: No.

The Court: If you are to sit and listen to this

case, will you judge this case on what you hear in the courtroom?

Juror Palmer: Yes.

The Court: Can you think of any reason why you should not sit?

Juror Palmer: No.

Juror Palmer was eventually seated as a juror.

Likewise, the next person questioned was seated as a juror after passing the following scrutiny about potential bias from the media blitz:

The Court: Mr. Wilson, have you heard about this case?

Juror Wilson: Yes, I have.

The Court: And how is it that you heard about this case?

Juror Wilson: Television, news and I also was down in Columbus last—two weeks ago and I heard it on the TV down there.

The Court: As a result of what you've seen and heard, have you developed any opinions that would make you an unfair juror?

Juror Wilson: No, I have not.

After additional questioning of two more potential jurors, defense counsel asked to approach the bench. Following a discussion off the record, the court asked the group, by show of hands, who had read a particular Free Press magazine article.[3] The record does not indicate if any jurors responded affirmatively.

The court then asked the attorneys if they had any written questions to submit at that time. Defense counsel answered "No, your Honor, just the ones that I have submitted." The court an-

[3] The article entitled "I found Mom!" appeared in the Detroit Free Press, Sunday Magazine, April 23, 1989. See n 10 for excerpts from this article. Defense counsel viewed it as particularly prejudicial.

swered that those that were not asked were not deemed relevant.[4]

At this point, the attorneys began exercising peremptory challenges. As the remaining potential jurors were questioned, three were excused for reasons relating to opinions formed after exposure to pretrial publicity. Nine of the remaining jurors questioned sat on the jury. The questioning of these nine on the issue of publicity-induced bias was perfunctory. An example is as follows:

> *The Court:* Have you heard about this case?
> *Juror Moynihan:* Yes.
> *The Court:* How have you heard about it?
> *Juror Moynihan:* Through the media, paper and TV.
> *The Court:* All right. You recall reading the article that I held up?
> *Juror Moynihan:* I may have, but I don't remember reading it.
> *The Court:* As a result of what you heard and read, have you formulated any opinions?
> *Juror Moynihan:* No.

After the jury was selected, defense counsel moved for a mistrial because of the court's voir

[4] The following questions from defendant's proposed questionnaire are illustrative of the difference between the questions posed by the trial court and those requested by the defense:

> 7. . . . .
> —What do you remember from reading those articles?
> 8. Did you see television coverage of this case?_____;
> —What stands out in your mind about what you saw on TV?
> 9. Did you talk about this case with family, friends or co-workers?
> —What stands out in your mind about what was discussed?
> 10. After hearing about this case, what was your reaction?
> 11. Did you form an opinion about anything connected to this case? If so, what was your opinion?

dire procedure. Although counsel did not exercise all of her peremptory challenges, she explained:

> I did not exercise all of our preemptory [sic] challenges. I was careful to say in closing yesterday not that I was satisfied with the juror panel but that I was not going to exercise on behalf of Mr. Tyburski any further pre-emptories [sic]. I don't believe that using pre-emptories [sic] would have cured the Court's procedure here. And I am not satisfied that this is an impartial jury. . . . So I do move for a mistrial at this time.

This motion was denied.

II

A defendant who chooses a jury trial has an absolute right to a fair and impartial jury. *Duncan v Louisiana,* 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Miller,* 411 Mich 321, 326; 307 NW2d 335 (1981). The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. *People v Brown,* 46 Mich App 592, 594; 208 NW2d 590 (1973); *People v Harvey,* 167 Mich App 734; 423 NW2d 335 (1988). In voir dire, meaning "to speak the truth," potential jurors are questioned in an effort to uncover any bias they may have that could prevent them from fairly deciding the case. It is the only mechanism, and the only safeguard a defendant has, for ensuring the right to an impartial jury. The propriety of the voir dire in this case turns on whether potential jurors who have been exposed to pervasive and sensationalized media coverage can "speak the truth" about their own bias, or whether a trial court must elicit more than mere self-assessment in order to safeguard a defendant's right to an impartial jury.

A

The trial court has discretion in both the scope and the conduct of voir dire.[5] Defendant does not have a right to have counsel conduct the voir dire, nor does he have a right to individual, sequestered voir dire. Neither does he have a right in every case to have the court ask questions submitted by counsel. The United States Supreme Court has also determined that there is no federal constitutional right to content-based publicity questions in every high publicity case. *Mu'Min v Virginia,* 500 US 415; 111 S Ct 1899; 114 L Ed 2d 493 (1991).

However, this Court has determined that where the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised. *Fedorinchik v Stewart,* 289 Mich 436, 438-439; 286 NW 673 (1939).

This Court has long recognized the importance of a voir dire that allows the court and the parties to discover hidden bias that would render a potential juror incompetent.

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[5] MCR 6.412(C) provides:

> (1) Scope and Purpose. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.
>
> (2) Conduct of the Examination. The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

> It is the evident intent of the law to secure a jury that shall come to the consideration of the case unaffected by any previous judgment, opinion or bias with respect either to the parties or subject-matter in controversy, and it is important to the rights of parties that they may be permitted inquiries which may be the means of discovering facts which will justify the exclusion of a juror. The success of a challenge depends upon eliciting such information from the juror himself, as well as from other sources, as to his state or condition of mind, as will enable a judgment to be formed *by the court* as to his competency. [*Monaghan v Agricultural Fire Ins Co,* 53 Mich 238, 246; 18 NW 797 (1884). Emphasis added.]

It is imperative, in securing the rights of the parties to an impartial jury, for the court to allow the elicitation of enough information so that the court itself can make an independent determination of a juror's ability to be impartial.

We will not address defendant's federal and state constitutional claims because there is no need to do so. Both Michigan and federal law support the conclusion that the superficial and leading questioning that took place here was an abuse of discretion.

In *Mu'Min, supra,* the United States Supreme Court, in a five to four decision, found that although inquiries into the content of news reports that a potential juror had read might have been beneficial in exercising peremptory challenges, peremptory challenges are not constitutionally mandated and therefore no constitutional violation had occurred. The Court noted that in reviewing a state court voir dire its authority was limited to enforcing the commands of the United States Constitution.

We enjoy more latitude in setting standards for

> voir dire in federal courts under our supervisory power than we have in interpreting the provisions of the Fourteenth Amendment with respect to voir dire in state courts. [500 US 424.]

The Court did not limit the authority of federal courts of appeals to continue requiring a voir dire that includes content questions in federal cases. See *Mu'Min,* 500 US 447, n 6 (Marshall, J., dissenting).

After *Mu'Min,* some federal courts of appeals have required content questions in high publicity cases, explaining that the court needs to inquire into the source and content of the exposure and the potential juror's attitudes towards what they have heard or read in order to discover the truth regarding potential bias.

The court in *United States v Davis,* 583 F2d 190 (CA 5, 1978), explained the need for such questioning.

> "[T]his Circuit has determined that it is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they have been exposed to. Therefore, when there has been publicity that would possibly prejudice the defendant's case if it reached the jurors, the court should first ask the jurors what information they have received. Then it should ask about the prejudicial effect and it should make an independent determination whether the juror's impartiality was destroyed." [*Davis* at 197, quoting *United States v Hyde,* 448 F2d 815, 848, n 38 (CA 5, 1971).]

Employing similar reasoning, the court in *Silverthorne v United States,* 400 F2d 627, 638 (CA 9, 1968), found that the trial court's "voir dire examination did not adequately dispel the probability of prejudice accruing from the pre-trial publicity and

the jury panel members' knowledge of the case." That court predicated its conclusion on two grounds:

> (1) the questions propounded by the court to the prospective jurors were calculated to evoke responses which were subjective in nature—the jurors were called upon to assess their own impartiality for the court's benefit, and (2) the entire voir dire examination was too general to adequately probe the prejudice issue. [*Id.*]

Other state supreme courts, citing their supervisory powers over lower courts, have also stated that despite the sufficiency of voir dire for constitutional purposes under the standards of *Mu'Min,* trial courts should conduct voir dire in a manner that attempts, as much as possible, to eliminate bias and prejudice. *State v James,* 819 P2d 781, 787-789 (Utah, 1991). See also *State v Everett,* 472 NW2d 864, 866, n 1 (Minn, 1991).[6]

[6] The pre-*Mu'Min* state supreme court decision in *State v Pokini,* 55 Hawaii 640; 526 P2d 94 (1974), is also instructive. A review of that case indicates that the pretrial publicity was not as pervasive as it was here. Yet, the Hawaii Supreme Court concluded that failure to conduct a probing voir dire denied the defendant his constitutional right to an impartial jury.

> Given the quantity, quality, and timing of this pre-trial publicity, it was incumbent on the trial judge to conduct a thorough-going examination of veniremen who indicated they had been exposed to it. Yet without exception the trial judge relied on perfunctory and generalized questions which elicited responses from these jurors solely on their subjective ability to ignore pre-trial publicity and be fair and impartial. He expressly refused to allow inquiry into the extent and nature of the specific matters of publicity to which jurors had been exposed. Where pre-trial publicity is as extensive and as likely prejudicial as it was here, the constitutional right to an impartial jury requires examination into objective as well as subjective indicia of non-prejudice. [*Pokini* at 643-644.]

> There is an essential difference between subjective and objective evidence of juror impartiality. The federal and state consti-

This Court, in keeping with our past decisions[7] respecting parties' rights to an impartial jury, likewise instructs the lower courts in this state to guard against potential bias resulting from media exposure. Pursuant to our supervisory powers under Const 1963, art 6, § 4,[8] we instruct lower courts to conduct a thorough and conscientious voir dire designed to elicit enough information for the court to make its own assessment of bias.

B

This area of the law does not lend itself to hard and fast rules regarding what is acceptable and what is unacceptable practice. Courts indeed should be allowed wide discretion in the *manner* they employ to achieve the goal of an impartial jury. However, a court does not have discretion to simply fail to elicit enough information during voir dire to make an intelligent assessment of bias. See *Monaghan* and *Fedorinchik, supra.*

Where pretrial publicity creates the danger of prejudice, a court has several options. It can allow submission of a questionnaire to potential jurors, prepared by the parties and approved by the court. Questionnaires have the advantage of allowing an in-depth exploration of the source, extent, and content of media exposure for each potential juror

> tutions require the trial judge to attempt to adduce both where pre-trial publicity is as extensive as that preceding the trial of these appellants. [Citation omitted.] The trial judge's express refusal to do so was reversible error because it foreclosed from his consideration crucial evidence of possible juror bias, thereby rendering fatally uninformed the exercise of his discretion not to excuse jurors for cause. [*Id.* at 644.]

[7] See *Monaghan* and *Fedorinchik, supra,* and *Poet v Traverse City Osteopathic Hosp,* 433 Mich 228; 445 NW2d 115 (1989).

[8] See *Tomlinson v Tomlinson,* 338 Mich 274, 276; 61 NW2d 102 (1953), and *In re Huff,* 352 Mich 402, 417-418; 91 NW2d 613 (1958), for a general discussion of this Court's supervisory powers.

at a minimum of the court's time. However, questionnaires have the disadvantage of not allowing observation of demeanor in order to assess credibility. Used in the proper context, however, they serve as a useful starting point by allowing identification of those potential jurors who may be most tainted because of exposure to particularly prejudicial news items or by extensive exposure.

Another option is to allow attorneys to participate in the voir dire. Because the attorneys are more familiar with the complexities and nuances of the case, they are in a better position than the trial court to ask in-depth questions designed to uncover hidden bias. However, in attorney-conducted voir dire, there is a risk that the skillful attorney can inject partiality by establishing rapport and introducing his theory of the case to the jury.

Yet another method effective in securing an impartial jury is to question individuals or small groups away from the remaining veniremen. This allows probing questions and detailed answers without the risk of tainting the other jurors.[9]

C

Despite being alerted by defense counsel of extensive media coverage, much of this being negative toward the defendant,[10] and becoming aware

[9] It also allows the court to assess the demeanor of potential jurors as well as their attitudes toward the case. This provides a basis for the court to make an individual judgment regarding a potential juror's ability to be impartial.

[10] The dissent's characterization of the nature of the publicity surrounding this case as "mainly factual" is incorrect. After reviewing the record, it is clear that many of the news items were in fact negative and prejudicial toward the defendant. The following excerpts are instructive:

From "I found Mom!" Detroit Free Press, Sunday Magazine, April 13, 1989:

Leonard Tyburski did more than kill his wife. According to his confession the day of his arrest, he slammed her head against a concrete pole in the basement after she came after him with a steak knife, while taunting him with news that she had had sex with Kelly's 18-year-old boyfriend. Once she was dead, he twisted her bloodied 5-foot-4, 135-pound body and stuffed it into the family freezer, atop frozen hamburger and kielbasa.

* * *

But Dorothy Tyburski suffered the ultimate indignity. The man who had made her miserable while she lived also succeeded in trivializing her desperate end. Her death became a standard of grisly comparison for other macabre tales, and the butt of morbid jokes.

From the Detroit Free Press, January 5, 1989:

For instance, how could Tyburski pass a lie detector test administered by the State Police in 1987 and how could he continue to live in his house knowing his freezer contained a dead body?

* * *

Joseph Buckley, president of John Reid & Associates, a Chicago-based polygraph firm, said that assuming the State Police polygraph technicians were well-trained and using proven testing techniques, an erroneous reading could have come from using a subject "with severe psychological problems who . . . operates on different norm than most of us."

"If you're testing somebody that believes he is Napoleon, he will pass the test because he believes it is true," Buckley said.

* * *

A person might learn to live with something as morbid as his wife's corpse if he was severely sociopathic—"a person with relatively little or no conscience," said Dr. Philip Veenhuis, spokesman for the Michigan Psychiatric Society.

From the Detroit Free Press, January 6, 1989:

The friend said he and Kelly had searched for her mother in the Monroe and Toledo areas based on information from her father.

"He made up some very good lies," the friend said. "He would make up stuff like she's been charging on charge accounts and he was mad at her."

* * *

He described Dorothy Tyburski as "a real nice lady," but said she and her husband didn't get along. "The more she was out of the house, the better she felt."

that virtually all the venire had been exposed to this coverage, the court elected to forgo all of the above procedures.[11] Because the court was put on notice of the high likelihood of media-induced bias, the court had a duty to exercise caution in the manner it conducted voir dire.[12] See *Davis* and *Silverthorne, supra.*

Individual sequestered voir dire was not necessarily required, as long as the method of questioning was adequate to expose bias and to avoid taint. The problem occurring in this case was that once the motions for sequestered voir dire and submission of the questionnaire were denied, an irreconcilable dilemma arose. If the court had asked

> The friend described Leonard Tyburski as "just a loud person, and when he'd get mad, he was an Adolf Hitler."
>
> * * *
>
> Her friend said Kelly didn't tell police about her suspicions because "she was afraid if she'd called the cops and her dad had come home, he would have done something to her."

[11] Although, as the dissent points out, the trial court told counsel that follow-up questions could be submitted, and indeed it appears that some were, follow-up questions that were more probing into the source and nature of the exposure of each juror were essentially precluded. This was made evident when the trial court indicated to defense counsel that those follow-up questions that had been submitted and were not asked were deemed irrelevant.

[12] As a practical matter, few murder cases engender the extent of media coverage involved here. It would be far better to take the extra time in voir dire with the few cases that pose a serious risk of prejudice rather than face future appeals of voir dire issues.

The arguments of the prosecutor that a certain amount of publicity is required before the "presumption of impartiality" can be overcome misses the point. The prosecutor analogizes to venue law. However, as Justice Marshall noted, cases such as *Irvin v Dowd,* 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961), stand "for the proposition that when a community has been subject to unrelenting prejudicial pretrial publicity the entire community will be presumed both exposed to the publicity and prejudiced by it, entitling the defendant to a change of venue. . . . In this case, however, [the defendant] does not argue that the pretrial publicity was extensive enough to create a presumption of community prejudice. Rather, he argues that the publicity was prejudicial enough to create a presumption of prejudice on the part of any individual juror who actually read it." *Mu'Min,* 500 US 442, n 3 (Marshall J., dissenting).

sufficiently probing questions into the jurors' media exposure and their opinions and attitudes toward it, then the entire panel may have been tainted by the answer.

Early on, defense counsel recognized this dilemma. Counsel attempted to avoid taint by asking the court to delve into pretrial publicity, but to frame questions so that jurors could indicate whether they held an opinion without expressing what the opinion was. The court refused, determining that it wanted to know what jurors' opinion would be if they indicated they had one.

After the morning voir dire, defense counsel moved for a mistrial on the basis of the taint of the venire. With a sharpened awareness of the potential for taint, the court began to word questions so that jurors could answer in a neutral manner whether they had framed an opinion. Unfortunately, in both the morning and afternoon sessions, the court was unsuccessful in trying to delve into the extent of media exposure and the jurors' reaction to it.

Instead, the court's manner of questioning appears to have been focused on qualifying jurors, rather than on discerning bias.

Questions were framed to lead the jurors to the conclusion that they could be impartial. For example, five of the twelve jurors who decided the case were asked, "Have you developed any opinions that would make you an unfair juror?"[13] The question is ambiguous and suggests the answer that

[13] We recognize that this compound question was asked by the court precisely because defense counsel wanted the court to frame questions so that jurors could answer without revealing that their opinions were negative toward defendant. However, the court could have separated the two questions asking: (1) Have you developed any opinion in this case, and (2) if so, could you set this opinion aside? We note, however, that curing this defect would not have solved the problem of juror self-assessment.

the court was looking for. Those jurors who volunteered that they could not be fair because of opinions formed after exposure to negative publicity were lectured to by the court. These "lectures," heard by the entire venire, sent a strong message that the court did not approve of those who volunteered that they were biased. It is not surprising, then, that as the questioning went on fewer and fewer jurors volunteered this information.[14] Yet, the court did nothing more to assess bias than to ask the jurors themselves whether they could be fair.

Courts have long recognized that juror self-assessment of bias is inherently untrustworthy. While sitting as trial judge in *United States v Burr,* 25 Fed Cas 49, 50 (D Va, 1807), Chief Justice Marshall observed that a juror's assertions of neutrality cannot be trusted:

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion . . . .

Justice O'Connor, concurring in *Smith v Phillips,* 455 US 209, 221-222; 102 S Ct 940; 71 L Ed 2d 78 (1982), expressed similar concerns stating: "Determining whether a juror is biased . . . is diffi-

[14] Of the initial fourteen veniremen seated for questioning, four volunteered that they had formed an opinion from their exposure to pretrial publicity that would render them unable to be fair jurors. After the lunch recess, only two of the twenty-three veniremen questioned admitted such opinions.

cult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."[15]

As previously noted, a court should allow elicitation of enough information from potential jurors to

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[15] Examples shared with this Court by the amici curiae, Criminal Defense Association of Michigan and National Jury Project, are illuminating:

> The highly publicized 1975 Massachusetts murder and bank robbery trial of Susan Saxe demonstrates that adequate voir dire can reveal the specific information, attitudes and opinions that may be hidden behind general assurances of impartiality. More than one-fourth of the 146 jurors excused for having already formed an opinion in that case had denied at least once that they had any opinion. Most striking, one prospective juror denied repeatedly that she had any opinion. She had read newspaper accounts about the case and "knew all about this naturally," but she repeatedly asserted that she could be fair, specifically denying any personal interest in the case or awareness of any bias or prejudice or inability to be impartial and repeatedly denying any opinion as to the defendant's guilt or innocence. When finally asked what she thought the defendant had done, however, the juror admitted, "Well, we all know what she has done . . . we all know the girl went in and held up the bank and the policeman was shot there." *Commonwealth v Saxe*, Suffolk Cty Super Ct #51775-77 (1976), voir dire of juror #54, transcript reprinted in *Jurywork: Systematic Techniques* (2d ed 1983) at 10-46.1-10.49. Quoted in *Mu'Min, supra* at 443, n 4 (Marshall, J., dissenting).

Another example from the amici curiae is contained in a letter from Judge Prentice H. Marshall, United States District Judge for the Northern District of Illinois to Judge Jim R. Carrigan, United States District Judge for the District of Colorado. Judge Marshall was relating his experiences when he began allowing counsel to participate in voir dire.

> "Immediately Judge Norman's assertion was confirmed. A juror here and there who had assured me he or she could be fair and held no biases or prejudices admitted to a lawyer a profound bias, e.g., against police officers, black persons, etc.
>
> "Then this fall the classic example occurred. I was presiding at a criminal case in which a labor union was a defendant. My inquiry addressed anti-union bias; virtually every prospective juror responded they had none and could be fair.
>
> "The lawyer for the union . . . on supplemental examination elicited admissions of prejudice from *eleven* prospective jurors who were excluded for cause."

enable judgments to be formed *by the court* regarding their ability to be impartial *Monaghan, supra.*[16]

D

Like the Court of Appeals, we cannot conclude that the trial court's manner of limiting and conducting the voir dire and its failure to ask probing questions was not prejudicial to defendant. See *People v Miller, supra* at 326. "Without the benefit of any probing questions, we do not know what answers the veniremen would have given and what such answers would have meant to defendant in exercising a challenge for cause or a peremptory challenge." *Tyburski, supra* at 590.

[16] While it is true, as the dissent points out, that potential jurors were asked to identify the general source of their information, and were asked to raise their hands if they had read a particularly prejudicial Detroit Free Press article, these questions added nothing to what basically was juror self-assessment. The questioning lacked the necessary depth of insight required for the court to make any independent determination of bias. The dissent's "general rule" that "a trial court does not abuse its discretion when it declines to submit questions to prospective jurors that are designed to reveal substantial prejudices, or to develop a rational basis for the exercise of challenges, as long as the trial court employs similar questions that adequately cover the area of potential bias," is not dispositive. *Post* at 673-674. Questions that do not go beyond juror self-assessment do not *adequately cover* the area of potential bias.

Although the dissent recognizes the potential problem of juror self-assessment, it is content that the judge did in fact carefully guard against it because he exercised caution with respect to one juror who had admitted having formed an opinion, but stated she could set that aside. The dissent notes that after further questioning by the trial judge, this juror, who had been employed by a Christian high school for several years, was excused because she revealed that she was morally opposed to killing and was not positive she could give defendant a fair hearing.

The court's apparent caution with this one juror does not negate its abandonment of caution in respect to other jurors. Those who did not voluntarily admit that they had formed opinions were merely asked if they could be impartial despite their admitted exposure to publicity. While the jurors who decided the case did not admit having formed opinions, they were asked nothing more than self-assessment of their ability to be impartial.

Therefore, we affirm the Court of Appeals decision. A juror's self-assessment of bias should not be accepted without first eliciting information concerning the content and extent of the juror's exposure to publicity so that the court can make its own determination of the juror's impartiality. While it is within the trial court's discretion to select the method for eliciting such information, it is an abuse of discretion to abdicate this responsibility.

CAVANAGH, C.J., and LEVIN, J., concurred with MALLETT, J.

LEVIN, J. (*separate opinion*). I agree with the signers of the lead opinion that the trial court abused its discretion by failing to ask questions that were sufficiently probing. I write separately to state that, while a litigant does not always have the right to have counsel conduct the voir dire, in the instant case the trial court abused its discretion when it refused to permit Tyburski's lawyer at any time to question the jurors individually.

The trial court's method of questioning en masse failed to provide Tyburski's lawyer with a sufficient factual basis to challenge a prospective juror's ability to serve impartially, and prevented informed exercise of peremptory challenges and challenges for cause.

In a high-profile case, where the risk of a verdict based on extrajudicial influences is substantial, lawyer participation at some point in the conduct of voir dire is ordinarily essential to an informed exercise of the rights of challenge.

The extent and nature of pretrial publicity determines the specificity and depth of questioning that should be permitted on voir dire. This necessarily varies, depending on the facts of each case

and the nature and extent of pretrial publicity and community passion.

I

Of the thirty-six questions submitted by Tyburski's lawyer, the lead and dissenting opinions advert to the fifteen questions concerning the amount of pretrial publicity and the jurors' exposure thereto.

Recognizing that questions merely quantifying exposure to publicity would not reveal underlying attitudes and biases and would render the voir dire incomplete,[1] Tyburski's lawyer proposed questions seeking to expose latent attitudes or biases that might, in light of the nature of the pretrial publicity, interfere with a juror's assessment of guilt based on the evidence. The questions submitted, but not posed, to prospective jurors were the following:

> This case will involve a number of very serious and sensitive issues (marital discord, adultery, death) that may tend to arouse strong feelings in some people. The following questions are intended to explore whether you have a particularly powerful emotional reaction to any of these issues that would affect your ability to concentrate, or your ability to decide this case fairly to both sides.
>
> There will be testimony in this case that the deceased, a forty-two year old woman, died from a

[1] Tyburski states the issue as follows:

> Where the media coverage in the freezer case was international in scope, saturated the local media, and was inflammatory against the defendant, did the voir dire process which was geared to qualify jurors without regard to media exposure, opinion or bias, violate defendant's state and federal constitutional rights as well as the Michigan common law rights to an impartial jury and effective assistance of counsel?

severe beating. When discovered her body was completely frozen. While none of us wants to be exposed to such disturbing things, some people have a far more extreme reaction and simply cannot tolerate this type of evidence.

16. Is that the way you feel?

17. Do you know anyone who died as a result of a violent incident?

18. Have you ever had the unfortunate experience of seeing a person who was seriously injured or killed?

19. Have you had any experience with the death of a loved one or friend that would make it hard for you to sit as a juror in a case like this?

20. Are your parents living or dead?

21. If one or both of your parents are now deceased, how old were you when the first of your parents died?

22. What was the cause of death?

Obviously, in our culture, and in just about every culture, there are ceremonies and rituals that we perform when someone dies.

23. Why do you think these ceremonies and rituals are important to some people?

24. Do you believe that a person who does not receive a regular or immediate burial suffers some adverse consequence?

25. Do you have any particular religious or philosophical beliefs which govern your feelings about the way bodies should be treated after death?

26. Have you known married people (or lovers) who have had frequent verbal arguments?

27. Have you known people who have had physical fights with their spouse?

28. Do you think its true that people often say and do the meanest things to the ones they love the most?

29. Have you ever witnessed a situation where a verbal argument, particularly between spouses, has escalated quickly and unexpectedly into physical violence?

30. Some people have a very strong reaction to people who are not faithful to their spouses; other people have very little reaction and don't believe that infidelity is morally wrong, depending on the circumstances. How do you feel?

31. Have you known anyone whose spouse was unfaithful to them?

32. What was their reaction to discovering that their spouse had not been faithful?

33. Was the "other" person involved in the affair a minor or a very young person? If so, do you think that made it worse? Why?

34. Have you ever heard of a situation where someone has overreacted or reacted violently to being told of or discovering adultery by their spouse?

35. Why do you think a person might react that way to hearing news of adultery?

36. Do you think that most people do have a breaking point—a point where they could be provoked into violent behavior?

The questionnaire prepared by Tyburski's lawyer sought relevant information in a measured and emotionally neutral manner. The questions were not leading. Nor did they suggest a particular answer. They did not seek to proselytize prospective jurors or to extract commitments from them. Nevertheless, the trial court declined to permit use of the questionnaire, or to pose the questions or their equivalent.

The trial court, rather, asked some, not all, the prospective jurors whether they had "religious or moral beliefs that would make you an unfair juror." In lieu of individualized, probing questions, the court asked the following compound questions, seeking a collective, *nonverbal* response:

As I told you earlier, ladies and gentlemen, if you are selected to sit on this case, you are here

for one reason and that is that you are going to decide this case.

If you hear testimony—and I really don't know what the testimony is going to be in this case—I have not seen the witnesses. I have not heard the witnesses. I will be hearing and seeing them for the first time as you will when they come before you.

But if you hear testimony—and I'm speculating as to what the testimony may or may not be as to any testimony concerning adultery or any testimony concerning violent beating or matrimonial arguments—and, of course, this is a case that involved death—but if any of those areas are brought up, if there's any testimony on those areas, is that going to shock anyone's conscience to such a degree? Or is there a background that you might have in any of those areas as to violence in the marriage or adultery or arguments that you believe might create an unfair mindset for you? Does anyone have a problem with any of those areas that are brought up in this case? If so, I'd like to see your hand raised if you think you might have a problem.

* * *

And, again, I really don't know what the facts are going to show in this case. But how many people have had the unfortunate experience of seeing a parent die, pass away, maybe have gone to a hospital bed and witnessed that, something along those lines where you have actually experienced—witnessed the parent's death?

Let me see a showing of hands.

Okay. As I told you, you'll decide this case. And in this case, you will be given instructions at the conclusion of this trial, that you are to decide this case based on the facts.

Sympathy, prejudice, bias, must not influence your decision. Is there any one on this particular panel, specifically those of you who have raised your hand as a result of seeing a parent pass away that in this particular trial—since there will prob-

ably be some family, some children that will testify as to their deceased mother—would that invoke some type of sympathy in you that you think you might be prejudiced in some manner—if you can think in any way—maybe you can enlighten the Court. Maybe you might be biased in favor of Mr. Tyburski or maybe you may be prejudice [sic] against Mr. Tyburski as a result of the death of a family member and children having to go through that experience.

Anyone have a problem with that? Do you think that that might cause you to be an unfair juror? If so, I'd like to see your hand raised. Okay.

And, again, specifically dealing with one particular item that I already discussed, if there is testimony in dealing with the terminology adultery, is that going to create any feelings in someone that they believe that might make them an unfair juror in any way respect if they hear that type of terminology in this type of trial?

I think you might also hear some testimony that the deceased was in a freezer in a basement for three years.

And, therefore, immediately upon death did not receive an immediate burial when she passed away.

Is that going to create any problems maybe as a result of your background or any religious beliefs that you might have since there was not an immediate burial upon death or proper services right after the death occurred; is that going to create any problem for you as jurors?

If so, I'd like to see your hand raised. All right.

Specifically, you might hear some testimony that the deceased had an affair with a younger man. As a result of the age difference or just as a result of there being an affair—I don't know if the testimony is going to show that, but if the testimony does show something along those lines, is that going to create a problem in anyone's mind where that may be a result of beliefs, religious or otherwise, might make you think unfairly towards the deceased or unfairly towards the defendant?

Any problems if that testimony arises? If so, I'd like to see your hand raised.

You know, I imagine in some countries and even in some religions when a husband finds that his wife has committed adultery—in some religions—maybe the beliefs in that religion that death or murder may, in fact, may even be appropriate.

Does anyone harbor those beliefs? Or is anyone from a country that might have those beliefs? If so, I'd like to see your hand raised.

Is there anyone on this particular panel right now that as a result of areas that I have already covered or possibly did not cover thus far, that you would like to enlighten the Court on that you think the Court should be apprised of, maybe something in your background or it may be something that I touched on or did not touch on that you think the Court should be aware of that you think that might make you an unfair juror either towards the Prosecution or towards the defense.

If so, I'd like to see your hand raised.

II

The foregoing method of questioning was wholly inadequate to develop a factual basis for exercising peremptory challenges or challenges for cause. The trial court asked the panel a series of questions before seeking a response. Questions suggesting a "correct" answer, or providing a limited range of possible answers, fail to provide the information necessary for exercise of the rights of challenge.

Tyburski's lawyer could not have been reasonably expected to evaluate the genuineness of the responses to questions calling for raising of hands —questions calling for no verbal expression whatsoever. Tyburski's lawyer was left with only the jurors' self-assessment of their impartiality, an

unreliable measure of ability to set aside preconceptions.[2]

General questions, "Does anyone harbor those beliefs?" "Any problem if that testimony arises?" and "Anyone have a problem with that?" did not provide Tyburski's lawyer with information sufficient to develop a reliable factual basis to select a jury reasonably free of preconception.

State and federal courts recognize the inherent unreliability of juror self-assessment of impartiality. Undue reliance on a prospective juror's self-assessment of his capacity to set aside preconceptions, without further exploration, constitutes grounds for reversal.

Where the nature of the publicity raises a significant possibility of prejudice, cursory questioning by the court will not suffice. The court must take affirmative steps to assure that the voir dire provides reasonable assurance that preconceptions will be exposed. *United States v Hawkins,* 658 F2d 279 (CA 5, 1981).[3] In that case, the trial court had asked the panel as a whole to raise their hands if

[2] The United States Supreme Court noted the inherent unreliability of juror self-assessment of impartiality. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. . . . [S]uch a statement of impartiality can be given little weight." *Irvin v Dowd,* 366 US 717, 728; 81 S Ct 1639; 6 L Ed 2d 751 (1961).

[3] Federal Rule of Criminal Procedure 24(a) provides:

> The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

MCR 6.412(C)(2) provides:

they felt they could be impartial. The failure to undertake any other significant inquiry concerning specific biases was held to require reversal.

Conclusory questioning of the venire as a group concerning pretrial publicity in a well-publicized ammunition smuggling/jailbreak prosecution was similarly found to be inadequate and to require reversal. *United States v Davis,* 583 F2d 190, 197 (CA 5, 1978). The trial court had asked any member of the panel to raise his hand if he felt the publicity impaired his ability to render an impartial decision. No prospective juror indicated an inability to serve as an impartial juror. The trial court was found to have abused its discretion in failing to inquire in particular what each juror had heard or read and how it affected his attitude toward the trial, and in failing to independently determine whether each juror's impartiality had been compromised.

The failure to inquire during voir dire concerning the effects of pretrial publicity was found to require a new trial in the case of the Chicago Seven (David Dellinger, Tom Hayden, Abbie Hoffman, Rennie Davis, Jerry Rubin and Bobby Seale), who were charged with making speeches for the purposes of inciting, organizing, promoting and encouraging a riot and conspiracy, under the 1968 Federal Anti-Riot Act.[4] The events leading to their arrest arose out of anti-Vietnam war demonstrations during the 1968 Democratic National Con-

The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

[4] *United States v Dellinger,* 472 F2d 340 (CA 7, 1972).

vention. The media saturated the public with reports and images of the rioting and events before and during trial.

In reversing their convictions, the United States Court of Appeals for the Seventh Circuit held that the voir dire should have included at least minimal inquiry into three areas, including anti-Vietnam war sentiment, attitudes regarding "hippie" culture, and juror attitude concerning confrontation between city police and demonstrators. General questions regarding attitudes, associations, family, and employment status were not sufficient to test a juror's possible prejudice, in a specific area where it might well exist.[5]

The Supreme Court of Hawaii reversed a conviction in a highly publicized armed robbery case, because the judge relied entirely on juror self-assessment of impartiality. There was significant publicity before and during trial, including photographs of defendants in handcuffs and reports of repeated outbursts in the courtroom, together with news articles that defendants led a gang responsible for recent robbery-murders in the community. *State v Pokini,* 55 Hawaii 640, 642-644; 526 P2d 94 (1974). The court found that the professed ability of jurors to set aside views resulting from the publicity, without more, did not adequately protect defendants' right to an impartial jury.[6]

The need for attorney participation in voir dire becomes apparent on comparison of the court's general, superficial questions with the carefully constructed questions submitted by Tyburski's lawyer that sought to elicit specific, probative responses concerning issues often difficult to articulate, let alone acknowledge, in a courtroom. The general, superficial questions posed by the court eli-

[5] *Dellinger,* n 4 *supra,* p 369.

[6] *United States v Lewin,* 467 F2d 1132 (CA 7, 1972).

cited similarly superficial, and therefore unenlightening, responses from prospective jurors.

National models of criminal procedure provide for lawyer conduct of voir dire.[7] Lawyer-conducted voir dire examination would have resulted in more complete factual development, leading to a more fully informed exercise of the rights of challenge. Questions should be closely related to the factual circumstances of the case. Lawyers review the facts and circumstances of the case over a period of days, weeks or even months. The judge, of necessity, allots but limited time and attention to

[7] The following standards recognize the need for attorney questioning during voir dire:

—ABA Standard 15-2.4, quoted *post,* p 668, n 17.

—National Prosecution Standards, 17.2 Jury Selection:

> Initial examination of jurors as to statutory qualifications may be conducted by the court; thereafter examination should be conducted by counsel.
>
> Voir dire examination should not be conducted solely by the court since "there are always points in practically every case which are peculiar to that case, and which, by the same token, are unknown to the trial judge, but known to defense counsel and the parties." Bias, preconception and prejudice are ever present, and they can and will affect a verdict. There is no foundation in reason, therefore, for placing these things beyond the thorough examination by counsel. [National Prosecution Standards, commentary, p 235.]

—Uniform Rules of Criminal Procedure, Rule 512(b):

> Examination. . . . The court may put to the prospective jurors appropriate questions regarding their qualifications to serve as jurors in the case, and shall permit questioning by the parties for the purposes of discovering bases for challenge for cause and enabling an intelligent exercise of peremptory challenges. [10 ULA 261, 1992 Special Pamphlet, p 125.]

The United States Supreme Court has declined to require submission of content questions to jurors in state criminal proceedings although there has been significant pretrial publicity. The Court, acknowledging that the ABA standards may represent the "better" view, ruled that that does not mean that they are incorporated into the Fourteenth Amendment. *Mu'Min v Virginia,* 500 US 415, 430-431; 111 S Ct 1899; 114 L Ed 2d 493 (1991).

review before the trial of the facts and circumstances.

If the rights of challenge are not to be empty, a litigant should be permitted sufficient inquiry into the background and attitudes of the jurors to enable intelligent exercise of those rights.[8] The trial court deprived Tyburski of the benefit of his lawyer's preparation and knowledge of the facts and circumstances. She was prevented from using that knowledge to assist the court in selecting an impartial jury.

Permitting attorney-conducted voir dire in appropriate cases need not result in abuse. The trial court retains the right to limit questions to appropriate information, and has the power to protect potential jurors from burdensome, harassing, or embarrassing questions.

III

In cases subject to intense media exposure, the prejudice arises in part from a juror's familiarity with details of the crime before the trial. Each juror is obliged to set aside "knowledge" gleaned from the media. The risk of prejudice should be evaluated by the degree to which pretrial publicity lodges preconceptions in the minds of prospective jurors. A defendant is deprived of his right to a fair trial when the trial court fails to sufficiently protect the accused from the results of pretrial publicity.[9]

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[8] *United States v Dellinger,* n 4 *supra,* p 368.

[9] Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. [*Sheppard v Maxwell,* 384 US 333, 362; 86 S Ct 1507; 16 L Ed 2d 600 (1966).]

Refusal to ask questions posed by the defense does not require reversal; "[r]ather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."[10] To satisfy federal and state constitutional concerns, the trial court must ask questions designed to elicit responses that will uncover latent biases, and selection of a jury competent to render a verdict free of extrajudicial influence.

The trial court's cursory questioning in the instant case was inadequate to protect Tyburski from the wave of publicity aired just before the trial.[11] Most of the news articles appeared in Janu-

[10] *Mu'Min,* n 7 *supra,* pp 425-426, citing *Murphy v Florida,* 421 US 794; 95 S Ct 2031; 44 L Ed 2d 589 (1975).

[11] The following are a sampling of headlines and dates. "Woman missing since '85 found in freezer," January 3, 1989, Detroit Free Press; "Woman discovered in freezer was beaten, Police seek answers in 3-year-old slaying," January 5, 1989, Detroit Free Press, Section A, pp 3, 4; "Daughter's suspicions of freezer deepened," January 6, 1989, Detroit Free Press, Section A, pp 3, 4; "Husband: We fought, she fell into the freezer, Statement to police says she threw knife," January 7, 1989, Detroit Free Press, Section A, pp 3, 14 (the latter article discussed Dorothy Tyburski's affair with her daughter's boyfriend, and Tyburski's statements to police). Similar articles appeared in the New York Times, Detroit News, and Plymouth Observer throughout January and February, 1989.

On April 23, 1989, the Detroit Free Press ran a lengthy article on the Tyburski family, complete with historical details of family discord and Tyburski's lies to explain his wife's three-year absence, including the following:

> Leonard Tyburski did more than kill his wife. According to his confession the day of his arrest, he slammed her head against a concrete pole in the basement after she came after him with a steak knife, while taunting him with news that she had had sex with Kelly's 18-year-old boyfriend. Once she was dead, he twisted her bloodied 5-foot-4, 135-pound body and stuffed it into the family freezer, atop frozen hamburger and kielbasa. Dorothy Tyburski's neatly made-up face, now gashed, was pressed against the side of the freezer; she was barefoot, and wore jeans and a gray Hall & Oates T-shirt Kelly had bought her.
>
> Within minutes after his wife's death, Tyburski began a complex psychological game, telling his wife's relatives elaborate lies, convincing his oldest daughter, Kelly, the inquisitive one, that her mother had left because she hated Kelly.

ary and February, 1989. All three local television news stations ran stories on March 2, 1989, the day of Tyburski's preliminary examination. The trial began on June 19, 1989, when the lurid details from media reports were still fresh in the public's mind.[12]

I join in affirmance of the decision of the Court of Appeals.

BOYLE, J. (*concurring in the result*). To the extent that the lead opinion could be read to require trial courts in high publicity cases to allow attorneys to: (1) submit questionnaires to potential jurors, (2) participate in voir dire, or (3) conduct sequestered voir dire, I respectfully disagree. Cf. MALLETT, J., *ante* at 623-624. Likewise, I disagree with the Court of Appeals cumulative-error analysis suggesting that the collective decisions of the court—failing to conduct a sequestered voir dire and not allowing counsel to meaningfully participate in voir dire—deprived the defendant of a fair trial. Cf. 196 Mich App 576, 590; 494 NW2d 20 (1992).

Nevertheless, I join in Justice MALLETT's result for the sole reason that the record supports the conclusion that counsel asked the court to question venire members about what they had heard or

See *Jordan v Lippman,* 763 F2d 1265 (CA 11, 1985), where the United States Court of Appeals for the Eleventh Circuit reversed a conviction because the trial court had failed to conduct a searching and extensive voir dire in light of massive publicity concerning a racially charged public demonstration that had occurred just three days before the trial.

[12] Jury selection long after a barrage of pretrial publicity has been held to be a significant factor in denying habeas relief. *Patton v Yount,* 467 US 1025; 104 S Ct 2885; 81 L Ed 2d 847 (1984). Lapse of time is crucial in softening the prejudicial effect of pretrial publicity, as community sentiment softens, details of the case slip from the public's mind, and even jurors who once held preformed impressions of guilt or innocence may have weakened or eliminated convictions once held. *Id.,* pp 1032-1034.

remembered from pretrial publicity, and the court did not do so.

What a prospective juror knows and remembers about an incident is of great significance in exercising challenges. However, a request for content questions, meaning questions about the content of the publicity to which potential jurors have been exposed, creates an obvious dilemma for the trial court and defense counsel. Where potential jurors are not sequestered during voir dire, as all agree they need not be, these questions pose the risk that the revelation of some detail might either cause the entire process to be aborted, or else furnish the basis for appellate claims based on jury taint or ineffective assistance of counsel. A trial court can only avoid these dangers completely by conducting sequestered voir dire of each member of the venire who acknowledges exposure to publicity (in this case, all but two of them), which is not required as a matter of law, or, when individualized voir dire is denied, by confirming on the record that counsel does not desire content questions directed to the entire panel.

Because trial counsel runs the risk that asking such questions will reinforce specific details or negative impressions that other panel members gained from pretrial exposure, counsel may deliberately forgo asking content questions for sound strategic reasons. For example, defense counsel's mid-voir dire request that the court refrain from asking potential jurors to state their opinions about the case was clearly a strategic decision designed to minimize the effect of panel members' opinions on the rest of the venire. For that reason, the superficiality of the compound question that was prompted by this request cannot form the basis for error.

The record does not permit the same conclusion,

however, with respect to questions regarding what the venire members remembered about pretrial publicity. I concur with Justice MALLETT's result because the extensive amount of pretrial publicity counseled special caution, and I cannot say with confidence that counsel elected to forgo content questions, which she asked for, but were not presented.

BRICKLEY, J. (*dissenting*). Because we would conclude that the trial court did not abuse its discretion in placing limitations on the voir dire conducted in this case, we respectfully dissent.

I

It is undisputed that on September 28, 1985, defendant Leonard Tyburski inflicted fatal injuries on his wife in the basement of their home. He stored her body in the locked basement freezer for approximately three years, until the body was discovered by one of his daughters on January 2, 1989. Tyburski was arrested on that same day and charged with open murder. Following the preliminary examination on March 2, 1989, he was bound over for trial on a charge of second-degree murder.

Extensive pretrial publicity surrounded the unfolding of these events, stemming mostly from the manner in which the defendant had disposed of the body and the circumstances attending the discovery of the body. Ample media coverage was also given to an alleged affair between the decedent and her daughter's boyfriend. On the international level, two British tabloids followed the case. On the national level, stories of the case appeared in the New York Times, USA Today, and the National Enquirer. Journalists from Arizona, Florida, and Pennsylvania, among other states, had

called requesting information about the case. On the local level, stories appeared in the Detroit Free Press, the Detroit News, and the Plymouth Observer, including an article that appeared in the April 23, 1989, Sunday magazine of the Detroit Free Press, entitled, "I found Mom!" On the basis of this pervasive pretrial publicity, defense counsel moved for individual sequestered voir dire and for submission of a questionnaire to all prospective jurors designed to determine the extent of their exposure to such publicity.[1] The trial court denied these requests.

At trial, the sole issue was the level of defendant's culpability. In an attempt to mitigate the crime to manslaughter, defendant raised a defense of provocation. This was premised on the fact that

[1] The questionnaire provided, in pertinent part:

This case has received some news coverage during the past 6 months . . . .

7. Do you remember reading or hearing about this case at all?

—Did you read articles about it?_____;

—How many do you think you read?_____;

—Where did the article(s) appear? (Please be specific, if possible)

—What do you remember from reading those articles?

8. Did you see television coverage of this case?_____;

—What stands out in your mind about what you saw on TV?

9. Did you talk about this case with family, friends or co-workers?

—What stands out in your mind about what was discussed?

10. After hearing about this case, what was your reaction?

11. Did you form an opinion about anything connected to this case? If so, what was your opinion?

12. Do you understand that none of what you read or heard before coming to trial is evidence in this case?

13. Do you realize that much of what you may have heard or read may not even be true?

14. Have you ever heard the saying, "you can't believe everything you read in the papers?" Do you agree with this?

15. If selected as a juror, will you promise to refrain from being exposed to any further news coverage during this case?

the murder occurred following an argument between the defendant and the decedent, an argument precipitated by the decedent's admission that she was having an affair with her daughter's boyfriend. Defendant testified that following this admission, the decedent began throwing food containers at him and lunged at him with a knife. This sequence of events triggered his actions in smashing her head against a beam in the basement, resulting in her fatal injuries.

The jury rejected defendant's defense of provocation and convicted the defendant of second-degree murder. Defendant was sentenced to a term of twenty to forty years. On direct appeal, the Court of Appeals reversed the defendant's conviction, concluding that the trial court had abused its discretion in limiting the scope and conduct of voir dire, resulting in a deficient voir dire.[2] It held that the cumulative effect of the trial court's refusal to conduct sequestered voir dire, its failure to allow meaningful participation by defense counsel in the jury selection, and the absence of probing questions on voir dire prevented defendant from receiving a fair trial. Because we disagree with the majority's affirmance of the decision of the Court of Appeals, we dissent.

II

The analysis of the lead opinion focuses solely on the conduct of the jury voir dire in the context of the pretrial publicity. Accordingly, we must carefully examine the transcript of the voir dire and the content of the pretrial publicity within the context of the recognized purposes of voir dire.

[2] 196 Mich App 576; 494 NW2d 20 (1992).

A

Jury voir dire began on Monday, June 19, 1989. As stated above, the court had earlier denied defense counsel's requests for individual sequestered voir dire and submission of a questionnaire to prospective jurors. The trial judge informed counsel that it was his practice to conduct the voir dire.[3] The court responded negatively to defense counsel's question pertaining to whether follow-up questions by counsel would be allowed. However, the court indicated to counsel that if a juror's response demonstrated a need for follow-up questions, counsel could submit such questions in writing to the judge and he would present them to the prospective jurors. Additionally, defense counsel requested that the trial court question potential jurors individually if it appeared that many had been exposed to pretrial publicity. The court expressed its intention to comply with this request.

The jury array was composed of eighty persons. After questioning prospective jurors regarding potential bias stemming from previous encounters

[3] In Michigan, the conduct of voir dire is a matter within the trial judge's discretion. See MCR 6.412(C), which provides in pertinent part:

> (1) Scope and Purpose. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.
>
> (2) Conduct of the Examination. The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of other jurors.

with the law or knowledge of one of the parties or witnesses in the case, the trial judge proceeded to the issue of pretrial publicity. Initially, the trial judge asked to see a display of hands by each person who had heard or seen something about this case. Every prospective juror responded. Beginning with the first juror, the judge asked, "how do you recall hearing something about this case?" When the juror responded that she had read about the case in the paper and had seen news coverage on television, the trial judge stated:

> All right. You understand, [name of juror], that if you are selected to sit as a juror in this courtroom, that you have to decide this case on what you hear in the courtroom; you understand that, don't you.

Following an affirmative response by the juror, the trial judge stated:

> All right. If you are selected as a juror, what you are going to have to do, [name of juror], is basically separate what you have heard on TV or on the radio or in the newspaper and judge this case on what you hear in the courtroom. Have you developed any opinions thus far or feelings on this case one way or another as to what you've heard or read?

The juror responded that she had and that she tended to think the defendant was guilty. Following this disclosure, the trial judge inquired:

> All right. Do you believe everything that you read in the newspaper?

When the juror responded in the negative, the trial judge implored:

> Okay. Do you think that that is a way to settle disputes as to guilt or innocence by reading the newspaper?

Upon receiving a negative response, the trial judge continued:

> Okay. If I were to tell you, [name of juror], that you have to decide this case based on what you hear in the courtroom, will you be able to set aside your beliefs, set aside your opinions and listen to this case and render a fair decision?

The juror responded in the negative. The trial judge followed up with:

> No. Do you think what you've read thus far has tainted you to such a degree that you do not think that you could be fair to this defendant?

Upon receiving an affirmative response, the trial judge ended this line of questioning (this juror was later excused by the trial judge) and moved on to another prospective juror.

During questioning of the next several prospective jurors, the trial judge inquired whether any feelings or opinions had been developed about the case. An affirmative response triggered a follow-up question by the judge regarding whether the prospective juror could set aside personal opinions and try the case solely on the evidence presented in the courtroom. After having excused several jurors for cause on the basis of their firmly held opinions, this exchange occurred:

> *The Court:* Okay. As a result of what you have heard and read, have you formulated any opinions?
>
> *Juror Zimmer:* Well, I'm afraid I would have to say I did.

The Court: Okay. And these opinions are not favorable toward Mr. Tyburski?

Juror Zimmer: That's right.

The Court: Okay.

[*Defense attorney*]: May we approach for a moment, your Honor?

The Court: All right.

(Off the record discussion was had.)

The Court: You understand, Ms. Zimmer, don't you, as I've discussed earlier that this case is going to be decided in the courtroom; isn't that correct?

Juror Zimmer: Yes.

The Court: You understand that?

Juror Zimmer: Yes.

The Court: And you don't believe that case[s] should be decided by the media, do you?

Juror Zimmer: No, I don't.

The Court: You don't believe that cases should be decided by what you read in the newspaper, do you?

Juror Zimmer: No.

The Court: You don't believe that cases should be decided on what you hear or say [sic] on the TV; isn't that correct?

Juror Zimmer: That's right.

The Court: Okay. But you are telling me that you've developed such a strong opinion that you'd have a hard time being a fair juror; is that correct?

Juror Zimmer: Well, I would have a rough time, I think.

The Court: You'd have a rough time?

Juror Zimmer: Yes, I believe I would.

The Court: Even though you believe that cases shouldn't be decided on what you heard and read in the newspapers?

Juror Zimmer: I realize that . . .

The Court: You don't know if what you've read is accurate, do you? There's no way for you to know that; isn't that correct?

Juror Zimmer: That's true.

At the conclusion of this exchange, juror Zimmer was excused for cause. Immediately following this, juror Louis admitted she had read about the case and formulated an opinion concerning what she had read.[4] The following exchange transpired:

> *The Court:* Okay. Do you understand that if you are selected to sit as a juror in this case that you have to decide the case on what you hear in the courtroom?
>
> *Juror Louis:* Yes.
>
> *The Court:* And will you be able to do that?
>
> *Juror Louis:* Yes.
>
> *The Court:* Will you be able to set aside the opinions that you've developed in the newspapers and judge this case on what you hear in the courtroom?
>
> *Juror Louis:* Yes.

Receiving this response, the trial judge proceeded to question the next prospective juror.[5] The morning session of the voir dire continued in similar fashion, with the trial judge asking every potential juror whether he had formed any opinions about this case, and inquiring into the substance of any opinions admittedly formed.

At the conclusion of the morning session, defense counsel filed a motion objecting to the Court's voir dire procedure. Counsel argued that the Court's procedure in inquiring into whether any juror had formed an opinion regarding defendant's guilt and its inquiry into the substance of this opinion served only to taint any prospective juror who either had not yet heard about the case or had failed to form an opinion about defendant's

[4] It is unclear from the transcript whether juror Louis had formed an opinion regarding defendant's guilt.

[5] Juror Louis was later excused on a peremptory challenge by the defendant.

guilt or innocence. Counsel further claimed that the voir dire process "has been more prejudicial to [defendant's] right to a fair trial by an impartial jury than had the Court asked no questions whatsoever about publicity." Counsel then requested that any extended questioning of jurors regarding their opinions be conducted individually and outside the presence of every other prospective juror.[6]

After the lunch break, voir dire continued with prospective juror Rae. Following an affirmative response to an inquiry into whether he had heard about the case, the trial judge queried whether he

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[6] Defense counsel's motion, in its entirety, is as follows:

> Now comes Leonard Tyburski, by and through his attorney . . . and hereby vehemently objects to the voir dire procedure employed by this Court thus far during the morning session of the first day of jury selection. The Court's procedure, in eliciting from each jury [sic] not only whether they have an opinion as to this case, but additionally what that opinion is, has the effect of tainting any juror who had not yet heard news accounts or who had not yet formed an opinion as to defendant's guilt or innocense [sic].
>
> Given the percentage of panelmembers who have been exposed to news reports (approximately 100 per cent), and given the almost unanimous decision by those persons who have read such accounts that Mr. Tyburski is guilty of murder, to continue this procedure simply cements in the minds of the yet undecided the "consensus" in the community as to the "appropriate" verdict. Moreover, now that potential jurors have been indoctrinated with the community's perception of the case, they are now under much more pressure to convict Mr. Tyburski.
>
> Mr. Tyburski contends that the Court's voir dire process thus far has been more prejudicial to his right to a fair trial by an impartial jury than had the Court asked no questions whatsoever about publicity. He requests again that any extended questionning [sic] of jurors regarding opinions they have reached about the case be conducted individually, sequestered from the rest of the panel.
>
> Defendant raises this objection now, prior to the commencement of the afternoon session, rather than at the end of the day (as suggested by this Court) in hopes of shielding any remaining impartial panel members from the enormous taint of this process.

had "developed any *opinions* that would make [him] an *unfair* juror?" (Emphasis added.)

The trial judge proceeded to question prospective jurors in this manner, but generally included such additional inquiries into whether a prospective juror would "be able to give this defendant all his constitutional guarantees?" and whether there was any reason why such juror could not sit as an impartial juror, despite having been exposed to pretrial publicity.

At the conclusion of the judge's questions regarding the effect of the pretrial publicity on the prospective jurors, it appears defense counsel reminded the judge that he had not inquired into whether prospective jurors had read the article published in the Sunday Free Press magazine, entitled, "I found Mom!" It seems defense counsel also requested the judge to probe the source of the prospective jurors' knowledge of the case.[7] The trial judge immediately requested a showing of hands by those prospective jurors who had read this article. He then asked how many prospective jurors had heard about the case only on television and how many had read about it only in the newspapers. Finally, he asked how many prospective jurors had heard about this case on the radio.

After covering other areas of potential bias, the trial judge asked if counsel had any written questions it wished to have submitted to the jury. This colloquy ensued:

> [*Defense Counsel*]: No, your Honor, just the ones that I have submitted.
>
> *The Court:* All right. I have gone through those.

[7] Because some of these questions were included in defendant's proposed questionnaire and because the court engaged in this inquiry following a discussion off the record requested by defense counsel, it appears that defense counsel was the impetus behind such questioning. See n 1.

> Those that I did not ask I did not deem to be relevant. But if you want to make those questions part of the file, I will give you that opportunity, counsel.

Following this, defense counsel passed on challenges for cause.

As peremptory challenges were exercised and new prospective jurors were selected to fill the vacant seats, the trial judge inquired whether any juror had heard about the case. Upon receiving an affirmative response, the judge engaged in an examination designed to determine whether any opinions had been formed that would create the potential for unfairness in a prospective juror. This examination was tailored to accommodate defense counsel's concern, as expressed in her motion at noon objecting to the voir dire procedures, that the questions posed by the trial judge in the morning session prompted answers that had the effect of tainting the remaining members of the venire. On one occasion, defense counsel requested and was given permission to submit a follow-up question to a juror. On several other occasions, defense counsel successfully interjected desired questions into the voir dire.[8]

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[8] Questions interjected by defense counsel include the following:

> *A juror:* I have some moral opinions of my own regarding several of those items. I'm not—I can't judge at this time morally—his moral . . .
>
> [*Defense counsel*]: Your Honor, can we break down those topics that you went through so we can . . .
>
> *The Court:* Okay. Go ahead.
>
> * * *
>
> *The Court:* Okay. Any challenges for cause?
>
> [*Defense Counsel*]: Your Honor, before we do that, adolescent daughter.
>
> *The Court:* Adolescent daughters, teenage daughters?
>
> *Juror Moynihan:* No. I have a 17 and [a] 20-year old boys [sic].

After having exercised only eight of the allotted twenty peremptory challenges, defense counsel announced it would have no further challenges. Instead, defense counsel submitted a motion for a mistrial the following day on the basis of the court's procedure in conducting voir dire.[9] Defense counsel argued that requesting prospective jurors to verbalize their opinions in front of other prospective jurors served to taint the panel. Counsel informed the judge that although she did not feel this was an impartial jury, she was declining to exercise further peremptory challenges because such challenges would not have cured the faulty procedure.

B

Analyzing the pretrial publicity in the case at bar, we note, as stated above, that this case attracted both national and international media attention, as well as substantial local publicity. This publicity, however, was mainly factual;[10] it focused

[9] The pertinent parts of the motion are as follows:

> I do have a motion with respect to the Court's procedure for conducting voir dire yesterday. I have a motion for mistrial.
>
> I believe that the Court's procedure and, number one, asking the jurors whether they had an opinion. But more importantly having them to verbalize what their opinion was in front of other jurors tainted the panel.
>
> I have expressed in various briefs how I think that that procedure causes other jurors to maybe hear the opinions of other people on the panel, their fellow jurors and that that taints the process.
>
> We had virtually everybody on this panel had [sic] heard about this story. But I think when a juror says in front of fellow jurors that they have received information about this case and that based upon that information they believe that Mr. Tyburski is guilty. That's a very, very powerful statement to hear. And I don't know that any juror can ignore that and be impartial after hearing that.

[10] The lead opinion takes issue with our characterization of the

on the bizarre facts of the case, many of which were revealed at trial. Emphasis was placed on the body being found in the freezer, three years after the date of death and on the daughter's discovery of the body. One article implied that defendant was "severely sociopathic." Another story was entitled, "Woman may have been alive when locked in freezer." Although evidence adduced at trial confirmed that the decedent *may* have had some vital signs when she was locked in the freezer, testimony by the medical examiner revealed that the decedent could not have been alive for longer than several minutes following the severe head injuries she sustained. While there was evidence of some journalistic sensationalism, we note that the stories did not focus substantially on irrelevant information. Additionally, there were no stories of confessions that were later ruled inadmissible. In sum, while the publicity was pervasive, it was not necessarily inaccurate, nor was it prejudicial to Tyburski's defense.

C

Turning now to the recognized purposes of voir dire, we note there are essentially three functions of voir dire. The primary function is to elicit information from prospective jurors that establishes a basis for a challenge for cause. A second important and related function is to facilitate the intelligent use of peremptory challenges. A third function of voir dire, often viewed as illegitimate, is to educate prospective jurors on the merits and theories of the case, and to develop a rapport between jurors and attorneys. It is here that skill-

publicity as "mainly factual." This conclusion, however, is supported by a careful reading of the record. Only four of the twenty articles in the record can aptly be classified as "prejudicial" to the defendant. Many of the other articles were favorable to the defense, detailing an alleged affair between the decedent and her daughter's boyfriend.

ful defense attorneys seek to extract commitments from potential jurors; such commitments produce a biased jury instead of an objective one, and thus serve to negate the purpose of voir dire.

For this reason, the trial judge must be given considerable latitude in determining what questions will be submitted to prospective jurors. It has been stated:

> [The trial judge] must be free to exclude those questions which are "intended solely to accomplish such improper purpose" or which are not "phrased in neutral, non-argumentative form." He must also be able to "restrict the examination of jurors within reasonable bounds so as to expedite the trial." And he must on occasion be allowed to restrict questioning in order to give some protection to the privacy of prospective jurors.[11]

With this background in mind, we review defendant's federal constitutional challenge before turning our attention to the abuse of discretion argument.

III

FEDERAL CONSTITUTIONAL CHALLENGE

The United States Supreme Court cases delineating the requirements of voir dire can be divided into two categories. The first includes cases that were tried in federal courts in which the court's authority stems from its federal supervisory powers.[12] The second includes cases that were tried in state courts in which the court's authority is limited to enforcing the mandates of the United

[11] 2 LaFave & Israel, Criminal Procedure, § 21.3, p 719.

[12] See *Rosales-Lopez v United States,* 451 US 182; 101 S Ct 1629; 68 L Ed 2d 22 (1981); *Aldridge v United States,* 283 US 308; 51 S Ct 470; 75 L Ed 1054 (1931); *Connors v United States,* 158 US 408; 15 S Ct 951; 39 L Ed 1033 (1895).

States Constitution.[13] While the Supreme Court's decisions under its federal supervisory power are instructive, they are not binding in this state criminal case. It is only that Court's constitutional decisions that are necessarily binding upon this Court.

A common theme flowing from the cases under both the federal supervisory powers and the constitution is that much discretion is vested in the trial court to determine what questions to ask on voir dire.[14] The reasons underpinning this rule were succinctly stated by the Supreme Court in *Rosales-Lopez v United States,* 451 US 182, 188; 101 S Ct 1629; 68 L Ed 2d 22 (1981):

> Despite its importance, the adequacy of voir dire is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.

Cognizant of the above rule, we turn now to the

[13] See *Turner v Murray,* 476 US 28; 106 S Ct 1683; 90 L Ed 2d 27 (1986); *Ristaino v Ross,* 424 US 589; 96 S Ct 1017; 47 L Ed 2d 258 (1976); *Ham v South Carolina,* 409 US 524; 93 S Ct 848; 35 L Ed 2d 46 (1973).

[14] In the federal system, the trial court may conduct the voir dire examination, or it may allow the attorneys to conduct such examination. If the court chooses to conduct the examination itself, then "[t]he court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper." FR Crim P 24(a).

One study of federal judges showed that more than half conducted voir dire themselves, approximately one-third allowed attorneys to ask supplemental questions, and the rest allowed the attorneys to ask all the questions. On the state level, thirteen states follow the federal approach, twenty states give the attorneys primary control of the questioning, and seventeen states provide for the judge to begin the questioning, with the attorneys then asking additional questions. 2 LaFave & Israel, n 11 *supra,* § 21.3, p 722.

relevant federal constitutional decisions and their application to the case at bar.

A

The United States Supreme Court has grappled with the issue of pretrial publicity and its effect on the requirements of voir dire on several occasions, dating from *United States v Burr,* 8 US (4 Cranch) 470; 2 L Ed 684 (1807), to its more recent pronouncements in *Mu'Min v Virginia,* 500 US 415; 111 S Ct 1899; 114 L Ed 2d 493 (1991). In *Mu'Min,* the petitioner Dawud Mu'Min was convicted of murdering a woman while out of prison on work detail and was sentenced to death. Substantial publicity had surrounded this case, including details of the murder, the petitioner's prior record, and reports of a confession. Publicity concerning the petitioner's prior record greatly enhanced the potential for prejudice because it included a first-degree murder conviction for which defendant had been incarcerated at the time of the instant murder. It was noted that the death penalty had not been an option when the petitioner was convicted of the earlier murder; instead, he had received a forty-eight-year sentence. The petitioner's counsel requested a change of venue, but the trial court declined to rule until an attempt had been made to seat a jury.

Before the trial date, the petitioner submitted sixty-four proposed voir dire questions to the trial judge and presented a motion for individual voir dire. The trial court refused to ask any of the petitioner's questions relating to the content of the publicity to which prospective jurors had been

exposed,[15] and denied the motion for individualized voir dire. The trial court ruled that, if necessary, the venire would be broken down into panels of four to explore the issue of pretrial publicity.

Sixteen of the initial twenty-six prospective jurors admitted to having acquired knowledge about the case from the media or another source. In response to this, the court asked the following questions:

> "Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> "Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> * * *
>
> "Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and

[15] The following questions were submitted by the petitioner, but disallowed by the trial judge:

> "32. What have you seen, read or heard about this case?
> "33. From whom or what did you get this information?
> "34. When and where did you get this information?
> "38. What did you discuss?
> "41. Has anyone expressed any opinion about this case to you?
> "42. Who? What? When? Where?"

Note, though, that "[t]he trial court did ask several of the requested questions concerning prior knowledge of the case:

> "31. Have you acquired any information about this case from the newspapers, television, conversations, or any other source?
> "35. Have you discussed this case with anyone?
> "36. With whom?
> "37. When and where?" [500 US 419, n 2.]

> await until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?
>
> * * *
>
> "In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?" [500 US 420.]

Following these questions, one of the sixteen prospective jurors who had admitted to having prior knowledge of the case professed an inability to be fair and was excused for cause. The petitioner moved for all prospective jurors who had been exposed to pretrial publicity to be excused for cause. The motion was denied.

The trial court proceeded to divide the prospective jurors into groups of four and conducted further voir dire concerning pretrial publicity. If a potential juror acknowledged having read or heard something about the case, the court would ask whether the juror had formed an opinion and whether the juror could be impartial. One juror was removed by the trial judge sua sponte after having equivocated in her response about whether she could enter the jury box with an open mind. Of the twelve jurors eventually chosen, eight had read or heard about the defendant's case, but none admitted having formed an opinion or being biased against the defendant.

Following his conviction and sentence of death, petitioner Mu'Min challenged his conviction on the basis of the Due Process Clause of the Fourteenth Amendment, arguing that in cases involving pretrial publicity of this magnitude, the trial

court must inquire into the contents of any news reports read by potential jurors. The Supreme Court admitted that such questions would be helpful to a defendant in exercising his peremptory challenges, but declined to make such "content" questions a constitutional requirement in cases engendering substantial pretrial publicity. It recognized that

> [t]o be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair. [500 US 425-426.]

Significantly, the Court noted that

> [w]ith respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror. The trial court, of course, does not impute his own perceptions to the jurors who are being examined, but these perceptions should be of assistance to it in deciding how detailed an inquiry to make of the members of the jury venire. [500 US 427.]

The Supreme Court concluded that there is no constitutional right to content-based questions designed to reveal the nature and extent of prospective jurors' pretrial media exposure in cases involving high publicity.

B

Applying this to the case at bar, we would hold that the trial court's failure to submit defense

counsel's questionnaire to prospective jurors did not violate the defendant's Sixth Amendment[16] right to a fair trial or his Fourteenth Amendment right of due process. Justice Kennedy, dissenting in *Mu'Min,* asserted that the trial judge must

> conduct a sufficient colloquy with the *individual* juror to make an assessment of the juror's ability to be impartial. [500 US 452. Emphasis added.]

The trial court *did* question the prospective jurors *individually* concerning whether information to which they had been exposed had led them to form opinions that would render them incapable of being impartial. Every prospective juror confessing an opinion that defendant was guilty or an inability to be fair was excused for cause. We think this is all that *Mu'Min* requires. We recognize that in *Mu'Min* the trial judge conducted further voir dire concerning pretrial publicity in panels of four. While we feel this is a salutary practice, we believe the same result was obtained in the case at bar, namely, all those jurors professing an inability to be fair were excused for cause.

C

Defendant's reliance on *Irvin v Dowd,* 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961), is similarly misplaced. In *Irvin,* the defendant was convicted of murder and sentenced to death in a trial preceded by extensive media coverage that included the defendant's confession to six murders, and his offer to plead guilty if given a ninety-nine-

[16] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, . . . and *to have the Assistance of Counsel for his defence.*

year sentence in lieu of the death penalty. *Id.* at 725-726. The " 'pattern of deep and bitter prejudice' " against the defendant was evidenced by the court's attempt to seat a jury; 268 of 430 prospective jurors were excused on the basis of their preconceived opinions of the defendant's guilt. *Id.* at 727. Eight of twelve jurors who believed the defendant was guilty managed to secure positions on the jury by professing their ability to be impartial. *Id.* The Supreme Court vacated the conviction, determining that under the circumstances, such a finding of impartiality did not comport with constitutional standards. *Id.* at 728.

Irvin is similar to the case at bar in that there was extensive pretrial publicity, but distinguishable in that two-thirds of the jurors *seated* in *Irvin* admitted having formed opinions regarding the defendant's guilt, while in the case at bar, *none* of the *seated* jurors admitted having formed an opinion regarding defendant's guilt. The *Irvin* Court, quoting from *Reynolds v United States,* 98 US 145, 155; 25 L Ed 244 (1878), stated:

> "The theory of the law is that a juror who has formed an opinion cannot be impartial." [366 US 722.]

Although each of the seated jurors professed to be impartial, the Supreme Court concluded:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see."
>
> With his life at stake, it is not requiring too

> much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which *two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.* [*Id.* at 728. Emphasis added.]

In the case at bar, despite the pervasive pretrial publicity that surrounded defendant's trial, *no member* of defendant's jury professed a belief in his guilt before hearing any of the testimony. Consequently, *Irvin* fails to support defendant's contention that his federal constitutional rights have been violated.

D

Defendant's reliance on *Sheppard v Maxwell,* 384 US 333; 86 S Ct 1507; 16 L Ed 2d 600 (1966), is likewise inapposite. In *Sheppard,* the United States Supreme Court concluded that the *combination* of the prejudicial publicity *and* the trial court's failure to control disruptive influences in the courtroom deprived the defendant of his constitutional right to a fair trial. That prejudicial pretrial publicity *alone* did not warrant a finding of a deprivation of the defendant's right to a fair trial is evident from the Court's opinion, in which it stated:

> *While we cannot say that* Sheppard *was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone,* the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." [*Id.* at 354-355, quoting *Estes v Texas,*

381 US 532, 536; 85 S Ct 1628; 14 L Ed 2d 543 (1965). Emphasis added.]

In contrast to the circus-like atmosphere in which the *Sheppard* trial was conducted, the ambiance of defendant's trial was one of "judicial serenity." Accordingly, defendant's reliance on *Sheppard* is misplaced, and it cannot be invoked to support his claim of a constitutional violation.

E

Finally, we note that a federal constitutional challenge to voir dire premised upon the failure of the voir dire to conform to ABA Standards for Criminal Justice, Trial by Jury, Standard 15-2.4 (approved August 1993)[17] cannot be sustained. In *Mu'Min,* the United States Supreme Court held that the ABA standards embody a stricter standard of juror eligibility than that required under the constitution. It observed:

> Under the ABA standard, answers to questions about content, without more, could disqualify the

[17] Standard 15-2.4 provides in pertinent part:

> (d) Where there is reason to believe the prospective jurors have been previously exposed to information about the case, or for other reason are likely to have preconceptions, concerning it, counsel should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.
>
> (e) Jurors should be examined outside the presence of other jurors on sensitive matters or prior exposure to potentially prejudicial material.
>
> (1) Sensitive matters are those matters which might be potentially embarrassing or intrusive into the juror's private life, feelings or beliefs, or those matters which, if discussed in the presence of the jury panel, might prejudice or influence the panel by exposing other potential jurors to improper information.

juror from sitting. Under the constitutional standard, on the other hand, "[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." [*Id.* at 430 (quoting from *Patton v Yount*, 467 US 1025, 1035; 104 S Ct 2885; 81 L Ed 2d 847 [1984]).]

Consequently, a failure to adhere to the ABA standards, standing alone, cannot support a constitutional challenge to voir dire. Defendant's argument to the contrary must be rejected.

Accordingly, because there is no constitutional right to content-based questions in high publicity cases or to an individual, sequestered voir dire, and because of the lack of a professed belief of guilt from any one of the defendant's jurors before the trial or a circus-like atmosphere during the trial, we would reject defendant's federal constitutional challenge to the conduct and scope of his voir dire.

IV

ABUSE OF DISCRETION

We would also reject defendant's argument that the trial court abused its discretion in conducting voir dire. The majority concludes that the trial judge abused his discretion by limiting the voir dire in a manner that precluded the defendant from developing an adequate factual basis for the exercise of both peremptory challenges and challenges for cause through his refusal to submit defense counsel's questionnaire to prospective jurors and his failure to ask sufficiently probing questions. Additionally, the majority concludes that the trial judge abused his discretion by allow-

ing juror self-assessment of bias to go unchallenged.[18] We disagree.

A

An abuse of discretion was defined in *Spalding v Spalding,* 355 Mich 382; 94 NW2d 810 (1959), and reaffirmed in the criminal context in *People v Charles O Williams,* 386 Mich 565, 572; 194 NW2d 337 (1972).

> "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." [Quoting *Spalding v Spalding, supra* at 384-385.]

The question before us necessarily becomes whether the limitations imposed on voir dire by the trial judge served to exclude a showing of facts that would provide a sufficient basis for a challenge for cause or would inhibit the reasonable exercise of peremptory challenges. In other words, were the judge's actions so "palpably and grossly violative of fact and logic" as to evidence perversity of the will, defiance of the exercise of judgment, and an exhibition of passion and bias, instead of reason.

In *Fedorinchik v Stewart,* 289 Mich 436; 286 NW 673 (1939), this Court held that the trial court abused its discretion in denying the plaintiff's

[18] We note that under Michigan Court Rules, both the conduct and the scope of voir dire of prospective jurors are within the trial court's discretion. See n 3.

request that prospective jurors be questioned during voir dire about whether they were insured in a mutual insurance company and, if so, which company. Such questions were relevant because attorneys from one of the largest mutual insurance companies in the area were conducting the defense, and the company paid dividends each year to its members. In view of the potential prejudice to the plaintiff, we recognized:

> It is indispensable to a fair trial that a litigant be given a reasonable opportunity to ascertain on the voir dire whether any of the jurors summoned are subject to being challenged for cause or even peremptorily. In a large measure the scope of examination of jurors on voir dire is within the discretion of the trial judge; but it must not be so limited as to exclude a showing of facts that would constitute ground for challenging for cause or the reasonable exercise of peremptory challenges. So to limit the examination is an abuse of discretion. [*Id.* at 438-439.]

In *People v Harrell,* 398 Mich 384; 247 NW2d 829 (1976), this Court was presented with a challenge to the voir dire following the trial court's refusal to submit 120 questions to prospective jurors that defense counsel had formulated to uncover latent racial prejudice. The defendant, a young African-American, was involved in an altercation with police officers, most of whom were white. He argued that the refusal to submit the proffered questions precluded a meaningful exercise of challenges for cause and an intelligent use of peremptory challenges, thus constituting a denial of his right to trial by a fair and impartial jury.

We held that the defendant's challenge must fail. Although *Ham v South Carolina,* 409 US 524;

93 S Ct 848; 35 L Ed 2d 46 (1973), mandated an inquiry into racial bias under these circumstances, we determined that it did *not* require the trial judge to ask every question designed to elicit racial bias submitted by defense counsel. We noted that Justice Marshall, concurring in part and dissenting in part in *Ham, supra* at 533, stated:

> I do not mean to suggest that a defendant must be permitted to propound any question or that limitless time must be devoted to preliminary voir dire. Although the defendant's interest in a jury free of prejudice is strong, there are countervailing state interests in the expeditious conduct of criminal trials and the avoidance of jury intimidation. These interests bulk larger as the possibility of uncovering prejudice becomes more attenuated.

The *Harrell* Court noted that Justice Marshall, in a footnote, had expressed his agreement with the majority's assertion that "the judge may properly decline to ask the questions in any particular form or ask any particular number of questions on a subject." *Id.* at 533, n 2.[19]

A similar result was obtained in *People v Cole,* 8 Mich App 250; 154 NW2d 579 (1967), rev'd on other grounds 382 Mich 695; 172 NW2d 354 (1969), in which the trial court refused to submit to the

[19] Numerous Michigan Court of Appeals decisions have applied this principle. See *People v Furman,* 158 Mich App 302; 404 NW2d 246 (1987) (No error was found in the trial court's failure to conduct voir dire on the basis of ninety questions submitted by the defendant); *People v Prast (On Rehearing),* 114 Mich App 469, 482; 319 NW2d 627 (1982) ("[a] trial judge does not err when he fails to ask specific questions requested by a defendant but does cover the area in another manner"); *People v Hoffmeister,* 52 Mich App 219, 222; 217 NW2d 58 (1974), rev'd on other grounds 394 Mich 155; 229 NW2d 305 (1975) (the trial judge refused to allow twelve of defendant's forty-two proposed voir dire questions, but the record revealed that similar questions were asked. "[T]he trial judge does not have to allow a voir dire question to be asked in the precise language in which it was submitted by counsel." 52 Mich App 222.).

prospective jurors twelve of seventeen questions proposed by defense counsel. The Court of Appeals determined that the seventeen questions were designed to elicit only four types of information. It concluded that such information had either been gleaned from the trial court's questioning of prospective jurors, or that the need for such information was not sufficiently compelling to support a claim of error by the trial court.

An abuse of discretion was found in *People v Taylor,* 195 Mich App 57; 489 NW2d 99 (1992). In this case, the trial court refused to question prospective jurors about their attitudes toward self-defense and the use of deadly force, despite the fact that the defendant was asserting self-defense as an excuse for shooting her husband in the face. Given the nature of the defense, the prospective jurors' attitudes on self-defense were critical. Consequently, the court's refusal was found to be an undue restriction on voir dire constituting an abuse of discretion.

A similar result obtained in *People v Sears,* 88 Mich App 1; 276 NW2d 496 (1979), in which the defendant's jury was selected three weeks before trial. During the interval between the date of selection and the date of the trial, various members of the defendant's jury sat on juries in other criminal cases. Despite this, defense counsel was denied an opportunity to conduct voir dire of the jury on the day of the trial. The Court of Appeals held that this procedure "improperly restricted defendant's ability to conduct a voir dire of the jurors and engage in the reasonable exercise of challenges." *Id.* at 3.

The general rule we would distill from these cases is that a trial court does not abuse its discretion when it declines to submit questions to prospective jurors that are designed to reveal sub-

stantial prejudices, or to develop a rational basis for the exercise of challenges, as long as the trial court employs similar questions that adequately cover the area of potential bias.

B

Applying this rule to the case at bar, we would hold that the trial court's failure to submit the questionnaire to prospective jurors did not constitute an abuse of discretion. Although the questionnaire was designed to elicit information that would have been beneficial to counsel in exercising both its challenges for cause and its peremptory challenges, we cannot conclude that the refusal to submit the questionnaire amounted to a "perversity of the will," a "defiance of the exercise of judgment," or the exercise "of passion and bias, instead of reason." Rather, we believe that the questions propounded by the trial judge were sufficiently probative, and that the trial court's actions in this matter did not even approach the high threshold marking an abuse of discretion.

Our conclusion is bolstered by an examination of the record. Contrary to the conclusions of the lead opinion and the Court of Appeals, we believe that the questions asked by the trial judge were sufficiently probative. We note that the trial judge *did* inquire whether each prospective juror had read or heard about the case and *did* request prospective jurors to raise their hands in response to a question fashioned to identify the source of their information. While lacking the depth of insight that the questionnaire may have provided, these questions produced information similar in kind to that which questions seven and eight on the questionnaire were designed to elicit.

Additionally, the trial court *did* question prospective jurors about any preconceived opinions

held by them, with the result that no juror on the actual jury had admitted having formed an opinion regarding defendant's guilt. Although it is clear that some jurors enjoyed a more abbreviated form of questioning than that endured by their fellow venire persons, this does not necessarily require the conclusion that the abbreviated questioning was sufficiently lacking in probativeness to warrant a new trial.[20]

We acknowledge that the trial court's use of the compound question, "have you developed any *opinions* that would make you an *unfair* juror," invited a single negative response that served only to leave counsel guessing with regard to whether an opinion had been formed by a juror who still felt able to judge impartially, or, alternatively, that no opinion had been formed. Despite this, we would decline to find error requiring reversal in the trial court's use of this question in the case at bar. Our reasons for this conclusion are threefold. First, we note that only nine jurors were presented with the dilemma of answering this question,[21] and of these, only five remained on the final jury.[22] Thus, the potential prejudice to the defendant in this situation is minimal. Second, we believe that defense counsel could have mitigated this potential harm by requesting the judge to clarify the question to

[20] The lead opinion's reliance on *Silverthorne v United States,* 400 F2d 627, 631 (CA 9, 1968), is misplaced. A careful reading of *Silverthorne* compels the conclusion that it was the inadequate nature of the voir dire *in light of the prejudicial nature of the publicity* that led the court to conclude that an abuse of discretion had occurred. Inadmissible evidence and allegations that the defendant had been charged before the Senate with "certain unspecified crimes" had surfaced in the media before the trial in *Silverthorne,* while the pretrial publicity in *Tyburski* contained neither inadmissible evidence nor allegations of uncharged crimes.

[21] These include jurors Palmer, Lazarski, Goodwin, Caldwell, Rae, Stewart, Wilson, Parker, and Hayden.

[22] Those remaining on the jury included jurors Goodwin, Wilson, Rae, Caldwell, and Palmer.

which a negative response applied.[23] In light of the trial judge's earlier treatment of a follow-up question presented by defense counsel, we presume the trial judge would have honored this request.[24] Third, and most importantly, we believe that defense counsel's motions surrounding the voir dire compel the conclusion that, within the context of the trial court's refusal to grant sequestered voir dire, defense counsel received exactly what she had requested: questions designed to identify those jurors possessing an inability to be impartial without eliciting the information giving rise to the juror's admitted bias.[25] Although defense counsel initially requested a probing voir dire of jurors' media exposure, counsel appears to have changed tactics following her realization that a sequestered voir dire was not forthcoming. Under these circumstances, we believe appellate counsel's argument that it was fundamentally unfair to utilize a compound question[26] in determining whether pro-

[23] We note that the trial court's use of this compound question began immediately after defense counsel's lunchtime motion objecting to the voir dire procedures employed, a motion in which defense counsel argued that the "voir dire process thus far has been more prejudicial to [defendant's] right to a fair trial by an impartial jury than had the Court asked no questions whatsoever about publicity." We believe that the use of this compound question may have been an attempt by the trial court to accommodate defense counsel's concerns about the potential taint to the venire engendered by the responses given to the questions utilized during the morning voir dire. Under these circumstances, it may be that the compound question that the defense now criticizes was in fact acceptable to counsel at the time it was propounded.

[24] Despite our dissent in this case, we caution that compound questions concerning a potential juror's preconceived opinions and ability to be fair should not be employed in high publicity cases, where the probability of a prospective juror having formed an opinion is greater than in those cases involving relatively little publicity, and where counsel's need to be apprised of such an opinion exists independent of his need to know whether a prospective juror can remain impartial.

[25] See n 23.

[26] Namely, "Have you developed any opinions that would make you an unfair juror?"

spective jurors possessed preconceived opinions concerning defendant's guilt is without merit.[27] We would not countenance appellate counsel's attempt to premise error on the trial court's actions that were precipitated by defense counsel's motion, and designed to accommodate defense counsel's concerns.[28]

Finally, we note that the trial court did allow written submission of follow-up questions by counsel. That counsel failed to utilize this procedure should not now be used to support the conclusion that voir dire was insufficiently probative.[29]

Accordingly, because we believe the questions propounded by the trial court were sufficiently probative and elicited information similar in kind to that which the questionnaire would have provided, we would reject defendant's argument and conclude that neither the trial court's questioning regarding media exposure nor its refusal to submit

[27] The lead opinion suggests that this question is "ambiguous and suggests the answer that the court was looking for." *Ante* at 627-628. It neglects to note, however, that this question was employed only after defense counsel criticized the trial court for allowing jurors to elaborate on their opinions regarding defendant's guilt before the entire venire. Although we recognize that defense counsel was attempting to obtain sequestered voir dire, we believe defense counsel's motion could be interpreted as containing alternative requests. If sequestered voir dire were not forthcoming, alternatively, defense counsel would prefer that the trial court refrain from asking potential jurors to expound on their opinions in this case.

[28] The lead opinion asserts that "follow-up questions that were more probing into the source and nature of the exposure of each juror were essentially precluded." *Ante* at 626, n 11. We believe that such questions were not precluded by the trial court, but rather, were avoided by defense counsel, who declined to pursue further inquiry along these lines once it had been determined that such inquiry would not take the form of her proposed questionnaire. Our view is consistent with defense counsel's motions reflecting her belief that such questions served only to taint the panel. See ns 6, 9.

[29] On one occasion, defense counsel requested that a follow-up question be submitted to a juror. The trial court allowed counsel to submit the question *directly* to the juror. On several other occasions, defense counsel succeeded in interjecting desired questions into the voir dire. See n 8.

defendant's proposed questionnaire constituted an abuse of discretion.

C

We would also conclude that the trial court did not err in allowing juror self-assessment of bias to go unchallenged. We are not unmindful of the problems underlying juror self-assessment. In a study of a highly publicized murder case, seventy-five percent of the persons surveyed, whose awareness of the case enabled them to supply details, were no less likely to feel they could hear the evidence with an open mind than those persons who could not supply details.[30] This profession of impartiality, however, is undermined to some extent by the revelation that those persons remembering details were more likely to align with the prosecution, although they believed it less likely that the defendant could receive a fair trial.

While we acknowledge that juror self-assessment of bias may be problematic and caution the trial courts to guard against such self-serving or unwitting declarations of impartiality, we note that, in this case, the trial court appeared to be cognizant of the problems inherent in juror self-assessment of bias. This is evidenced by the exchange between the court and juror Shirlen. Juror Shirlen admitted having formed an opinion, but stated she could set aside such an opinion and give the defendant all his constitutional guarantees. Upon further questioning by the trial judge, however, she admitted being morally opposed to killing, and felt that, given her position in a Christian high school for the last twenty-five years, she was "not positive"

[30] Carroll, *Free press and fair trial: The role of behavioral research,* 10 Law & Human Behavior 187 (1986).

that she could give the defendant "a fair trial."[31] While this illustrates the defendant's point that judges must carefully guard against inaccurate juror self-assessment, it also establishes that *in the case at bar,* the trial judge employed such precautions.[32]

Accordingly, we would reject defendant's argument that the trial court erred in allowing juror self-assessment of bias to go unchallenged and would conclude that the trial court was in fact cognizant of and attentive to the problems underlying juror self-assessment of bias.

D

We would also hold that the trial court did not abuse its discretion in denying the defendant's request for a sequestered voir dire. We see little merit in defendant's argument that the answers given by prospective jurors during voir dire served to taint the entire venire. No information prejudicial to the defendant surfaced during voir dire.

[31] Note also that juror Hayden responded affirmatively to the trial judge's question that she would be able to give the defendant all his constitutional guarantees, but upon further questioning by the trial judge, indicated that she would have a hard time being impartial, because she had a daughter the same age as the defendant's daughter who had found the body. Following this admission, she was excused by the trial judge.

[32] We would caution that the problems inherent in juror self-assessment may be a function of the facts in the case. This can be illustrated by contrasting the potential bias stemming from pretrial publicity with the bias stemming from racial or ethnic prejudice. While a person may feel little hesitation in admitting that his views have been colored by extensive pretrial publicity, such a person may become much more reticent about admitting to a deeply held racial or ethnic prejudice. In this context, trial judges must be judiciously skeptical of such self-declarations of impartiality. This is not to say that potential bias stemming from pretrial publicity merits only cursory attention; it is only to note that, in the pretrial publicity context, the trial court must focus its concern on a juror's unwitting bias. In the context of cases presenting other potential biases, the trial court must seek also to uncover the juror's deliberately hidden bias.

Only nine of the forty-three prospective jurors admitted having an opinion about the case. Mere admissions by less than one-quarter of the prospective jurors that they had formed an opinion and could not be fair, without more, cannot serve to taint the jury pool. We acknowledge that the absence of a sequestered voir dire in high publicity cases poses a risk of tainting the venire. This risk, however, is greatest when the pretrial publicity has included more prejudicial information.[33] A trial court confronted with *prejudicial* pretrial publicity must be sensitive to the potential taint of the venire engendered by responses during voir dire. It is in this situation that sequestered voir dire should be considered.

E

Finally, we would reject the Court of Appeals conclusion that the cumulative effect of the trial court's refusal to conduct sequestered voir dire, its prohibition of meaningful participation by defense counsel, and its failure to ask probing questions regarding media exposure served to deny defendant his right to a fair trial. We believe that neither the refusal to conduct sequestered voir dire nor the failure to submit defendant's proposed questionnaire to prospective jurors constitutes error requiring reversal. Additionally, we believe that the questions asked by the trial court were sufficiently probative; appellate counsel's attempt to premise error on the leading and superficial nature of the questions propounded fails to consider that such questions were the offspring of defense counsel's motion regarding the conduct of

[33] The classic paradigm of prejudicial information is the inadmissible confession. In this case, however, we are not presented with pretrial publication of an inadmissible confession.

voir dire. Finally, we would not conclude that the combination of these actions by the trial court establishes error requiring reversal.

V

CONCLUSION

Accordingly, we would conclude that the trial court did not abuse its discretion in denying defendant's motions for a sequestered, individualized voir dire and for submission of a questionnaire to prospective jurors. We believe that the questions chosen by the trial judge to assess jurors' media exposure were sufficiently probative when considered in the context of defense counsel's motion expressing her belief that questions requiring a prospective juror to expound on the reasons underlying any opinions held served only to taint the panel. Lastly, we would conclude that the trial court did not err in allowing juror self-assessment of bias to go unchallenged, but rather, was in fact cognizant of such potential bias. Accordingly, we would reverse the decision of the Court of Appeals and remand for consideration of the issues previously briefed, but not yet addressed by that Court.

RILEY and GRIFFIN, JJ., concurred with BRICKLEY, J.

CITY OF DETROIT v WALKER

Docket Nos. 96594-96599. Argued April 6, 1994 (Calendar No. 8). Decided July 26, 1994.

The City of Detroit brought separate in personam actions in the Wayne Circuit Court against R. Terry Walker and five other real property owners, seeking to collect delinquent property taxes pursuant to the General Property Tax Act, 1988 PA 202, MCL 211.47; MSA 7.91. The court, Richard Kaufman, J., consolidated the cases and granted summary disposition for the defendants, finding, pursuant to *Joy Management Co v Detroit,* 176 Mich App 722 (1989), that the city charter precluded the use of any method of tax collection other than foreclosure of real property. The Court of Appeals, SULLIVAN, P.J., and JANSEN and R. R. LAMB, JJ., affirmed in an unpublished opinion per curiam, holding that the city's sole means of collecting delinquent real property taxes was by lien and foreclosure (Docket Nos. 129624-129629). The city appeals.

In an opinion by Justice MALLETT, joined by Chief Justice CAVANAGH, and Justices BRICKLEY and BOYLE, the Supreme Court *held:*

The Detroit City Charter expressly incorporates by reference future powers and rights as may be granted by the Legislature. Statutes that provide new procedures or methods for collecting unpaid real property taxes are applicable retroactively.

1. The home rule cities act specifically directs the City of Detroit and other home rule cities to enact charters recognizing the power to levy taxes. Case law provides that home rule cities have power to make all reasonable provisions for the collection of such taxes. Const 1963, art 7, §§ 22 and 34 make clear that home rule cities enjoy not only those powers specifically granted, but they also may exercise all powers not expressly denied. They are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the right of self-governance. The municipal gover-

REFERENCES

Am Jur 2d, State and Local Taxation § 875.

See ALR Index under Taxes.

nance system has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions.

2. The Detroit City Charter, art 8, § 8-403, plainly and unambiguously declares that state law regarding property tax collection applies unless the charter provides otherwise. The charter was amended to allow the maintenance of personal actions against delinquent real property taxpayers. When an amendment is enacted soon after controversies arise regarding the meaning of the original act, it is logical to regard the amendment as an interpretation of the original act. The ratification of the amendment clarifies the drafters' and ratifiers' intent to incorporate by reference the tax collection remedies afforded by the General Property Tax Act and all future amendments of the act, including 1988 PA 202.

3. A vested right is an interest that the government is compelled to recognize and protect of which the holder cannot be deprived without injustice. When determining whether a right is vested, policy considerations, rather than inflexible definitions, must control, and consideration is to be given regarding whether the holder possesses what amounts to a title interest in the right asserted. Allowing an in personam action to collect delinquent real property taxes does not change the character of the tax because the amount of the tax is not altered. The tax is a debt a defendant elected not to pay.

4. 1988 PA 202 is a procedural device to secure taxes owed. The defendants are not being taxed as a result of voluntary activities they might have forgone had they been aware of the tax. Rather, had they elected to forgo the activities at issue, namely, refusing to pay the taxes, they would now be in the same position—paying their taxes. There is no vested right in any particular procedure or remedy, and thus the defendants have no right in the continuance of pre-1988 procedures that compels protection.

5. 1988 PA 202 did not create, enlarge, diminish, or destroy contractual or vested rights. Rather, it implemented an additional enforcement mechanism that the city may use to effect its preexisting constitutional and statutory right to assess and collect city property taxes. Because the procedure relates only to tax collection remedies or procedures, it does not fall within the general rule against retrospective operation. Although it is remedial, its retroactive reach is limited as a personal action by the general six-year limitation period of MCL 600.5813; MSA 27A.5813.

Reversed and remanded.

Justice RILEY, joined by Justices LEVIN and GRIFFIN, dissent-

ing, stated that changes in the method of tax collection that alter the nature of collection from an in rem to an in personam action are unconstitutional to the extent that they apply retroactively, i.e., to taxes previously assessed. Statutes governing the collection of taxes are to be strictly construed in favor of the taxpayer. The 1974 Detroit City Charter provisions at issue are ambiguous regarding whether the charter provides for, or even preserves the right to utilize, methods of tax collection other than the judicial sale method provided in § 8-403. The clear intent of the charter's ratifiers was to limit the method of tax collection to the judicial sale.

Generally, property taxes burden the property assessed, but do not constitute personal debts. Thus, absent a specific provision by the taxing legislature, no personal action will lie against a delinquent taxpayer. Tax laws are to be strictly construed, with ambiguities decided in favor of the taxpayer. Statutes creating tax liens may not be enlarged by construction. The method of collection prescribed generally is exclusive.

The procedure for tax collection in § 8-403 is in the nature of an in rem proceeding. Although the amendments of MCL 211.47; MSA 7.91 by 1987 PA 177 and 1988 PA 202 permit the filing of in personam actions against delinquent taxpayers, because retroactive application was not specifically provided, application must be presumed to have been prospective. Further, neither the home rule cities act nor case law addressing this issue permits retroactive application. Thus, the plaintiff is precluded from bringing an in personam action against property owners for the payment of delinquent property taxes for the time periods at issue under the doctrine of stare decisis.

The recitation in the charter of a single sale mechanism, and the exclusion of other methods of tax collection permitted by state law, activates the "except as otherwise provided" language in § 8-403's reservation-of-rights clause. Therefore, the generalized reservation of rights in this context was nullified. In addition, the comments to § 8-403 manifest a singular intent with respect to the tax collection provisions: the limitation of powers otherwise permitted under state law. Thus, the reservation-of-rights clauses of the charter do not permit retroactive application of the in personam action.

A state may impose a tax only if it is expressly authorized by law. The authority to tax may not be inferred or extended by implication. A specific remedy provided as the proper method of tax collection precludes the use of any other collection method unless specifically provided for. Changing the nature of tax collection from in rem to in personam affects substantive

rights. Despite the existence of several reservation-of-rights clauses, the charter provides for a single method of collection and obligates courts to construe it as the exclusive method. The plaintiff is entitled to collect delinquent taxes through a personal action only for taxes assessed after the 1991 amendment of the city charter.

TAXATION — GENERAL PROPERTY TAX ACT — METHOD OF COLLECTING UNPAID TAXES — RETROACTIVE APPLICATION.

Statutes that provide new procedures or methods for collecting unpaid real property taxes for home rule cities are applicable retroactively (1988 PA 202, MCL 211.47; MSA 7.91).

City of Detroit Law Department (by *Joanne D. Stafford*) for the plaintiff.

Mager, Monahan, Donaldson & Alber, P.C. (by *Lawrence M. Scott*), for defendants Walker and Anderson.

Rubenstein, Plotkin, P.C. (by *Edward L. Haroutunian* and *Casimir J. Swastek*), for defendant Estate of Almas.

MALLETT, J. We granted leave in these consolidated cases to resolve two questions: (1) whether the 1974 Detroit City Charter incorporates by reference provisions of state statutory law, specifically the 1988 amendment of the General Property Tax Act, 1988 PA 202, MCL 211.47; MSA 7.91, that authorizes local governments to collect delinquent real property taxes by suing a taxpayer individually, and (2) assuming the city may utilize the in personam tax collection provisions contained in the General Property Tax Act to collect delinquent real property taxes, whether 1988 PA 202 may be retroactively applied.

We reverse the decision of the Court of Appeals and find that § 8-403 of the Detroit City Charter expressly incorporates by reference future powers and rights as may be granted by the Michigan

Legislature. We further hold that state statutes that provide new procedures or methods for collecting unpaid real property taxes are retroactively applicable. Consequently, we remand this case to the trial court for proceedings consistent with this opinion.

I

This matter involves six consolidated tax collection suits initiated in 1989 by the plaintiff-appellant City of Detroit, to collect delinquent real property taxes owed by the defendants-appellees R. Terry Walker, Curtis Anderson, Superior Investment and Rental Corporation, Total Investment Company, Charles Smith, and Kenneth Almas, personally and as personal representative of the estate of Victor Almas.[1] The City of Detroit attempted to collect the debts by filing in personam lawsuits against the delinquent taxpayers, a remedy authorized by a 1988 amendment of the General Property Tax Act.[2]

On motion by the delinquent taxpayers, the trial court granted summary judgment in their favor. The trial court accepted the defendants' argument that pursuant to the holding in *Joy Management Co v Detroit,* 176 Mich App 722; 440 NW2d 654 (1989), the city was precluded by the provisions of the city charter from using any method of tax collection, other than the real property foreclosure method contained in art 8, § 8-403(6).[3] A unani-

[1] The only appellees before us are Walker, Anderson, and Almas. Superior Investment and Rental Corporation and Charles Smith elected not to appear at the appellate level. Total Investment Company settled with the city.

[2] See 1988 PA 202, MCL 211.47; MSA 7.91.

[3] In relevant part, before its 1991 amendment, § 8-403, Collection of property taxes, of the Detroit City Charter, provided as follows:

mous panel of the Court of Appeals affirmed.[4] We thereafter granted leave to appeal.

II

At the turn of the century, a Michigan city's autonomy was inferior to a modern state agency. See *Streat v Vermilya*, 268 Mich 1; 255 NW 604 (1934). For example, state lawmakers had the power to select local officers. In addition, state lawmakers modified city charters and made organizational changes to city departments. This interference perpetually fueled public resentment.[5]

In 1908, constitutional convention delegates pro-

1. *Except as otherwise provided by this charter or ordinance, the rights, duties, powers, immunities and procedures established by state law shall apply in the collection and enforcement of City property taxes.*

* * *

6. Two years after such a sale of the lien on any real property, the City *may bring a civil action to foreclose its lien.*

If the City prevails in the action, the judgment, which may not be entered before 120 days have expired from the filing of the complaint, shall provide that possession of the real property to which the lien attached shall be given to the City, unless the judgment and all costs are paid within 60 days. There shall be no redemption period under the judgment beyond the 60 days. The judgment when final shall be conclusive evidence of the City's title in fee simple, subject only to unextinguished interests or encumbrances. [Emphasis added.]

It is important to note that the charter has *no express* limitation that the lien foreclosure method is the solitary remedy afforded the city.

[4] Unpublished opinion per curiam of the Court of Appeals, issued January 21, 1993 (Docket Nos. 129624-129629).

[5] In *Marxer v Saginaw*, 270 Mich 256, 258-259; 258 NW 627 (1935), we provide a comprehensive discussion about the relationship between municipalities and early state lawmakers.

> Some of them had charters before the organization of the Michigan territorial government. It is unnecessary to consider their common-law origins. They probably arose out of the necessity of having local officers to care for local governmental functions peculiar to the locality which could be better cared for by local officers than by central authority. They are local governmental organizations deriving their power and authority

posed and the Michigan voters approved the following language:

> The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts. [Const 1908, art 8, § 20.]
>
> Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state. [*Id.*, § 21.]

State lawmakers propelled by the Michigan Constitution and the power and authority conferred by it enacted the home rule cities act.[6] The act, among other things, provides that each organized city shall be a body corporate and shall adopt mandatory charter provisions, and allows for other permissible charter provisions. The act also pro-

> from the State, organized for the purpose of carrying on local municipal government. City officers locally elected in many cases perform State functions as well as local governmental functions. In the absence of constitutional provision and restriction, matters of local municipal concern in cities may be determined by the citizens themselves. *They were, in this State, for many years, looked after by the legislature.* [Emphasis added.]

[6] Amended by 1911 PA 203, effective August 1, 1911; 1913 PA 5, immediately effective March 11, 1913; 1973 PA 81, § 1, immediately effective July 31, 1973; 1981 PA 175, § 1, immediately effective December 14, 1981; 1986 PA 64, § 1, immediately effective March 31, 1986.

vides for the revision of existing city charters and the creation of a charter commission, and defines the powers and duties of such a commission.[7]

The home rule cities act, MCL 117.1 *et seq.*; MSA 5.2071 *et seq.*, specifically directs the City of Detroit and other home rule cities to enact charters recognizing the power to levy taxes; limiting the subject of ad valorem taxation for municipal purposes to the same subject of state, county, and school purposes under the general law; and setting a maximum rate of taxes. MCL 117.3(f), (g); MSA 5.2073(f), (g). Moreover, home rule cities have power to make all reasonable provisions for the collection of these taxes. *Detroit v Safety Investment Corp,* 288 Mich 511, 515; 285 NW 42 (1939).

The Michigan Constitution provides that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const 1963, art 7, § 34. It also provides that "[n]o enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of

[7] In *Streat v Vermilya, supra* at 4, we explained the genesis of the home rule act:

> Public sentiment demanded uniformity in powers and duties in cities and villages, thus making possible unified judicial construction, and, it was claimed, a consequent saving of expense. In 1895, a uniform village charter act (Act No. 3, Pub. Acts 1895, 1 Comp. Laws 1929, § 1465 *et seq.*) was adopted by the legislature and a uniform city charter act (Act No. 215, Pub. Acts 1895, 1 Comp. Laws 1929, § 1796 *et seq.*), providing for the incorporation of cities of the fourth class. The people were not satisfied with the results attained under the so-called uniform charter provisions, and in the constitutional convention of 1908 home rule was demanded, that is, the right of cities to frame and adopt their own charters. The constitutional convention compromised between these two ideas by giving cities the right to frame, adopt and amend their charters, subject, however, to certain broad general restrictions and limitations fixed by the legislature in the so-called home rule act.

authority conferred by this section." Const 1963, art 7, § 22.

Accordingly, it is clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied. Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance. See Const 1963, art 7, § 22.[8]

Our municipal governance system has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified. The convention comment to the most recent amendment of the Michigan Constitution announces best the current relationship between municipalities and the state. It provides that "a revision of Sec 21, Article VIII, of the present [1908] constitution *reflects Michigan's successful experience with home rule.*"

Against this backdrop, we go forward.

III

The matter before us requires the construction

[8] Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city . . . heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the *general grant of authority conferred by this section.* [Emphasis supplied.]

of a home rule city charter. The prevailing rules regarding statutory construction are well established and extend to the construction of home rule charters. *Brady v Detroit,* 353 Mich 243, 248; 91 NW2d 257 (1958). Therefore, we are required to construe the charter's language by its commonly accepted meaning as long as it does not produce absurdity, hardship, injustice, or prejudice to the drafters and ratifiers. *Reisman v Regents of Wayne State Univ,* 188 Mich App 526, 536; 470 NW2d 678 (1991).

Here, we must determine whether § 8-403(1) of the Detroit City Charter incorporates by reference the provisions of state law, specifically the 1988 amendment of the General Property Tax Act that allows local governments to collect delinquent real property taxes by suing the taxpayer personally.

The Detroit City Charter, in its general powers section, directs that the specific mention of particular powers in the charter *shall* not be construed as a limitation of the powers of the city conferred by the constitution and state law, and that the powers of the city under the charter shall be construed liberally in favor of the city.[9] Moreover, several sections of the 1974 Detroit City Charter

[9] Section 1-102 provides:

> The city has the comprehensive home rule power conferred upon it by the Michigan Constitution, subject only to the limitations on the exercise of that power contained in the Constitution or this Charter or imposed by statute. *The city also has all other powers which a city may possess under the Constitution and laws of this state.* [Emphasis added.]

Section 1-103 provides:

> The powers of the city under this Charter shall be construed liberally in favor of the city. *The specific mention of particular powers in the Charter shall not be construed as limiting in any way the general power stated in this article.* [Emphasis added.]

incorporate by reference provisions of state law.[10] Nonetheless, in *Joy Management v Detroit, supra* at 733, the Court of Appeals held that art 8, § 8-403 of the Detroit City Charter only authorized a single means of collecting delinquent real property taxes.[11]

In *Joy Management,* the City of Detroit attempted to settle delinquent real property taxes by seizing fire insurance proceeds. The circuit court ruled that statutory law then in effect precluded seizure of insurance proceeds as intangibles.[12] The Court of Appeals affirmed and went several steps further to conclude that the city's charter afforded merely one remedy for collecting unpaid real property taxes:

> Defendant's charter limits defendant's remedy

[10] For example, the elections article, § 3-104, and its commentary provides as follows:

> *Except as otherwise provided by this charter or ordinance, state law applies to the qualifications and registration of voters, the filing for office by candidates, and the conduct and canvass of City elections.*
>
> COMMENTARY
>
> This section incorporates by reference the provisions of the Michigan general election law, making them applicable to City elections (as nearly as possible) except where specific contrary provisions are contained in the new charter or in ordinance. [Final Report of the Detroit Charter Revision Comm, Commentary to § 3-104, p 6. Emphasis added.]

[11] The City of Detroit appealed this adverse ruling; however, we denied leave. 433 Mich 860 (1989). It is important to emphasize that in Michigan, denial of leave has no substantive effect on a particular case.

[12] We also note that this case was decided before MCL 211.47; MSA 7.91. The most recent amendments clearly permit a city treasurer to seize personal property for sale, and allow the city to bring an in personam action on a debt to collect taxes. Furthermore, we have no comment regarding this portion of the Court of Appeals decision.

> to an action for foreclosure on the tax lien. Section 8-403 of the Detroit City Code provides that the city may bring a civil action to foreclose its lien two years after the city's lien on real property for delinquent city real property taxes accrues. The city's charter does not provide any other method for the city to collect delinquent real property taxes. Even if § 47 [MCL 211.47; MSA 7.91] were to allow the city treasurer to place a lien on insurance proceeds, defendant's own charter does not authorize it to do so. The General Property Tax Act does not apply to cities whose charters provide inconsistent provisions. MCL 211.107; MSA 7.161. [*Id.* at 733-734.]

In the case before us, the Court of Appeals similarly held that the city's sole means of collecting delinquent real property taxes was by lien and foreclosure. Defendants argue that the Detroit City Charter's article 8, before its 1991 amendment, expressly provided that the sole remedy available to the City of Detroit to collect unpaid real property taxes was the lien foreclosure remedy. We do not agree.

When the Detroit City Charter was adopted in 1974, the 1893 General Property Tax Act mentioned two methods to *enforce* and *collect* delinquent real property taxes. One was the lien foreclosure procedure set forth in MCL 211.61; MSA 7.105[13] and the other was the seizure and sale of

[13] Under MCL 211.61 *et seq.*; MSA 7.105 *et seq.*, "the state treasurer [was] required to file a petition in the circuit court for the county where the assessed real property [was] located, for entry of a court decree directing that the property be sold by the county treasurer at the annual county tax sale. . . . After notice, hearing, and entry of the decree, the county treasurer [was] authorized to accept bids by private individuals, as well as the state, and [was] required to issue to the successful bidder a certificate stating that the bidder, or purchaser, [would] be entitled to a deed after the expiration of the one year period of redemption from sale afforded the owner under MCL 211.74; MSA 7.120. After the deed [was] issued at the end of the one year redemption period, a notice of the right to redeem, or notice of

the taxpayer's personal property as set forth in MCL 211.47; MSA 7.91.[14] Therefore, at the time of the 1974 enactment, § 8-403(1) incorporated by reference the collection provisions of MCL 211.47; MSA 7.91 (seizure and sale of personal property) and the lien foreclosure method of MCL 211.61 *et seq.*; MSA 7.105 *et seq.*, "[e]xcept as otherwise provided by [the] charter . . . ."[15]

The Detroit City Charter language contained in art 8, § 8-403 is plain and unambiguous. The charter declares that state law regarding property tax collection applies unless the charter provides otherwise.[16] Therefore, in order to embrace defendants' positions, we would have to find that the City of Detroit deliberately precluded itself from exercising the broad powers granted by our Michigan Constitution.

Defendants suggest that the express inclusion of one procedure manifests exclusion of all others,

reconveyance, signed by the purchaser, [was required to] be served, which entitle[d] the owner to redeem within an additional six month period, upon payment of all delinquencies and 50% in addition. MCL 211.140; MSA 7.198."

[14] The plaintiff notes:

> In 1987, the Michigan Legislature amended the General Property Tax Act, MCL 211.47; MSA 7.91, to provide that city and township treasurers could institute an in personam action to collect "any" delinquent taxes on personal property owed by individual or corporate tax payers, regardless of whether the treasurer had attempted to seize personal property for sale at public auction. [1987 PA 177.] Prior to the passage of the amendment, the General Property Tax Act required treasurers to first exhaust seizure procedures before filing a lawsuit for delinquent personal property taxes.
>
> In 1988 PA 202, the Legislature further amended the Act to provide that the city and township treasurers could institute an in personam action for any delinquent property tax, regardless of whether the treasurer had attempted seizure of property for sale at public auction.

[15] See n 10.

[16] See n 3.

and that that should be the reason why the city foreclosure method must be construed as being the sole remedy available to the city. Their arguments, however, fail because they ignore the language of the city charter and its instructive commentaries. The 1974 Charter Comments purposefully provide:

> Subsection 8-403(1) *incorporates by reference the provisions of state law for the collection and enforcement of property taxes.* As a result, it has been possible to eliminate 14 pages of procedural detail contained in chapter 4 of title 6 of the present charter.
>
> With respect to subsection 8-403(2), state law provides "all taxes shall become a debt due to the . . . city" on December 31st. See CL 1948 211.81, 211.2 and 211.13.
>
> In two important respects, however, Detroit's law and procedure is different from, and preferable to, the law and procedure of the state.
>
> First, there is no counterpart in state law for the right granted Detroit property taxpayers to pay in 2 installments. Second, state law permits the sale of liens for delinquent property taxes to private tax title speculators, often to the great prejudice of the owner whose taxes are delinquent. Because of the abuses that can result, the Detroit treasurer, for some years, has not sold to private persons the City's lien for delinquent City real property taxes but has collected those delinquent taxes himself.
>
> Detroit's current practice on both these matters is retained in the new charter. [Final Report of the Detroit Charter Revision Comm, Commentary to Art 8, § 8-403, p 37. Emphasis added.]

Moreover, defendants direct the Court to *Fink v Detroit,* 124 Mich App 44; 333 NW2d 376 (1983), for the holding that a city charter takes priority over the General Property Tax Act. In *Fink,* the Court noted that the General Property Tax Act

applies only where it is consistent with respect to the charter provision involved. However, defendants' reliance on *Fink* is clearly misplaced because the charter differs only with regard to the state's exhausting foreclosure sale procedure.

Defendants further highlight *Fink,* for a semantic discourse on "shall" versus "may" as contained in § 8-403(6).[17] The defendants state with conviction:

> In examining the context of that term as used in the Charter, it is clear that the word "may" means "shall." The Charter does not contain any other option for bringing an action to recover unpaid taxes. If any other action was available, it would have been specifically included in the original Charter. In this context, the word "may" was used to authorize the City to bring a civil action to foreclose upon its lien, as opposed to taking no action at all to foreclose. That was the option available to the City at the time.

Defendants have engaged in a semantic war. However, such a battle is futile when the drafters' and ratifiers' intent is clear as it is here. The comments suggest no intention to exclude from the incorporation by reference of state law any provision for the collection of taxes other than portions of the lien foreclosure procedure of state law.[18]

Assuming arguendo, that the city charter in effect failed at the time the actions were filed to incorporate by reference the additional tax collection remedy, the city attempted to stop the hemorrhaging arguably caused by the loss of tax reve-

[17] See n 3.

[18] Thus, it is clear that the drafters intended to adopt a different and better procedure for realty tax lien foreclosure different in part from the tax lien foreclosure procedure set forth in the General Property Tax Act, MCL 211.61 *et seq.*; MSA 7.105 *et seq.*

nue resulting from the *Joy Management* decision and other delinquent taxpayers like the defendants. Consequently, in 1991, the Detroit City Charter was amended to allow the city to maintain a personal action against a delinquent real property taxpayer.[19]

It is well settled by this Court that when an amendment is enacted soon after controversies arise regarding the meaning of the original act, "'it is logical to regard the amendment as a legislative interpretation of the original act . . . .'" *Detroit Edison Co v Revenue Dep't,* 320 Mich 506, 519-521; 31 NW2d 809 (1948), quoting 1 Sutherland, Statutory Construction (3d ed), § 1931, p 418. See also *People v Khoury,* 437 Mich 954; 467 NW2d 810 (1991); *Detroit Edison Co v Janosz,* 350 Mich 606, 613-614; 87 NW2d 126 (1957). In our case, the amendment of the Detroit City Charter clarifies what the drafters' and ratifiers' intent had been all along.

The Court of Appeals in the case at bar and *Joy Management*[20] was incorrect in its rulings. Each panel failed to give effect to the drafters' and ratifiers' intent. Each disregarded the express provisions that permit incorporation by reference, such as § 8-403(1). Moreover, the decisions ren-

[19] On June 4, 1991, the citizens of Detroit amended § 8-403 and added the following subsection 7:

> In addition to the other remedies specified in this section, at the time unpaid city property taxes become delinquent or at any later time permitted by law, the city may maintain personal action against the debtor for collection of the unpaid property taxes and may use any means permitted by law for collection of the debt. The city of Detroit tax roll shall be prima facie evidence of the amount of the indebtedness to the city of Detroit. The preceding sections of 8-403 are not the exclusive remedies of the city of Detroit.

[20] Our ruling today only overturns the decision regarding the city's incorporation by reference language.

dered nugatory other provisions of the Detroit City Charter.[21]

The general powers of a home rule city as expressed by §§ 1-102 and 1-103 of the Detroit City Charter naturally adopt future amendments.[22] Moreover, the charter is the organic law of the City of Detroit, and, absent a clear declaration by its citizens to preclude provided by state law, we find that the 1974 Detroit City Charter incorporates by reference the tax collection remedies afforded by the General Property Tax Act and all future amendments of the act, including 1988 PA 202, MCL 211.47; MSA 7.91.[23]

IV

A

Defendants argue in the alternative that it is impermissible to retroactively apply 1988 PA 202 because the amendment creates a new right for plaintiff and creates a new liability for the defendants, i.e., personal liability for real property taxes where they did not exist before. The concern regarding the retroactivity of statutes arises from constitutional due process principles that prevent retrospective laws from divesting rights to property or vested rights, or the impairment of contracts. See, e.g., US Const, art I, § 10; Const 1963, art 1, § 10. See also *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480; 124 NW2d 286 (1963);

[21] A home rule city may implement collection procedures not delineated in the General Property Tax Act, subject to Michigan's Constitution and laws. See n 8.

[22] See n 9.

[23] Assuming arguendo, that an ambiguity exists with regard to whether the charter incorporates the General Property Tax Act, the ambiguity must be resolved in favor of the city. See Const 1963, art 7, § 34; charter, art 1, § 1-103.

Stott v Stott Realty Co, 288 Mich 35; 284 NW 635 (1939).

In the case before us, defendants do not claim that the retroactive application of 1988 PA 202 injuriously affects any contractual obligations. Therefore, we assume that defendants allege that the retroactive application of this statutory amendment adversely affects some vested right. We do not agree.

1. VESTED RIGHT

A vested right has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice. *Cusick v Feldpausch,* 259 Mich 349, 352; 243 NW 226 (1932), citing 2 Cooley, Constitutional Limitations (8th ed), p 749. Nonetheless, when determining whether a right is vested, policy considerations, rather than inflexible definitions must control, and we must consider whether the holder possesses what amounts to be a title interest in the right asserted. We explained in *Minty v Bd of State Auditors,* 336 Mich 370, 390; 58 NW2d 106 (1953):

> "It would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another."

See also *Wylie v Grand Rapids City Comm,* 293 Mich 571, 587; 292 NW 668 (1940).

In the case at bar, defendants suggest that the

new enforcement procedure creates a new liability and therefore infringes on a right deserving protection. As we articulated in *Minty,* the holder must have more than an expectation that the tax collection procedures would remain unchanged. Here, defendants would have us include within the realm of vested rights immunity from the retroactive operation of a tax collection procedure implemented to secure delinquent taxes owed to a municipality where there is no question that the amendment is not expanding the defendant's preexisting indebtedness. We refuse to do so.

The underlying concern is that allowing in personam actions may affect the character of the *remedy* or the character of the *tax.* In this case, allowing an in personam action does not change the character of the tax because the amount of the tax itself has not been altered. The taxes assessed against defendants' property were never forgiven and then reinstated as a result of the new enforcement procedure. Quite the opposite. They are debts defendants elected not to pay. Thus, its character as a property tax has never been affected.[24]

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[24] Upon initial review, there appears to be precedent supporting a finding that a tax assessment against land alone may not be retroactively transformed into a personal obligation of the taxpayer. See *Grand Rapids v Lake Shore & M S R Co,* 130 Mich 238; 89 NW 932 (1902), and *Weber v Detroit,* 158 Mich 149; 122 NW 570 (1909). However, those cases are easily distinguishable from the case before us. Both are the progeny of *Mogg v Hall,* 83 Mich 576; 47 NW 553 (1890). In *Mogg,* certain parcels owned by the plaintiff had been assessed. The Duplain Township treasurer in 1884 sought to recover delinquent taxes for drain assessments. At the time, the drain law of 1881 was in effect and did not contain any provision "making the drain tax a personal claim against the owner of land," but instead declared a failure to pay taxes due to constitute a lien on the land, and provided for a sale of the land in case of nonpayment. *Id.* at 580. To eliminate any doubt, the Court noted that the 1885 drain law expressly stated that an in personam action to collect taxes was permissible, thereby curing a defect in the 1881 act.

Similar to *Mogg,* in *Grand Rapids* and *Weber,* personal liability was attached to the taxpayer after the taxes had been assessed. At the time of *Grand Rapids, Weber,* and *Mogg,* neither the pertinent tax

Today, as we have in the past, we refuse to make delinquent taxpayers immune from the imposition of statutory obligations. It is instructive to revisit our decision in *Detroit v Safety Investment, supra,* p 516, in which we discussed what tax collection was like before and after the enactment of the General Property Tax Act, 1893 PA 206, MCL 211.1 *et seq.*; MSA 7.1 *et seq.* We said:

> "Under the old law, the prudent and honest men paid their taxes; *the careless and dishonest did not.* Under that system the prudent and honorable men paid more than their fair share of the public burdens. [*The General Property Tax Act*] *was aimed to cure this evil, and should be liberally construed.*" [288 Mich 516. Citation omitted; emphasis added.]

Property tax collection is essential to the eco-

law nor the charter regarding the assessments under review authorized in personam actions or stated that personal liability attached.

Moreover, any reliance on those cases is tenuous at best, because each case lacked a substantive analysis of why a tax on land cannot be transformed into a personal obligation. Nevertheless, the law has come a long way since *Mogg,* and today, personal liability attaches the moment taxes are assessed. In *Gilken Corp v Comm'r of Internal Revenue,* 176 F2d 141, 143-144 (CA 6, 1949), the United States Court of Appeals for the Sixth Circuit decided that, under Michigan law, the real and personal property taxes assessed before the taxpayer acquired title or possession were the personal liability of the taxpayer's vendor. The court looked to the Detroit City Charter, § 8-403(2) " 'all city taxes shall become a debt' " language and stated:

> We cannot accept as valid the argument of petitioner that Michigan realty taxes are exclusively in rem and that there is no personal liability for them. We think the contrary to be true. [See] *Gulf Refining Co v Perry,* 303 Mich 487, 490; 6 NW2d 756 (1942).

In *Gulf Refining,* we stated that despite the defendant having had a mortgage foreclosed, and the mortgagee's title, having subsequently become absolute: "The tax assessment against defendants Perry [concerning *real* property] was a debt due from them to the city of Lansing. Perry's *personal* property was subject to seizure and sale for the amount of the tax." *Id.* at 490 (emphasis added).

nomic security and social stability of Detroit and other municipalities, as well as the state. As a matter of policy, it is imperative that taxpayers do not hide behind the facade of vested rights in an attempt to evade their financial responsibilities. As explained by one commentator:

> Traditionally, the property tax—and in particular, the tax on real property—has been the mainstay of municipal revenue-gathering—the largest single source of municipal revenue. . . . But the property tax has numerous advantages that may keep it in use to a considerable extent: (1) Property, especially real property, is directly benefited by many municipal services, such as fire protection and garbage collection. Thus, there is a certain fairness in assessing the costs of these services on the basis of the value of property benefited thereby. (2) It is fairly easy to forecast in advance the amount of revenue that the real-property tax in a particular locality will produce, thus facilitating the budget process. (3) The real-property tax is not likely to be used by the federal government; it is thus one of the few potential sources of municipal income that is untapped by the U.S. government. And the full potential of the real-property tax has not been realized, since much urban property is assessed, and thus taxed, at substantially less than its current fair-market value. [Reynolds, Local Government Law, § 96, pp 291-293.]

Recently, in *Taxpayers United v Detroit,* 196 Mich App 463, 466; 493 NW2d 463 (1992), a Court of Appeals panel held that the retroactive revival of Detroit utility users tax is constitutional because the 1990 law did not create a novel tax. Plaintiffs were not assessed a retroactive fee for engaging in a voluntary act they might have forgone had they been aware of the tax. *Id.* at 468. The panel reasoned that the 1990 law did not violate the Due Process Clauses of the United

States or Michigan Constitutions because it applied the same type and rate of tax to the same group of taxpayers.

Similarly, the tax collection method in the case before us is not a novel tax because it does not enlarge the preexisting tax debt. On the contrary, 1988 PA 202 is a procedural device to secure taxes owed. Defendants are not being taxed as a result of voluntary activities that they might have forgone had they been aware of the tax. Rather, had defendants elected to forgo the activities at issue in this case, namely, their refusal to pay property taxes, they would have ended up in exactly the same situation in which they now find themselves —in short, paying their taxes.[25]

It is firmly established that there is no vested right in any particular procedure or remedy. See *Hanes & Co v Wadey,* 73 Mich 178, 181; 41 NW 222 (1889). Moreover, it is also well established that a taxpayer does not have a vested right in a tax statute or in the continuance of any tax law. *Ludka v Treasury Dep't,* 155 Mich App 250; 399 NW2d 490 (1986). See 6 Michigan Law & Practice, Constitutional Law, § 223, pp 248-249; 16A CJS, Constitutional Law, § 246, pp 49-52.

For instance, in *Webster v Auditor General,* 121 Mich 668; 80 NW 705 (1899), a provision of the General Property Tax Act of 1893 regarding the assessment, levy, and the return of land for delinquent taxes was amended. The dispute involved the retroactive operation of the interest added to delinquent taxes. The Court noted that a landowner has a duty to pay taxes and to pay them when they become due. The interest imposed on delinquent taxes serves multiple purposes, one of which is to encourage the timely payment of prop-

[25] In other words, they pay their taxes, either voluntarily or by being subject to an in personam collection action.

erty taxes. Consequently, the Court held that one who owes delinquent taxes has no vested right to have the rate of interest thereon remain unchanged. *Id.* at 674.

In this action, 1988 PA 202 did not create, enlarge, diminish, or destroy contractual or vested rights. Rather, it implemented an additional enforcement mechanism that the city may use to effect its preexisting constitutional and statutory right to assess and collect city property taxes. Furthermore, because the procedure relates only to tax collection remedies or procedures, it does not fall within the general rule against retrospective operation:

> The constitutional prohibition of the passage of retroactive laws refers only to retroactive laws that injuriously affect some substantial or vested right, and "does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce on account of defects in the law or its omission to provide the relief necessary to secure such right." [*Stott* at 46.]

In *Hansen-Snyder,* this Court observed:

> [Amendments of] statutes related to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing, do not come within the legal conception of retrospective law, or the general rule against retrospective operation of statutes. [*Id.* at 485.]

In fact, statutes or amendments that relate only to procedure, prima facie apply to all actions that

have accrued as well as future actions, unless the amendment expressly provides otherwise. *Stott, supra* at 46. We acknowledge that generally the distinction between remedial procedures and the impairment of vested rights is difficult to draw. However, it is clear that defendants have no property or title interest in our state or local tax collection methods. A vested right may encompass many things, but this is not one of them.

Finally, although it is remedial, the retroactive reach of 1988 PA 202 has statutory limitations. MCL 600.5813; MSA 27A.5813 provides that personal actions not otherwise provided for are subject to a six-year limitation period. An in personam suit to collect real property taxes is clearly a personal action. See *Borden, Inc v Treasury Dep't,* 391 Mich 495; 218 NW2d 667 (1974). Because an in personam suit to collect delinquent real property taxes becomes a personal action, we also find that the general six-year limitation statute applies. *In re Atkinson Estate,* 305 Mich 323; 9 NW2d 588 (1943).

CONCLUSION

Our decision today affirms the integrity of not only the City of Detroit's charter, but Michigan statutory law as well. We find that the Detroit City Charter incorporates the General Property Tax Act, and hold that the amendment of MCL 211.47; MSA 7.91 is remedial and may be retroactively applied. Noting the restraint imposed by MCL 600.5813; MSA 27A.5813, we remand this case to the trial court for proceedings consistent with this opinion.

CAVANAGH, C.J., and BRICKLEY and BOYLE, JJ., concurred with MALLETT, J.

RILEY, J. I respectfully dissent for several reasons. First and foremost, there exists binding authority for the proposition that changes in the method of tax collection that alter the nature of collection from an in rem to an in personam action are unconstitutional to the extent that they apply retroactively, i.e., to taxes previously assessed. Second, statutes governing the collection of taxes are to be strictly construed with all doubts to be construed in favor of the taxpayer. Contrary to the majority's assertions, the 1974 charter provisions at issue are far from clear on the issue whether the charter provides for, or even preserves the right to utilize, methods of tax collection other than the judicial sale method provided in charter § 8-403. In fact, I am persuaded that the clear intent of the charter's ratifiers was to limit the method of tax collection to the judicial sale set forth in § 8-403. Third, careful analysis of the historical backdrop provides, if implicitly, a strong policy reason for limiting plaintiff's tax collection powers. Although this Court's inquiry could more appropriately be decided without resort to policy arguments, I offer a plausible reason for the ratifiers' intent to limit plaintiff's tax collection powers. Thus, the language at issue is ambiguous at best. In turn, resort to a construction in favor of the taxpayer is in order.

I

A

It is important to understand the history and the mechanics of the tax lien in the area of real property law. The first step is to distinguish real and personal property taxes from other forms of taxation such as the excise tax. Property taxes are assessments on real and personal property within a specific territory, measured in proportion to its

value, and whose obligation for payment is absolute.[1] In contrast, an excise tax is a "privilege" tax that is not imposed *directly* upon persons or property,[2] but that is instead levied on activities that are voluntarily assumed to the degree to which the privilege is exercised.[3] Accordingly, it has generally been said that property taxes burden the property assessed, but do not constitute personal debts of an individual in the ordinary sense.[4]

A taxpayer's proportionate share of debt for the general revenue is secured only by property owned at the time a lien attaches and only on property located within the taxing district.[5] To be sure, the taxing legislature may secure the payment of de-

[1] 71 Am Jur 2d, State and Local Taxation, § 24, p 358.

[2] *Id.*, § 28, pp 360-361.

[3] *Id.*, §§ 28-29, pp 360-362. See also *Dooley v Detroit*, 370 Mich 194, 204-206; 121 NW2d 724 (1963) (upholding Detroit's income tax ordinance as an excise tax); *Continental Motors Corp v Muskegon Twp*, 376 Mich 170, 180; 135 NW2d 908 (1965) ("A basic distinction between an ad valorem property tax and an excise tax is that the former is regarded as primarily *in rem* in nature while the latter is regarded as *in personam* in nature").

[4] See, generally, 71 Am Jur 2d, State and Local Taxation, § 5, pp 345-346; 72 Am Jur 2d, State and Local Taxation, § 836, pp 142-143, § 869, pp 170-171. See also Rockwell, *Easement, servitude, or covenant as affected by sale for taxes*, 7 ALR5th 187, § 2, p 202; 1 Cooley, Taxation (4th ed), § 22, p 88.

In his landmark treatise on taxation, Justice COOLEY defined the relationship between taxpayer, tax, and the taxpayer's property as follows:

> The individual, and not his property, pays the tax. *The property is resorted to for the purpose of ascertaining the amount of the tax* with which the owner must be charged, *and for the purpose of enforcing payment when the owner shall be legally in default* in paying at the time stipulated by law. [*Id.*, § 24, p 93. Emphasis added.]

In other words, property provides a basis for assessment of a particular taxpayer's share of the tax burden, and it also provides security for the payment thereof. With this form of enforcement in place, the questions arise whether and when other methods of enforcement are permissible or even necessary.

[5] 3 Cooley, n 4 *supra*, § 1235, pp 2458-2459.

linquent taxes with real or personal property.[6] However, a line of demarcation has been drawn between the right of seizure and sale of real or personal property and a personal obligation for taxes that permits a lawsuit for the collection of delinquent taxes, i.e., an in personam action.[7] While some states permit in personam actions for the collection of delinquent tax liability,[8] the general rule indicates that no personal action will lie against a delinquent taxpayer at law or in equity.[9] As one author has stated:

> Generally, . . . the rule developed that *in the absence of an explicit statutory provision, no personal action will lie to recover property taxes.* These holdings are grounded on the theory that taxes are not debts, or in the view that since the statute provides only for proceedings *in rem,* personal liability is not imposed. [Hellerstein, State and Local Taxation (3d ed), p 702. Emphasis added.]

Another source provides:

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[6] See *id.,* § 39, pp 118-122. However, Justice COOLEY notes inherent problems with the taxation of personal property. Review of these reasons makes clear some of the likely reasons why plaintiff has not engaged in proceedings to collect back taxes by seizing and selling personal property and why it now prefers an in personam remedy rather than the procedure for distress clearly permitted under state law.

See also *id.,* § 1327, p 2624 ("the power of the legislature to make taxes assessed against real or personal property is unquestioned"); § 1323, pp 2612-2613 ("So far as personal property is concerned, nearly every kind is subject to compulsory process, *so far as found within the tax district,* provided it is within the terms of the tax statute providing what personalty shall be subject and provided it is not expressly exempted") (emphasis added). Cf. 72 Am Jur 2d, n 4 *supra,* § 868, p 169 ("nothing can be taken under a distress [action] but tangible property capable of seizure and sale, and . . . intangible property, such as shares of stock in corporations, . . . cannot lawfully be taken on distress").

[7] 3 Cooley, n 4 *supra,* § 1327, pp 2624-2625.

[8] *Id.,* p 2625.

[9] *Id.,* § 1329, pp 2626-2627.

> In the absence of constitutional restrictions, the legislature has plenary power to make any change in the method of collecting taxes, *but the amendment . . . of a statute providing for the levy and collection of taxes will not operate retrospectively so as to affect unpaid taxes already due or pending proceedings for their collection* . . . . [84 CJS, Taxation, § 642, p 1318. Emphasis added.]

Before turning to specific state law on the issues involved, it is instructive to review certain other general propositions that arise in this context. First, laws on taxation must be strictly construed, with any ambiguities to be decided in favor of the taxpayer.[10] Second, statutes creating tax liens are not to be enlarged by construction.[11] Finally, the method of collection that is prescribed by statute (or charter) is generally the exclusive method.[12]

B

This Court had the opportunity to address a similar issue nearly a century ago. In *Grand Rapids v Lake Shore & M S R Co,* 130 Mich 238; 89 NW 932 (1902), the Court was called on to determine whether an amendment of a city charter providing for personal liability could be applied to taxes for improvements to real property that had already been assessed. Six justices agreed that a change in collection methods from in rem to in personam could not apply retroactively. See also *Weber v Detroit,* 158 Mich 149; 122 NW 570 (1909) (a property owner could not be made personally liable for a special assessment tax created at a

[10] 2 Cooley, n 4 *supra,* § 503, pp 1113-1119. But see *id.,* § 504, pp 1120-1122, collecting cases for the opposite proposition. See also 72 Am Jur 2d, n 4 *supra,* § 866, p 168 (tax collection provisions are also to be strictly construed against the taxing authority).

[11] 3 Cooley, n 4 *supra,* § 1230, p 2452.

[12] *Id.,* § 1326, p 2621; 72 Am Jur 2d, n 4 *supra,* § 870, pp 171-172.

time when the city charter provided for enforcement only against real property).[13]

The majority attempts to avoid this precedent although it is dispositive.[14] Whether plaintiff reserved the right to seize personal property in the applicable sections of the 1974 charter is the subject of later argument, but it cannot be gainsaid

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[13] Cf. *Lucking v Ballantyne,* 132 Mich 584; 94 NW 8 (1903), superseded by statute as stated in *Michigan Nat'l Bank v Auburn Hills,* 193 Mich App 109; 483 NW2d 436 (1992) (taxes assessed on tangible personal property could not be enforced retroactively, but rather could only be applied prospectively under the terms of the existing Detroit City Charter). See, also, e.g., *Commonwealth ex rel Martin v Stone,* 279 Ky 243; 130 SW2d 750 (1939) (real estate taxes are not collectible by suit unless a personal action is expressly authorized, and the statute finally imposing personal liability was not given retroactive effect).

[14] Careful review of the authorities cited in the majority opinion makes clear their inapplicability to the issue at hand. In *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480; 124 NW2d 286 (1963), *ante,* p 698, this Court treated the extension of a lien filing date as procedural. However, the nature of the remedy, i.e., a mechanic's lien to secure payment for materials and services supplied, was unchanged. *Stott v Stott Realty Co,* 288 Mich 35; 284 NW 635 (1939), *ante,* p 699, involved a corporate privilege tax rather than a real property tax, which, as provided earlier, varies with the level of prescribed activity. See also *Taxpayers United v Detroit,* 196 Mich App 463, 466; 493 NW2d 463 (1992), *ante,* p 702 (utility tax), and *Ludka v Treasury Dep't,* 155 Mich App 250; 399 NW2d 490 (1986), *ante,* p 703 (income tax). *Hanes & Co v Wadey,* 73 Mich 178, 181; 41 NW 222 (1889), *ante,* p 703, concerned a lienholder's inability to use the previously mandated form of lien collection, i.e., the amendment of a statute did not retroactively preserve the old method of collection that was more favorable to the lienholder. It had nothing to do with the retroactive application of a new form of tax collection. In *Webster v Auditor General,* 121 Mich 668; 80 NW 705 (1899), *ante,* p 703, this Court unanimously agreed that a change in the interest rate charged for delinquent taxes as a condition to redemption before judicial sale could be applied retroactively. Because the choice to redeem was discretionary, property owners were not obligated to pay the interest charge or the increase. Moreover, it is clear that the purpose of the increase was to defray the costs incurred by seizing real property for delinquent taxes only to have the property redeemed before sale. *Id.* at 671. Thus, the purpose was to ensure recoupment of costs incurred in the judicial sale process rather than secure payment of the delinquent tax liability through the use of a new form of collection.

that the procedure described in § 8-403 is in the nature of an in rem proceeding.[15]

The Legislature amended MCL 211.47; MSA 7.91 to permit the filing of in personam actions against delinquent taxpayers by way of 1987 PA 177 and 1988 PA 202. Because the legislators did not create a specific provision for retroactive application of this new procedure, we may assume for purposes of this case that its application is prospective.[16]

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[15] See *Detroit v O'Connor,* 302 Mich 531, 535; 5 NW2d 453 (1942) (tax foreclosure proceedings under the existing city charter were in rem actions); *Thompson v Auditor General,* 261 Mich 624, 649, 657; 247 NW 360 (1933). See also *United States v Michigan,* 346 F Supp 1277, 1280 (ED Mich, 1972) ("The law in Michigan is explicit in stating that the enforcement of an *ad valorem* tax is an *in rem* proceeding against the property rather than the owner"). There are cases that may be cited for the proposition that city taxes are personal to the landowner. While this is true, it does not support the proposition that actions to collect delinquent taxes are in personam in nature. For example, in *Gulf Refining Co v Perry,* 303 Mich 487; 6 NW2d 756 (1942), this Court stated that a tax assessment was a debt due to the City of Lansing for which the defendants were responsible. However, the Court went on to indicate that collection was to be had under a state law permitting seizure and sale of personal property. Clearly, the case involves an action for distress and sale of personal property, which is not the same as an in personam action.

In *Gilken Corp v Comm'r of Internal Revenue,* 176 F2d 141, 143 (CA 6, 1949), the United States Court of Appeals for the Sixth Circuit noted that the existing Detroit City Charter " 'makes the tax a debt of the owner . . . .' " However, that case involved the question who is entitled to an exemption for the payment of state taxes under federal tax law. In other words, the case had nothing to do with the nature of the debt or the assets securing it. Cf. *United States v Michigan, supra.*

Finally, the majority's attempt to distinguish this line of authority by interpreting *Mogg v Hall,* 83 Mich 576; 47 NW 553 (1890), is unavailing. While an 1885 amendment of the relevant statute may have "cured" the defect, even a casual reading of *Mogg* only permits a single conclusion: the "cure" could not be applied retroactively. In the Court's own words,

> This act [the 1885 amendment creating personal liability] could not have the retrospective action contemplated . . . . Taxes levied after the act went into effect may properly be made a personal claim, but the rejected taxes of 1884, re-assessed under the act of 1885, cannot, in our opinion, be made a personal claim against the owner of the land. [83 Mich 582.]

[16] See *Selk v Detroit Plastic Products,* 419 Mich 1, 9; 345 NW2d 184 (1984).

While I agree that municipalities operating under the home rule cities act, MCL 117.1 *et seq.*; MSA 5.2071 *et seq.* and its predecessors[17] are empowered to develop tax collection procedures that vary from those contained in MCL 211.47; MSA 7.91, I cannot agree that this discretion permits retroactive, in personam collection of delinquent taxes where it appears that all other municipalities would not have such power until 1987 and thereafter.[18] More-

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In *Municipal Investors Ass'n v Birmingham,* 298 Mich 314, 325; 299 NW 90 (1941), this Court had the following to say about the intent behind amendments to the statutes providing for judicial sale of real property for delinquent taxes:

> The clear import of the language of the foregoing amendatory enactments, and the obvious intent and purpose of the legislature to relieve owners from the weight of accumulated obligation . . . must lead one to the conclusion that when title to [real property] became absolute in the State of Michigan upon expiration of the period of redemption provided by the tax law free of all taxes and other liens and incumbrances of whatever kind or nature, and future and deficiency as well as past assessments and taxes were cancelled. To hold otherwise would defeat the purpose of this remedial legislation . . . . [Citation omitted.]

The remedial purpose alluded to by the *Municipal Investors* majority had two important facets. The first was to ensure a method of payment of property taxes assessed to support the general welfare. The second was to protect landowners from the accumulation of significant tax liability through the mechanism of judicial sale.

> "The primary and inducing purpose of the legislation was to secure a portion of the unpaid taxes, rather than nothing, and to restore lands to a taxpaying basis, instead of supinely allowing them to accumulate tax delinquencies . . . ." [*Id.* at 321, quoting *Baker v State Land Office Bd,* 294 Mich 587, 606; 293 NW 763 (1940).]

In light of the pronouncement of legislative intent by this Court, together with the complete lack of any language on retroactivity in 1987 PA 177 and 1988 PA 202, I am convinced that the novel in personam action was intended to have prospective effect.

[17] See *ante,* pp 689-690.

[18] Cf. *Schaefer v Woodmere Cemetery Ass'n,* 256 Mich 332, 333; 239 NW 300 (1931) (courts are without jurisdiction to entertain personal lawsuits for the collection of general property taxes and special

over, early cases that address a virtually identical issue mandate against retroactive application of a tax collection method that changes the nature of the liability from in rem to in personam. *Grand Rapids* and *Weber, supra.*

For all the foregoing reasons, I conclude that plaintiff is precluded from bringing an in personam action against property owners for the payment of delinquent property taxes for the time periods at issue under the doctrine of stare decisis.[19]

II

The majority asserts that the relevant language contained in the 1974 charter clearly and unambiguously reserves the right to utilize any taxing authority permitted by the Legislature. While I agree that the language is clear, I disagree with the majority's interpretation of that language.

The charter does contain several broad reservation-of-rights clauses.[20] One of these clauses is found in the first provision of § 8-403.[21] However,

assessments in the absence of statutory authority); *Boekeloo v Hodel,* 828 F2d 727, 732 and ns 4-5 (CA Fed, 1987) ("All authorities agree that the tax 'debt' is not enforceable against a former property owner except as explicitly provided by statute. Michigan provides only for enforcement of real property taxes against the taxed property or the 'debtor's' personal property"); *In re Diamond Reo Trucks, Inc,* 1 Bankr 57, 58 (WD Mich, 1979) (a county could not collect tax deficiencies on real property from a bankrupt lessor that remained after judicial sale); OAG, 1928-1930, pp 426-431 (June 7, 1929).

[19] See *People v Jamieson,* 436 Mich 61, 79; 461 NW2d 884 (1990) ("principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed") (opinion of BRICKLEY, J.).

[20] See *ante,* p 691, n 9.

[21] See *ante,* p 686, n 3. The majority states that there is no *express* limitation contained in § 8-403 that would limit plaintiff's tax collecting powers to the judicial sale method found in § 8-403(6). However, tax collection statutes are to be construed against the taxing authority, and they are not to be enlarged by judicial construction. See ns 10

the reservation-of-rights clause that immediately precedes the judicial sale provision uses the term "[e]xcept as otherwise provided by this charter . . . ." In my opinion, the recitation of a single judicial sale mechanism, and the exclusion of other methods of tax collection permitted by state law, constitutes the type of provision contemplated by the language of § 8-403(1). In other words, § 8-403(6) "specifically provides otherwise" so that the reservation-of-rights clauses are nullified.

In addition, review of the charter comments regarding the provisions at issue is highly instructive. The comments provide, in pertinent part, as follows:

> In two important respects, however, *Detroit's law and procedure is different from, and preferable to, the law and procedure of the state.*
>
> First, there is no counterpart in state law for the right granted Detroit property taxpayers to pay in 2 installments. Second, *state law permits the sale of liens for delinquent property taxes to private tax title speculators, often to the great prejudice of the owner whose taxes are delinquent. Because of the abuses that can result, the Detroit treasurer, for some years, has not sold to private persons the City's lien for delinquent City real property taxes but has collected those taxes himself.* [Final Report of the Detroit Charter Revision Commission, Commentary to article 8, § 8-403, p 37. Emphasis added.][22]

and 11 and accompanying text. Thus, an express limitation is not required to find in favor of defendants.

[22] In *Detroit v Safety Investment Corp*, 288 Mich 511; 285 NW 42 (1939), this Court upheld the plaintiff's authority to create the mechanism of judicial sale to the city under the home rule act. In so ruling, our brothers noted that the procedure for foreclosure and sale to the city for unpaid taxes was no different than the provisions of the General Property Tax Act but for the party initiating the foreclosure proceedings. *Id.* at 517. Because there was no substantive change in

In this quotation, the charter's revisers made clear the intent to limit plaintiff's tax collecting powers by specifically rejecting one method that was permitted under MCL 211.47; MSA 7.91. This language, which is the only source of concrete evidence of intent *specifically relating to the tax collection provisions,* manifests a singular intent: the limitation of powers otherwise permitted under state law. In light of the fact that the only evidence of intent specifically dealing with the collection of delinquent taxes evinces the desire to limit its power, I cannot agree with the majority that the broad reservation-of-rights clauses permit retroactive application of the in personam action.[23]

The most basic rule of statutory construction[24] is that the intent of the Legislature is to be followed. *Town & Country Dodge, Inc v Treasury Dep't,* 420 Mich 226, 240; 362 NW2d 618 (1984). Of equal importance to this case is the rule that a state may impose a tax only if it is expressly authorized by law. The authority to tax may not be inferred or extended by implication. *Molter v Treasury Dep't,* 443 Mich 537, 543; 505 NW2d 244 (1993); *Michigan Allied Dairy Ass'n v State Bd of Tax Administration,* 302 Mich 643, 650; 5 NW2d 516

the nature of the tax or its collection (except for the authority initiating the action), the provision in the city charter was afforded retroactive application.

The majority quotes from *Safety Investment, supra,* p 516, to highlight the evils of the old taxation system wherein " 'the careless and dishonest did not [pay their taxes].' " See *ante,* p 701. The new system simply secured the payment of taxes with real and personal property. It did not address the possibility of in personam liability. Thus, the evils considered therein and the liberal construction our brothers advocated have no bearing on the issue before us today.

[23] Furthermore, I am disturbed by the majority's failure to adequately explain how the discretion afforded under the home rule cities act permits plaintiff to avoid the general rule that statutes and amendments thereto are to be applied prospectively unless the Legislature provides otherwise.

[24] As the majority properly notes, the rules of statutory construction apply to home rule charters. See *ante,* pp 690-691.

(1942); *In re Dodge Bros,* 241 Mich 665, 669; 217 NW 777 (1928); *Triangle Land Co v Detroit,* 204 Mich 442, 455; 170 NW 549 (1919); 3A Singer, Sutherland Statutory Construction (5th ed), § 66.01, p 1.[25] In addition, ambiguities are to be resolved in favor of the taxpayer. *Dodge Bros, supra.*[26] A specific remedy provided as the proper method of tax collection precludes the use of any other collection method unless specifically provided for. *Bankers Trust Co of Detroit v Russell,* 270 Mich 568, 571-572; 259 NW 328 (1935).[27] Changing the nature of tax collection from in rem to in personam affects substantive rights. See *ante,* pp 707-709. Furthermore, tax collection provisions are to be strictly construed against the taxing authority.[28]

In my opinion, the language of the charter is clear on the point that plaintiff advocated a single method of tax collection and requires affirming the decision of the Court of Appeals. See *Town & Country Dodge, supra.* Even if the intent of the drafters and ratifiers is ambiguous, the great weight of authority requires a construction that favors the taxpayer. See *Molter, Michigan Allied Dairy Ass'n, In re Dodge Bros, Triangle Land Co,* and 3A Singer, Sutherland Statutory Construction, *supra.* Despite the existence of several reservation-of-rights clauses, the charter provides for a single

[25] See ns 10-12 and accompanying text.

[26] For a comprehensive discussion of the due process implications underlying the lien foreclosure process and the need for strict construction of statutes divesting citizens of property to satisfy tax debts, see *Thompson v Auditor General,* n 15 *supra.*

[27] Before amendment, the rule regarding collection for taxes assessed on personal property was identical. See *Detroit v Jepp,* 52 Mich 458, 459; 18 NW 217 (1884) ("It has always been recognized as the law of this State, that where such a specific remedy is provided in the tax law as the proper method of collection, no suit will lie unless specifically provided for, and then only as so provided").

[28] See n 10.

method collection and obligates courts to construe it as the exclusive method. *Bankers Trust Co of Detroit, supra.*[29]

III

A final question that the majority fails to address is why plaintiff would forgo the method of judicial sale provided in charter provision § 8-403 for nearly two decades and at a time when the real property subject to taxation was worth significantly more than the escalating delinquent tax liability.[30] The fact that the instant lawsuits were filed *after* the 1987 and 1988 amendments of MCL 211.47; MSA 7.91 appears to indicate that plaintiff gave no thought to the possibility of an in personam action pursuant to its discretionary powers under the home rule cities act[31] until § 47 of the General Property Tax Act was amended.

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[29] In *Bankers Trust Co, supra,* p 572, a majority of this Court recognized only two methods of tax collection provided under the Detroit City Charter that existed in 1935. These two procedures were the judicial sale to the city treasurer and the distress and sale of goods and chattels as provided in 1929 CL 3431, 3438 (distant predecessors to the provisions of the General Property Tax Act that are involved in this case).

The tone of earlier cases indicates that the tax sale method adopted by the plaintiff in the earlier part of this century was intended to be the exclusive method. See, e.g., *O'Connor,* n 15 *supra,* p 533. In fact, our Court of Appeals concluded that the judicial sale method of collecting delinquent taxes was the sole method permitted by the 1974 charter and did *not* permit seizure of fire insurance proceeds even under a lien theory. *Joy Management Co v Detroit,* 176 Mich App 722, 736; 440 NW2d 654 (1989). I believe that the *Joy Management* decision indicates the proper resolution of this issue, and therefore I do not join in the majority's conclusion that the decision was incorrect with regard to the analysis of the charter language.

[30] See n 16.

[31] In *Joy Management Co,* n 29 *supra,* the City of Detroit brought a claim to collect delinquent taxes against the plaintiff for fire insurance proceeds payable to the plaintiff for the destruction of its property. Although proceedings were filed before the amendment of MCL 211.47; MSA 7.91, the city claimed a *lien* on the proceeds to secure the payment of delinquent taxes. There is no indication that the city asserted in personam liability of the plaintiff in *Joy Management.*

I am unaware of any evidence, outside the language of the charter itself, that explains the intent either of the charter's drafters or its ratifiers on the issue whether plaintiff was entitled to utilize in personam methods of tax collection until this option was specifically adopted in the 1991 amendments of the charter. The majority presumes that the broad reservation-of-rights language in the preamble and in other areas of the charter, together with latent policy arguments that are not well defined in the majority's opinion, entitles plaintiff to a judgment in its favor. In contrast, I am aware of another possibility that may explain why the drafters and the ratifiers of the 1974 charter failed to provide for in personam liability.

In the late 1960s and early 1970s, large urban areas experienced an alarming exodus of residents and businesses[32] that eroded their tax bases. Moreover, abandonment of property located within the city limits, and the inherent social evils that are thought to naturally follow, reached crisis levels.[33] The City of Detroit was no exception.[34] It is not outside the realm of possibility that the drafters and ratifiers of the 1974 charter had this in mind when the charter was enacted. The imposition of in personam liability for delinquent taxes, which would allow plaintiff to attach a new set of assets

[32] See, generally, Cisneros, *Interwoven Destinies: Cities and the Nation,* in Interwoven Destinies: Cities and the Nation (New York: Norton & Co, 1993) (Cisneros, ed), pp 20, 25; Ginzberg, *The Changing Urban Scene: 1960-1990 and Beyond,* pp 33-44; Kasarda, *Cities as places where people live and work: Urban change and neighborhood distress,* pp 81-83, 87, 90-91, and the tables that follow.

[33] See, generally, comment, *Property abandonment in Detroit,* 20 Wayne L R 845 (1974), and authorities cited therein. See also Hamilton, *Homesteading urban America after* Moore v Detroit: *The constitutionality of Detroit's nuisance abatement plan and its implications for urban homesteading legislation,* 34 Wayne L R 1609, 1612-1615 (1988).

[34] *Id.*

that includes *intangibles* such as bank accounts and even wage garnishment for the first time, may be an attractive method of tax collection today.[35] However, the hint of this form of liability at the time when the 1974 charter was enacted could have had a disastrous effect on continued investment in real property located within city limits, which would have taken the form of even more widespread abandonment than actually occurred.

In the least, the foregoing analysis constitutes a plausible formulation of the drafters' and ratifiers' intent where there is little else to guide us. The fact that the ratifiers specifically abdicated one state right to protect real property owners, i.e., the right to sell land to title speculators, underscores the validity of this point. Thus, it is not possible to validly claim that the ratifiers' intent on this narrow question, as evidenced by the language of § 8-403, only permits a single conclusion: that plaintiff had not only the authority to reserve such a right, but also that it clearly did so. At best, the intent that the majority attributes to the charter provision is ambiguous. Accordingly, construction against the taxing authority is in order pursuant to longstanding precedent. See *In re Dodge Bros, supra;* note 10 and accompanying text, *ante,* p 709.

IV

In conclusion, I cannot agree with the majority that plaintiff somehow preserved its right to retroactively assert in personam liability for delinquent taxes. I am convinced that the home rule cities act does not afford this degree of discretion, which would flout established constitutional principles

[35] A ruling in favor of plaintiff under a personal liability theory would entitle it to collect judgments using any methods available to the public generally under the laws governing satisfaction of judgments. See MCL 600.6001 *et seq.*; MSA 27A.6001 *et seq.*

and rules of construction. Moreover, I believe that the majority is allowing present concerns and policies to guide its conclusion when the appropriate form of inquiry demands attention to the political and economic climate at the time of the charter's ratification. Accordingly, I conclude that plaintiff is entitled to collect delinquent taxes through a personal action only for taxes assessed after the 1991 amendment of the city charter.

LEVIN and GRIFFIN, JJ., concurred with RILEY, J.

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied April 8, 1994:

MAKINEN v SPEED QUEEN COMPANY, No. 97128; Court of Appeals No. 152599.

LEVIN, J. I would grant leave to appeal to consider the question addressed in *Grzebik v Kerr,* 91 Mich App 482 (1979), and decided in the instant case (by an unreported opinion, Court of Appeals Docket No. 152599, released June 23, 1993) on the authority of *Grzebik.* See *Neves v Potter,* 769 P2d 1047 (Colo, 1989); *Lackey v McDowell,* 262 Ga 185; 415 SE2d 902 (1992).

AFENDOULIS v KENT COUNTRY CLUB, No. 97191; Court of Appeals No. 143219.

BOYLE and MALLETT, JJ. We would grant leave to appeal.

LEVIN, J. I would grant leave to appeal to consider whether the circuit judge erred in granting summary disposition to the defendant on the issue whether the plaintiff had a "just cause" contract of employment.

Four months after the plaintiff was hired as manager of the defendant country club, the parties entered into a written agreement that stated it was being entered into to "induce" the plaintiff "to remain with the Club as Manager until he reaches age 65."

I agree with Judge MARILYN J. KELLY, who dissented in the Court of Appeals, which affirmed the summary disposition in an unreported opinion (Docket No. 143219, decided July 1, 1993) that "reasonable minds could differ regarding the existence of an employment contract providing for termination only for just cause." The "purpose, intent and effect" of the written agreement entered into in the instant case depends on all the circumstances, and presents a question for resolution by the trier of fact and not a question of law.

Reconsideration denied June 28, 1994.

LEVIN, BOYLE, and MALLETT, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v BRUNELL, No. 97408; Court of Appeals No. 132275.

CAVANAGH, C.J. I would direct the prosecutor to show cause why the conviction should not be reversed.

LEVIN, J. I would (i) authorize the appointment of a lawyer for the defendant, if indigent, to file an application for leave to appeal, or (ii) order the prosecutor to show cause why leave to appeal should not be granted, or (iii) remand for an evidentiary hearing on the question whether, as found by the Court of Appeals, the defendant breached

the agreement promising immunity by failing to answer truthfully during the polygraph examination, or (iv) grant leave to appeal.

I

The unreported opinion of the Court of Appeals[1] states that this case was decided without oral argument pursuant to MCR 7.214(E)(1)(b).[2] The opinion does not state whether the panel "unanimously" viewed the appeal to be "without merit," or concluded that "the court's deliberation would not be significantly aided by oral argument."

Clearly, it cannot properly be said that this appeal is without merit. Nor do I think it can properly be said that "the court's deliberation would not be significantly aided by oral argument."

In the almost three years since this Court added subparagraph (E) to MCR 7.214, this Court has not reviewed the exercise by the Court of Appeals of the power to decide a case without oral argument. This would be an appropriate case to consider whether the Court of Appeals abused its discretion in deciding a case without oral argument.

II

The second and concluding paragraph of the opinion of the Court of Appeals states, in its entirety:

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[1] Docket No. 132275, decided June 29, 1993.

[2] MCR 7.214 states as follows:

(E) Decision Without Oral Argument. Cases may be assigned to panels of judges for appropriate review and disposition without oral argument as provided in this subrule.

(1) If, as a result of review under this rule, the panel unanimously concludes that

(a) the dispositive issue or issues have been recently authoritatively decided;

(b) the briefs and record adequately present the facts and legal arguments, and the court's deliberation would not be significantly aided by oral argument; or

(c) the appeal is without merit;

the panel may enter without oral argument an appropriate order or opinion dismissing the appeal, affirming, reversing, or vacating the judgment or order appealed from, or remanding the case for additional proceedings.

(2) Any party's brief may include, at the conclusion of the brief, a statement setting forth the reasons why oral argument should be heard. [Subparagraph (E) was added July 11, 1991, effective August 1, 1991.]

> Defendant argues that the prosecution breached an agreement promising him immunity from prosecution in return for his cooperation in an investigation. However, the record indicates that it was defendant who breached the agreement by failing to answer truthfully during a polygraph examination. Thus, the prosecution was released from its obligation to seek immunity for defendant. Therefore, the trial court did not err in finding that defendant was not entitled to immunity, even though its ruling was based on a different ground. *People v Lucas,* 188 Mich App 554, 577; 470 NW2d 460 (1991).

The circuit judge did not find that the defendant breached the agreement by failing to answer truthfully during the polygraph examination. He ruled that the agreement promising immunity was not binding because the agreement had not been approved by a circuit judge pursuant to the statute.[3] The question whether the statute provides the sole basis for a grant of immunity was not addressed by the Court of Appeals.

In *People v Jackson,* 192 Mich App 10 (1991), the Court of Appeals, in a case in which the prosecutor had entered into an agreement with the defendant promising immunity, held that the circuit judge had properly ordered dismissal of the charge. The statutory provision relied on by the circuit judge in the instant case was not adverted to by the Court of Appeals in *Jackson;* it appears that there had not been an application to the circuit court for approval of a grant of immunity. *Jackson* is a first-out opinion,[4] but subsequent panels of the Court of Appeals might regard the holding there as limited to the facts and circumstances of the case. The issues presented in this case are of jurisprudential significance.

III

In the instant case, the Court of Appeals decided that the defendant had breached the agreement "by failing to answer truthfully during a polygraph examination" without an evidentiary hearing focused on that question, and without findings of fact by the circuit judge. The case should, minimally, be remanded for such an evidentiary hearing and findings of fact.

It appears that both the prosecutor and the defendant sought an evidentiary hearing in the circuit court on the question whether the defendant had breached the agreement, but the circuit judge declined to hold such a hearing[5] because he concluded that the agreement was

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[3] MCL 780.701; MSA 28.1287(101).

[4] Administrative Order No. 1990-6.

[5] The preliminary examination record contains some pertinent evidence, but, in all events, there was no finding of fact by the circuit judge.

invalid as a result of the failure to comply with the statutory procedure.

IV

The factual record so far made suggests that the Court of Appeals may have erred in finding, on this possibly inadequate record, that "the *record indicates* that it was defendant who breached the agreement by failing to answer truthfully during a polygraph examination." (Emphasis added.)

A

A drugstore employee was robbed at gunpoint of approximately $30,000 in cash and $7,000 in checks while on his way to the bank. Nine days after the robbery, the defendant's lawyer approached the police and said that his client was willing to identify the robber in exchange for immunity from prosecution. The following agreement was signed by the Jackson County prosecuting attorney and the lawyer for the defendant:

> Total immunity from prosecution on Walgreen Drug Store R/A 12-11-89.
>
> Will poly to verify—
>
> 1) not gunman
>
> 2) did not initiate crime being planned
>
> 3) provide info:
> other suspect/s involved
> location of money/checks or disbursement gun
> drop off vehicle
> hat/coat of robber
> money bag
> /s/

Thereafter, the defendant provided the police with the name of the robber and the additional information specified in paragraph 3 of the agreement. He confessed to his own involvement, and assisted the police in recovering more than $23,000.

The defendant testified at the robber's preliminary examination, stating that he was doing so under a grant of immunity. Two days after his testimony against the robber, he submitted to a polygraph examination. The following day he was charged with armed robbery.

At defendant's preliminary examination, the prosecutor argued that the defendant had breached the immunity agreement by failing to pass the polygraph examination on the question whether he had

initiated the armed robbery, and also because he had failed to identify "all suspects," specifically, the defendant's wife. The polygraph examiner testified at the preliminary examination that defendant had also given deceptive responses to questions concerning whose share of the money had been recovered.

B

While the defendant agreed to submit to a polygraph examination to "verify" the information he provided, that condition was not synonymous, or necessarily synonymous, with "passing" the polygraph examination. Although the defendant declined to implicate his wife as another suspect, that does not mean that he was untruthful concerning the information he did provide, nor does it establish that he was untruthful in failing to implicate his wife. The record does not support the claim that the defendant "initiated" the crime.

C

The prosecutor did not seek to "verify," before the preliminary examination of the robber, the information provided by the defendant by requiring that the defendant submit to a polygraph examination. Had the prosecutor required the defendant to submit to a polygraph examination before the robber's preliminary examination, and thus before the defendant had provided testimony that would convict the robber, the prosecutor might have been constrained to choose between using the defendant's testimony against the robber or announcing that the defendant would be prosecuted for failing to fulfil his end of the immunity agreement.

The timing of the polygraph examination further suggests that a full evidentiary hearing on the question whether the defendant failed to comply with the immunity agreement is warranted.

PEOPLE v HAYNES and PEOPLE v MILLER, Nos. 97562, 97571; reported below: 199 Mich App 593 and 199 Mich App 609.

BOYLE, J. I join in the order of denial because I agree that the Court of Appeals applied the correct standard under MCR 6.931(3)(c)(ii) and (d). I write separately to urge the Legislature to amend MCL 769.1; MSA 28.1072 to provide a broader range of sentencing discretion in cases involving automatic waiver of juveniles. The interests of public safety can be served without forcing the trial court into the all-or-nothing choice of placing a person sixteen or seventeen years old in the juvenile system until the age of twenty-one, or placing that same person in the adult system for a nonparolable term of natural life.

CAVANAGH, C.J. I would grant leave to appeal.

LEVIN, J. I would grant leave to appeal.

The defendants were involved in an attempted carjacking. Haynes, sixteen, fatally shot the motorist. Miller, fifteen, supplied the gun.

They were prosecuted under the automatic-waiver provisions.[1] Each pleaded guilty of first-degree murder, assault with intent to commit armed robbery, and possession of a firearm during the commission of a felony.[2]

The required sentencing hearing[3] took place before Chief Recorder's Court Judge Dalton A. Roberson. In separate, full written opinions, he decided to place each offender in the juvenile system, rather than to impose the mandatory life sentence without possibility of parole provided by law for an adult offender. The Court of Appeals, one judge dissenting, reversed,[4] holding that Haynes and Miller should have been sentenced as adults, with the result that they must be sentenced, as a result of their convictions of first-degree murder, to life imprisonment without possibility of parole.

Judge Roberson conducted lengthy hearings extending over a number of days, listened to a number of witnesses, and received nearly unanimous expert recommendations in favor of juvenile disposition of Haynes, and unanimous expert recommendations in favor of juvenile disposition of Miller. One could surely differ with Judge Roberson's conclusions, but his conclusions were supported by ample proofs in carefully reasoned opinions. I agree with the dissenting Court of Appeals judge that Judge Roberson did not commit clear error or abuse his discretion.

The Court of Appeals stated that Judge Roberson failed to make sufficient findings concerning whether "the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures,"[5] or "[w]hat is in the best interests of the public welfare and the protection of the public security."[6] Instead of remanding to Judge Roberson to make the required findings, the Court of Appeals itself made the findings. This was inappropriate, and suggests that the Court of Appeals decided to substitute its judgment for that of the sentencing judge.

I agree with Justice BOYLE that the Legislature should consider amending the statutes "to provide a broader range of sentencing discretion in cases involving automatic waiver of juveniles. The interests of public safety can be served without forcing the trial court into the all-or-nothing choice of placing a person sixteen or seventeen years old in the juvenile system until the age of twenty-one, or placing that same person in the adult system for a nonparolable term of natural life."

In deciding whether to plead guilty, an accused person takes into consideration the sentencing history and reputation of the judge to

[1] MCL 764.1f; MSA 28.860(6) and MCL 600.606; MSA 27A.606.

[2] See *People v Veling*, 443 Mich 23 (1993).

[3] MCL 769.1; MSA 28.1072.

[4] *People v Haynes*, 199 Mich App 593 (1993); *People v Miller*, 199 Mich App 609 (1993).

[5] MCL 769.1(3)(e); MSA 28.1072(3)(e).

[6] MCL 769.1(3)(f); MSA 28.1072(3)(f).

whom the case is assigned. Until the Legislature acts along the lines suggested by Justice BOYLE, the Court should consider amending the court rules to provide that a juvenile offender may not plead guilty of first-degree murder.[7]

Reconsideration denied July 22, 1994.

CAVANAGH, C.J. To avoid absurd results, I would grant leave to appeal to consider the appropriate construction of the phrase "any other sentence provided by law for an adult offender." MCL 769.1(3); MSA 28.1072(3).

LEVIN, J. (*dissenting*). I would grant the motion and would grant leave to appeal for the reasons set forth in my dissenting statement in the Court's earlier order which denied leave to appeal. *Ante,* pp 855-857.

PEOPLE v WARREN, No. 97791; reported below: (*After Remand*) 200 Mich App 586.

LEVIN, J. I would grant leave to appeal.

PEOPLE v MCALLISTER, No. 98617; Court of Appeals No. 166402.

LEVIN, J. I would grant leave to appeal. The stipulation to dismiss the appeal in Court of Appeals Docket No. 119351 stated that it was "based upon the Michigan Supreme Court Decision" in *In re Rankin, In re Dumas,* 433 Mich 592 (1989), "decided November 8, 1989 . . . ." The Legislature responded to *Rankin/Dumas* by adding 1990 PA 315,[1] § 6b to the Child Custody Act. Act 315 was approved December 19, 1990, with immediate effect.

Under the circumstances that the appeal to the Court of Appeals was dismissed following the filing of the stipulation dated February 1, 1990, on the basis of this Court's decision in *Rankin/Dumas,* and the Legislature added § 6b in response to this Court's decision in *Rankin/Dumas,* leave to appeal should be granted to consider whether Act 315 applies retroactively in the instant case, and whether the appeal dismissed following the filing of the February 1, 1990, stipulation should be reinstated.[2]

Summary Dispositions April 15, 1994:

PEOPLE v DERRICK TERRY, No. 98338. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to the Recorder's Court for further proceedings. MCR 7.302(F)(1). The police officers' entry into the building without a warrant was justified by the exigent circumstances exception to the

[7] See *People v Jenkins,* 395 Mich 440 (1975), in which this Court held that in every trial of first-degree murder, the court is required to instruct the jury, sua sponte, and even over objection, on the included offense of second-degree murder.

[1] MCL 722.26b; MSA 25.312(6b).

[2] See MCR 7.316(A)(7).

warrant requirement, making the subsequently discovered controlled substances admissible evidence. *In re Forfeiture of $176,598,* 443 Mich 261 (1993). Court of Appeals No. 123037.

LEVIN, J. I would grant or deny leave to appeal, and dissent from the order peremptorily reversing the Court of Appeals, and remanding for further proceedings.

PEOPLE v SHERMAN, No. 98485. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the judgment of the Kent Circuit Court is reinstated for the reasons stated in the dissenting opinion in the Court of Appeals. MCR 7.302(F)(1). Court of Appeals No. 111891.

LEVIN, J. I would grant or deny leave to appeal, and dissent from the order peremptorily reversing the Court of Appeals.

Leave to Appeal Denied April 15, 1994:

ANTONE v F X COUGHLIN COMPANY, No. 97054; Court of Appeals No. 137115.

LEVIN, J. I would grant leave to appeal.

The Court of Appeals concluded that defendants FX Coughlin Company and CDC Properties, Inc., did not retain "control over the work done and the contractor's activities," with the following explanation:

> Plaintiffs claim defendants retained control of the overhead electrical power lines which caused Antone's injuries. Antone's job foreman, Billy Cranford, told defendants' operational manager, Gerald Kopp, that the iron workers refused to set the steel because of the danger posed by the overhead lines. Kopp told Cranford that he could not turn the power off because it powered the existing warehouse. Kopp informed Fuga, the owner of Danic Construction, of this discussion. A few days later, Fuga allegedly told Cranford that the power was off. Contrary to plaintiffs' claim, this is insufficient evidence to conclude that defendants retained control over the work performed or the contractor's activities. *Funk* [*v General Motors Corp,* 392 Mich 91, 101 (1974)].*

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* The dissenting judge similarly described the facts:

> Plaintiffs offered evidence that plaintiff Edmund Antone's employer's job foreman, Cranford, told defendants' operations manager, Kopp, that the ironworkers would not set the steel while the power was on because of the danger presented. Plaintiffs also presented deposition testimony showing that Kopp told Cranford that the lines could not be turned off because they powered the existing facilities, and that Kopp called the contractor's agent, Fuga, and reported that the

I agree with the dissenting judge that the plaintiffs produced sufficient evidence to create a genuine issue of material fact whether defendants "retained control of the overhead wires which caused Edmund Antone's injury. See *Funk,* p 108." Even if the evidence did not, as the majority says, establish that defendants "*retain[ed]* control over the *work* done and the contractor's activities," (emphasis added) it tended to establish that the contractor did, in fact, *exercise* control of the *overhead wires* that caused the injury.

BOYLE and MALLETT, JJ. We would grant leave to appeal.

PEOPLE v TIMOTHY MOORE, No. 97261; Court of Appeals No. 154521.

PEOPLE v STEPHENS, No. 97436; Court of Appeals No. 135330 (after remand).

LEVIN, J. I would grant leave to appeal to consider whether the error in admitting the testimony of the parents was harmless.

Summary Dispositions April 19, 1994:

FREEZER SERVICES OF MICHIGAN v CITY OF HAMTRAMCK, Nos. 96761, 97040, 10/March 1994. Leave to appeal having been granted, 444 Mich 900, and the cause having been briefed and orally argued, the June 23, 1993, judgment of the Court of Appeals in Supreme Court file number 97040 is affirmed, and the March 9, 1993, order of the Wayne Circuit Court in Supreme Court file number 96761 is reversed. For the reasons stated by the Court of Appeals in its June 23, 1993 opinion, the Wayne Circuit Court erred when it entered its July 9, 1992 and June 23, 1993 orders, delaying the defendant's obligation to spread the cost of the consent judgment on the tax rolls if it remains unpaid. MCR 2.612(C)(1). The case is remanded to the Wayne Circuit Court for further proceedings that are consistent with this order. Jurisdiction is not retained. Court of Appeals Nos. 162557, 154205.

BOYLE, J. I concur with the order of the Court. I write separately simply to express my view that MCR 2.612(C)(1)(f) should not be narrowly construed. Like its substantially identical federal counterpart FR Civ 60(b)(6), the rule authorizes a court to grant relief from judgment where extreme injustice would otherwise result. The "requirements" read into the rule by the Court of Appeals majority in this case first appeared in a published decision in *Kaleal v Kaleal,* 73 Mich App 181, 189 (1977). The panel in *Kaleal* presented these considerations as general guidelines describing the circumstances in which courts ordinarily grant relief, while correctly acknowledging that the rule " 'give[s] the courts ample power to vacate judgments whenever extraordinary circumstances make it necessary to achieve

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ironworkers wanted the hot wires turned off but he told them that they could not be turned off because they powered the facility. After the accident, Detroit Edison insisted that defendants promise that the lines would be moved before construction was resumed.

justice.' " *Id.*, quoting 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 189.

However, because the Court of Appeals reached the correct result under the appropriate, more flexible standard, I concur in the order of affirmance. The "broad power" granted by MCR 2.612(C)(1) "is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made." 11 Wright & Miller, Federal Practice and Procedure, § 2864, p 214, discussing FR Civ 60(b)(6).

LEVIN, J. I would decide by written opinion the questions presented in the briefs filed by the parties.

BUTCHER v AUTO CLUB INSURANCE ASSOCIATION, No. 97437. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to the Oakland Circuit Court for further proceedings. MCR 7.302(F)(1). The motion for summary disposition was prematurely granted. Jurisdiction is not retained. Court of Appeals No. 133528.

PROSSER v GENERAL MOTORS CORPORATION, No. 97544. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 162378.

MCCORMICK v MCCORMICK, No. 98370. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). The motion for stay of proceedings during the pendency of the appeal at the Court of Appeals is granted. Court of Appeals No. 165493.

PEOPLE v RAYMOND MORRIS, No. 98437. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the defendant's conviction is reinstated. MCR 7.302(F)(1). The trial court did not err in denying the defendant's motion for directed verdict. *People v Tilley,* 405 Mich 38 (1979). The case is remanded to the Court of Appeals for reconsideration of the remaining issue raised by the prosecutor. Reported below: 202 Mich App 620.

CAVANAGH, C.J. I would deny leave to appeal.

LEVIN, J. I would grant or deny leave to appeal, and dissent from the order peremptorily reversing the Court of Appeals and remanding for further proceedings.

Reconsideration denied June 28, 1994.

Leave to Appeal Denied April 19, 1994:

GORDON-SHABAZZ v CLAGUE (GORDON-SHABAZZ v SONG), No. 95576; Court of Appeals No. 133458.

LEVIN and MALLETT, JJ. We would grant leave to appeal.

PEOPLE v MYRON TAYLOR, No. 95668; Court of Appeals No. 126848.

LEVIN and BRICKLEY, JJ. We would grant leave to appeal.

THE GILLETTE COMPANY v DEPARTMENT OF TREASURY, No. 96793; reported below: 198 Mich App 303.

MALLETT, J. I would grant leave to appeal.

Reconsideration denied July 29, 1994.

MALLETT, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

COHENS v DEPARTMENT OF CORRECTIONS, No. 97397; Court of Appeals No. 162955.

CAVANAGH, C.J., and LEVIN, J. We would remand to the Court of Appeals for consideration as on leave granted.

AUTO CLUB INSURANCE ASSOCIATION v BLOSSOM, No. 97423; Court of Appeals No. 137150.

LEVIN, J. I would grant leave to appeal.

KINTIGH v ABBOTT PHARMACY, No. 97449; reported below: 200 Mich App 92.

LEVIN, J. I would grant leave to appeal.

SIMMONS v APEX DRUG STORES, INC, No. 97561; reported below: 201 Mich App 250.

ROSS v GENERAL MOTORS CORPORATION, No. 97604; Court of Appeals No. 161788.

PEOPLE v CARY, No. 98598; Court of Appeals No. 169582.

BOYLE and RILEY, JJ. We would grant leave to appeal.

PEOPLE v CATOR JOHNSON, No. 98665; Court of Appeals No. 140771.

PEOPLE v GOW, No. 98702; reported below: 203 Mich App 94.

BOYLE and RILEY, JJ. We would grant leave to appeal.

In re MCGINNIS (DEPARTMENT OF SOCIAL SERVICES v MCGINNIS), No. 98831; Court of Appeals No. 156764.

Interlocutory Appeals

Leave to Appeal Denied April 19, 1994:

KEREKES v JOHNNY'S, INCORPORATED and KEREKES v URBAN, Nos. 97591, 97592; Court of Appeals Nos. 133255, 136777.

BOYLE, RILEY, and GRIFFIN, JJ. We would grant leave to appeal.

In re NAPHIER v KUFFA, No. 97628; Court of Appeals No. 139534.

RILEY, J. I would grant leave to appeal.

Reconsideration Granted April 20, 1994:

BUCZKOWSKI v ALLSTATE INSURANCE COMPANY, No. 96036. On reconsideration, leave to appeal is granted. Leave to appeal was denied

October 1, 1993, 444 Mich 863. Reported below: (*On Rehearing*) 198 Mich App 276.

Leave to Appeal Granted April 20, 1994:

BERTRAND v ALAN FORD, INC, No. 96603; Court of Appeals No. 158355.

BAHR v HARPER-GRACE HOSPITALS, Nos. 96660, 96661. Leave to cross appeal is also granted. Reported below: 198 Mich App 31.

AUTO CLUB GROUP INSURANCE COMPANY v MARZONIE, No. 96828; Court of Appeals No. 132237.

MICHIGAN *ex rel* WAYNE COUNTY PROSECUTOR v BENNIS, No. 97339; reported below: 200 Mich App 670.

BOYLE, RILEY, and GRIFFIN, JJ. We would grant the motion to stay precedential effect.

PEOPLE v HICKS, No. 97552. The case is to be argued and submitted with *People v Bellew,* No. 98753. Reported below: 201 Mich App 197.

SIMKO v BLAKE, No. 97579; reported below: 201 Mich App 191.

GROSS v GENERAL MOTORS CORPORATION, Nos. 98045, 98046. The case is to be argued and submitted with *McLain v General Motors Corp,* No. 98806. Reported below: 199 Mich App 620.

PEOPLE v TIMS, No. 98192; reported below: 202 Mich App 335.

PEOPLE v REEVES, No. 98452; reported below: 202 Mich App 706.

PEOPLE v BELLEW, No. 98753. The case is to be argued and submitted with *People v Hicks,* No. 97552. Court of Appeals No. 157434.

MCLAIN v GENERAL MOTORS CORPORATION, No. 98806. The case is to be argued and submitted with *Gross v General Motors Corp,* Nos. 98045, 98046. Court of Appeals No. 170235.

Leave to Appeal Denied April 20, 1994:

NOVOTNEY v BURGER KING CORPORATION, No. 96695; reported below: (*On Remand*) 198 Mich App 470.

LEVIN and MALLETT, JJ. We would hold this case in abeyance pending the decision in *Bertrand v Alan Ford, Inc,* No. 96603.

Reconsideration denied July 29, 1994.

LEVIN, J. I would grant reconsideration and hold in abeyance pending decision in *Bertrand v Allen Ford, Inc,* No. 96603, or grant leave to appeal.

Summary Dispositions April 26, 1994:

PEOPLE v BROOMFIELD, No. 97287. In lieu of granting leave to appeal, and in light of the prosecution's confession of error, the case

is remanded to the trial court for resentencing pursuant to MCL 333.7413(2); MSA 14.15(7413)(2). MCR 7.302(F)(1). Court of Appeals No. 138490.

PEOPLE v THOMAS FERGUSON, No. 97569. In lieu of granting leave to appeal, on the basis of the unique circumstances of this case, the case is remanded to the Saginaw Circuit Court to permit defendant to withdraw his guilty plea and for further proceedings. MCR 7.302(F)(1). Court of Appeals No. 152070.

Reconsideration denied June 28, 1994.

Leave to Appeal Denied April 26, 1994:

ADAMSKI v COLE, No. 95916; reported below: 197 Mich App 124.

PEOPLE v MURAD, No. 97141; Court of Appeals No. 135767.

LEVIN and MALLETT, JJ. We would grant leave to appeal.

PEOPLE v DUNLAP, No. 97259; Court of Appeals No. 139939.

LEVIN, J. I would grant leave to appeal to review the sentence.

PEOPLE v MCGEE-BEY, No. 97281; Court of Appeals No. 149636.

PEOPLE v BULLOCK, No. 97284; Court of Appeals No. 150320.

PEOPLE v JOHN CAIN, No. 97358; Court of Appeals No. 136429.

CAVANAGH, C.J., and LEVIN and BRICKLEY, JJ. We would grant leave to appeal to review the sentence.

PEOPLE v NICHOLS, No. 97365; Court of Appeals No. 146910.

CAVANAGH, C.J., and LEVIN, J. We would remand for resentencing per the dissenting opinion in the Court of Appeals.

BRICKLEY, J. I would grant leave to appeal.

PEOPLE v RIOS, No. 97379; Court of Appeals No. 125655.

LEVIN, J. I would grant leave to appeal.

PEOPLE v HADDAD, No. 97390; Court of Appeals No. 133632.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal for the reasons stated in Justice LEVIN's dissenting statement in *People v Fluker,* 442 Mich 891, 892-893 (1993).

PEOPLE v ANTHONY REED, No. 97416; Court of Appeals No. 136730.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal for the reasons stated in Justice LEVIN's dissenting statement in *People v Fluker,* 442 Mich 891, 892-893 (1993).

FARRELL v FORD MOTOR COMPANY, No. 97420; reported below: 199 Mich App 81.

CAVANAGH, C.J., and BOYLE and MALLETT, JJ. We would grant leave to appeal.

Reconsideration denied September 2, 1994.

PEOPLE v BRADSHAW, No. 97447; Court of Appeals No. 141536.

PEOPLE v BERNIE SCOTT, No. 97487; Court of Appeals No. 128685.

BRICKLEY, J. I would grant leave to appeal.

PEOPLE v MCCULLOUGH, No. 97603; Court of Appeals No. 133680.

LEVIN and BRICKLEY, JJ. We would remand this case to the trial court for an evidentiary hearing under *People v Ginther,* 390 Mich 436 (1973).

PEOPLE v TALVEST ALLEN, No. 97610; reported below: 201 Mich App 98.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

Reconsideration denied July 29, 1994.

LEVIN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v LARRY TAYLOR, No. 97622; Court of Appeals No. 150284.

CAVANAGH, C.J., and LEVIN, J. We would remand for resentencing on the basis of *People v Moore,* 432 Mich 311 (1989).

HAMILTON v RUBENSTEIN, No. 97629; Court of Appeals No. 135997.

ZENKER v BARNES GROUP, INC, No. 97639; Court of Appeals No. 134870.

RILEY, J. I would grant leave to appeal.

BOMIA v GENERAL MOTORS CORPORATION, No. 97659; Court of Appeals No. 162349.

NORTHERN ABSTRACT AND TITLE COMPANY v JACOBS, No. 97663; Court of Appeals No. 144014.

JONES v GENERAL MOTORS CORPORATION, No. 97690; Court of Appeals No. 162580.

In re OBARZANEK (DEPARTMENT OF SOCIAL SERVICES v TAYLOR), No. 98813; Court of Appeals No. 162648.

Leave to Appeal Granted April 27, 1994:

PEOPLE v ROBERTS, No. 96756. The issue is limited to whether the Bay Circuit Court erred reversibly when it refused to permit the defense to introduce the preliminary examination testimony of a witness who, it was claimed, had become unavailable due to lack of memory. Court of Appeals No. 132355.

Reconsideration Granted April 27, 1994:

RICHARDS v ROCKWELL INTERNATIONAL, No. 96069. On reconsideration, the Supreme Court's order of October 19, 1993, is vacated, and

the application for leave to appeal is granted. Leave to appeal was denied at 444 Mich 865. Court of Appeals No. 144365 (on remand).

Summary Dispositions April 29, 1994:

TALBOT v HIGHLAND SUPERSTORES, INC, No. 97919. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)* (current Court of Appeals No. 166767). See also *Charbonneau v General Motors Corp* (current Court of Appeals Docket No. 169929). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 161684.

VINCI v DAVIS COLLISION SERVICES, No. 98035. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)* (current Court of Appeals No. 166767). See also *Charbonneau v General Motors Corp* (current Court of Appeals Docket No. 169929). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 164182.

LECH v GENERAL MOTORS CORPORATION, No. 98092. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)* (current Court of Appeals No. 166767). See also *Charbonneau v General Motors Corp* (current Court of Appeals Docket No. 169929). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 162632.

RYAN v GRACE CONVALESCENT NURSING HOME, No. 98198. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)* (current Court of Appeals No. 166767). See also *Charbonneau v General Motors Corp* (current Court of Appeals Docket No. 169929). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 164107.

HAYES v BROOKS FOUNDRY, No. 98287. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)* (current Court of Appeals No. 166767). See also *Charbonneau v General Motors Corp* (current Court of Appeals Docket No. 169929). MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 161422.

PEOPLE v PONDER, No. 98950. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 171100.

Leave to Appeal Denied April 29, 1994:

JAWOR v HUEBNER, No. 96900; Court of Appeals No. 158745.

PEOPLE v DANIEL BROWN, No. 97168; Court of Appeals No. 141368.

LEVIN, J. I would grant leave to appeal

Defendant, Daniel Brown, driving while intoxicated, killed two persons in a head-on collision. I would grant leave to appeal to consider whether there was sufficient evidence to support his conviction of second-degree murder.

I

On the evening of December 16, 1988, Brown met friends at a bowling alley in Sterling Heights. Over the course of five hours, Brown and his friends consumed a number of pitchers of beer.

Brown left the bowling alley at approximately 1:00 A.M. and attempted to drive home. Brown was traveling west on I-696. Brown stopped his vehicle, made a U-turn, and began traveling east in the westbound lane of I-696. A witness testified at the preliminary examination that Brown's vehicle was swerving. She estimated that Brown was driving below the speed limit.

After traveling in the wrong direction for about two miles, Brown encountered an Oldsmobile traveling west. Brown collided head-on with the Oldsmobile, and the driver and a passenger were killed.

Police officers testified that Brown smelled of alcohol, that his eyes appeared bloodshot, and a test revealed that he had a blood alcohol level of 0.25 percent.

Brown was charged with, and after preliminary examination was bound over for trial on, two counts of second-degree murder. Brown moved to quash the information on the ground that the evidence established no more than involuntary manslaughter. The motion was denied.

Brown pleaded nolo contendere to the two counts of second-degree murder, and was ultimately sentenced to serve two concurrent terms of eight to twenty years.[1] The Court of Appeals affirmed.[2]

II

In 1991, the Legislature amended the Motor Vehicle Code to provide that a person who operates a motor vehicle under the influence of intoxicating liquor and causes the death of another person is guilty of a felony punishable by imprisonment for not more than

[1] Brown was twenty-five years old. He was a college graduate with a degree in engineering. He had no prior criminal record.

[2] Brown relied on case law holding that a plea of guilty or nolo contendere does not preclude a claim that there was insufficient evidence to support a conviction. *Guilty Plea Cases,* 395 Mich 96, 129 (1975); *People v Haack,* 396 Mich 367, 376-377 (1976); *People v White,* 411 Mich 366, 381-382 (1981).

fifteen years.[3] The enactment of this legislation suggests that it was not thought that evidence that a person was driving while intoxicated was in itself sufficient to establish the element of malice requisite to a conviction of second-degree murder.

The Legislature,[4] the Secretary of State,[5] and the media[6] understood that the 1991 legislation increased the penalties for drunk

[3] 1991 PA 98, amending MCL 257.625; MSA 9.2325.

Earlier pertinent Penal Code provisions are:

MCL 750.321; MSA 28.553

> Sec. 321. Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court.

MCL 750.324; MSA 28.556

> Sec. 324. Any person who, by the operation of any vehicle upon any highway or upon any other property, public or private, at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than $2,000.00, or by both such fine and imprisonment.

MCL 750.325; MSA 28.557

> Sec. 325. The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter, it may render a verdict of guilty of negligent homicide.

MCL 750.326; MSA 28.558

> Sec. 326. In any prosecution under the 2 next preceding sections, whether the defendant was driving at an immoderate rate of speed shall not depend upon the rate of speed fixed by law for operating such vehicle.

[4] A 1991 Senate Fiscal Agency analysis of the proposed drunk driving reforms that were eventually enacted into law explained that the bills "would send a message that drunk drivers will be handled severely in the State of Michigan," Senate Fiscal Agency, Bill Analy-

driving and, more specifically, increased the punishment for causing another person's death while driving intoxicated. The *Detroit Free Press* reported, two days after the 1991 legislation became effective, "[p]unishments are *stiffer* for drivers who kill somebody or cause serious injury while drunk."[7]

Brown's conviction of second-degree murder, a crime punishable by a sentence of life in prison,[8] appears inconsistent with the apparent legislative view that, before the enactment of the 1991 legislation, a drunk driver was not subject to imprisonment for more than fifteen years.[9]

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sis of Senate Bill 314 & 315 of 1991, p 5, September 5, 1991; the House Legislative Analysis similarly observed that the proposed legislation "focuse[d] on stronger sanctions and closing loopholes . . . ." House Legislative Analysis Section, Third Analysis of House Bills 4827 & 4828 of 1991, p 6, August 14, 1991.

[5] In 1992, Secretary of State Richard Austin looked back on the recently enacted drunk driving legislation, and said, " 'A year ago we were hoping to tighten our drunk-driving laws. We made good on that!' " Laitner, "Secretary of State Seeks Stricter Seat-Belt Law," *Detroit Free Press*, February 20, 1992, p 1D.

[6] An article that appeared in the *Detroit Free Press* two days after the new law went into effect contained the following passage:

> At work, at home,—and of course at the bar—everybody has been buzzing about Michigan's bold new drunken driving LAW, among the toughest in the nation. The LAW makes it easier for people to be punished for DRIVING DRUNK—and more difficult for convicted drunk drivers to keep their licenses. [Kovanis, "New Laws For Drunk Drivers Draw Some Sharp Responses," *Detroit Free Press*, January 3, 1992, p 3F.]

[7] *Id.* (emphasis added).

[8] MCL 750.317; MSA 28.549.

[9] The Legislature did not, in 1991, intend to lessen the penalties for killing a person while driving intoxicated.

In *Blackwell v State*, 34 Md App 547, 554; 369 A2d 153 (1977), the court held that in enacting the specific offense of manslaughter by automobile, the legislature intended to "pre-empt the subject matter of unintended homicides resulting from the operation of a motor vehicle."

Although a prosecutor has broad discretion in deciding what offenses to charge, *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683 (1972), "[i]f [two] statutes prohibit the same conduct, the specific statute, enacted subsequent to the more general statute, prevails." *People v Chappelle*, 114 Mich App 364, 367 (1982), citing *People v LaRose*, 87 Mich App 298, 302 (1978), and *People v McFadden*, 73 Mich App 232, 235 (1977).

See also *State v Blevins*, 40 NM 367; 60 P2d 208 (1936), where the court held that a conviction of selling neat cattle belonging to another under a general statute that penalized selling goods of another was

The *Detroit Free Press* explained that the bills that eventually became the new drunk driving laws were "the carefully crafted result of two years of talks with a coalition whose members often don't see eye to eye—police, prosecutors, state officials, judges, citizen groups, insurers, substance abuse experts and church leaders."[10] This broad-based coalition did not draft a bill that classified the killing of a person in a drunk driving accident as murder. Rather, they classified this act as a crime less than murder. It is apparent that it was not thought that a person who accidentally kills another in a drunk driving accident is a murderer.

It appears that until recently, drunk drivers who killed someone were charged with involuntary manslaughter or negligent homicide.[11]

III

The question whether a drunk driver who kills another person may be convicted of second-degree murder is worthy of this Court's attention. There is a split of authority among other state courts on the issue whether driving drunk manifests such a gross disregard for human life that a drunk driver who kills another person can be said to have acted with malice, an essential element of murder.

A number of courts take the view that a drunk driver who kills another person may be said to have acted with malice where he drove recklessly while intoxicated and was involved in an accident in which

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not sustainable in view of a statute punishing theft or sale of animals of another including neat cattle.

[10] Boyle, "Engler's Help Sought to Pass Rigid Drunken Driving Package," *Detroit Free Press,* December 1, 1990, p 3A.

[11] See n 3.

In *People v Townsend,* 214 Mich 267, 272 (1921), this Court explained that it was a purpose of the provision of the Penal Code providing for the offense of *manslaughter* to deter drunk driving and punish drunk drivers:

> The purpose of the statute is to prevent accidents and preserve persons from injury, and the reason for it is that an intoxicated person has so befuddled and deranged and obscured his faculties of perception, judgment and recognition of obligation toward his fellows as to be a menace in guiding an instrumentality so speedy and high-powered as a modern automobile.

Other cases indicating that a drunk driver who killed another person was ordinarily charged with negligent homicide or involuntary manslaughter are *People v Beauchamp,* 260 Mich 491 (1932) (negligent homicide); *People v Layman,* 299 Mich 141 (1941) (involuntary manslaughter); *People v Rettelle,* 173 Mich App 196 (1988) (involuntary manslaughter); *People v Thinel,* 160 Mich App 450 (1987) (involuntary manslaughter).

a person was killed. The Alabama Court of Criminal Appeals affirmed a murder conviction where a drunk driver hit a pedestrian who was attending to a flat tire of a vehicle that was parked three feet off the road. *Commander v State,* 374 So 2d 910 (Ala Crim App, 1978).[12] Other courts have found the requisite malice where a defendant, aware that he would have to drive home, became drunk the Supreme Court of Tennessee said:

> It is inconceivable that a man can get as drunk as [the defendant] was on that occasion without previously realizing that he would get in that condition if he continued to drink. But he did continue to drink and presumably with knowledge that he was going to drive his car back to, or close to, Lebanon over this heavily traveled highway. He knew, of course, that such conduct would be directly perilous to human life. From his conduct in so doing, it was permissible for the jury to imply "such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice." [*Edwards v State,* 202 Tenn 393, 398; 304 SW2d 500 (1957).]

Other state supreme courts have held, however, that drinking, driving recklessly, and killing another person cannot alone establish the malice necessary to support a conviction of murder. In *Essex v Commonwealth,* 228 Va 273; 322 SE2d 216 (1984), the Virginia Supreme Court rejected the reasoning of the Tennessee Supreme Court in *Edwards.* The court held that malice could not be inferred from the act of drinking and then driving recklessly, and said:

> Some courts reason that one who deliberately drives a car to a place remote from home for the purpose of drinking, knowing that he will have to drive home under the influence of alcohol, then, after becoming intoxicated, drives recklessly, thereby acts so wantonly, and with such a disregard of human life as to supply an inference of malice. See, e.g., *People v Watson,* 30 Cal 3d 290; 179 Cal Rptr 43; 637 P2d 279 (1981). We do not think the premises support the conclusion reached. [*Essex,* 228 Va 283, n 3.]

In *State v Jensen,* 197 Kan 427, 445; 417 P2d 273 (1966), the Kansas Supreme Court held that driving drunk was not sufficient evidence of malice, and said:

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[12] See also *Commonwealth v Taylor,* 461 Pa 557, 563-564; 337 A2d 545 (1975) (finding malice based on "[t]he intoxicated condition of the driver, the excessive rate of speed which he was travelling, the distance the bodies and bicycles were propelled upon impact, his awareness that this was an area where children were likely to traverse, [and] the absence of any physical or climatic condition which could explain or contribute to the happening of the accident"); *United States v Fleming,* 739 F2d 945 (CA 4, 1984) (finding malice where the defendant became intoxicated and drove recklessly).

> [W]e hold the fact the defendant[13] was driving while under the influence of intoxicating liquor without more being shown, is not sufficient of itself to support an implication of malice as a matter of law. . . .
>
> While voluntary intoxication does not relieve one driving an automobile from his responsibility to care for others, we are of the opinion the record fails to show that McMurray's death was occasioned by some degree of deliberation, wickedness of disposition, an evil design in general, the dictate of a heart regardless of social duty and fatally bent upon mischief on the part of Jensen, to imply malice in law to the act causing the death.[14]

This Court has not addressed the issue whether a person who knowingly becomes intoxicated, drives recklessly, and kills another person has acted with malice. In *People v Townsend,* 214 Mich 267, 272 (1921), the defendant became intoxicated and then killed another person in an automobile accident. This Court affirmed the defendant's conviction of involuntary manslaughter—which does not require a showing of malice—yet recognized that a driver who becomes intoxicated is a "menace" to others.

I would grant leave to appeal.

CAVANAGH, C.J. I concur in the statement of LEVIN, J.

Reconsideration denied December 20, 1994.

LEVIN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal, for the reasons stated in the order of April 29, 1994, *supra* at 866-871.

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[13] The defendant drove erratically and weaved back and forth between the lanes a number of times after consuming a substantial amount of alcohol. *Id.* at 429.

[14] See also *Freeman v State,* 114 Tex Crim 624, 628; 27 SW2d 162 (1930), in which the court held that malice cannot be inferred from the act of drinking and driving recklessly, and said:

> It seems difficult to conceive of a sane man, not desirous of suicide, intentionally colliding with the car of another, even though a lighter one, and especially when both cars are meeting at great speed. The occurrence here was most deplorable, and reckless car driving upon highways is a practice deserving condemnation, but we can only try and sentence a citizen to penal servitude upon a showing that he has violated some written law of the land. This man could not be given a greater penalty for murder than five years, unless and until the State both alleges and proves a killing upon malice aforethought, which was not done in this case.

In this connection I note that Brown, as well as the unfortunate driver and passenger of the other automobile, was involved in the head-on collision. There is no reason to suppose that he deliberately put himself, as well as others, in harm's way.

CALCUTT v HARPER-GRACE HOSPITALS, No. 97465; Court of Appeals No. 119430.

BOYLE, J. I would grant leave to appeal.

Reconsideration denied October 18, 1994.

BOYLE and MALLETT, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v SINADINOS, No. 97582; Court of Appeals No. 159112.

MUTUAL BENEFIT LIFE INSURANCE COMPANY v HUNTER'S SQUARE LIMITED PARTNERSHIP, No. 97619; Court of Appeals No. 140325.

PEOPLE v TOMMY MARTIN, No. 97637. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 161267.

PEOPLE v HUSAIN, No. 97658; Court of Appeals No. 125235.

PEOPLE v FREDDY GIBSON, No. 97703; Court of Appeals No. 148049.

MITHRANDIR v DEPARTMENT OF CORRECTIONS, No. 97743; Court of Appeals No. 136967. Reconsideration denied July 29, 1994.

BURTIS v MCDONALD FORD SALES, INC, No. 97762; Court of Appeals No. 162352.

PEOPLE v BERRY, No. 97776; Court of Appeals No. 128535.

PEOPLE v ANDREW GRAHAM, No. 97850; Court of Appeals No. 125297.

ROOF v MCLAREN GENERAL HOSPITAL, INC, No. 97854; Court of Appeals No. 164639.

PEOPLE v WATERS, No. 97856; Court of Appeals No. 137486.

PEOPLE v NORTH, No. 97886; Court of Appeals No. 129285.

PEOPLE v HENDRICKSON, No. 97891; Court of Appeals No. 137721.

PEOPLE v JAMES PERSHING DAVIS, No. 97893. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 160452.

Reconsideration denied July 29, 1994.

PEOPLE v BURKS, No. 97894; Court of Appeals No. 148784.

PEOPLE v RICKY TURNER, No. 97895. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 159984.

Reconsideration denied June 28, 1994.

PEOPLE v TOMMY SMITH, No. 97897; Court of Appeals No. 157229.

PEOPLE v DAMON PERRY, No. 97901; Court of Appeals No. 139388.

PEOPLE v DALE MCNEIL, No. 97902; Court of Appeals No. 138819.

PEOPLE v HOWARD, No. 97903. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 164840.

PEOPLE v MICHAEL STANLEY, No. 97905; Court of Appeals No. 133285.

PEOPLE v PENNY, No. 97910; Court of Appeals No. 131907.

POPIELARZ v GENERAL MOTORS CORPORATION, No. 97917; Court of Appeals No. 162757.

AUTO-OWNERS INSURANCE COMPANY v BULLA, No. 97924; Court of Appeals No. 157445.

PEOPLE v LEAVELLS, No. 97925; Court of Appeals No. 139439.

ALLEN v KNOLL, Nos. 97928, 98807; Court of Appeals No. 166248. The appellees' motion to dismiss and assess damages pursuant to MCR 7.316(D) is denied. Court of Appeals No. 166248.

JACKSON v MICHIGAN BELL TELEPHONE COMPANY, No. 97932; Court of Appeals No. 145859.

O'NEAL-EL v DEPARTMENT OF CORRECTIONS, No. 97940; Court of Appeals No. 161675.

PEOPLE v CARDONA, No. 97944; Court of Appeals No. 148475.

EASTRIDGE v NORTH POINTE INSURANCE COMPANY, No. 97946; Court of Appeals No. 166949.

PEOPLE v PIERCE, No. 97948. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 161952.

PEOPLE v VASSER, No. 97958; Court of Appeals No. 137489.

PEOPLE v MICHAEL NEAL, No. 97963; Court of Appeals No. 155165.

PEOPLE v CLINTON MOORE, No. 97964; Court of Appeals No. 146951.

VERBISON v AUTO CLUB INSURANCE ASSOCIATION, No. 97975; reported below: 201 Mich App 635.

PEOPLE v DALLAS, No. 97987; Court of Appeals No. 133074.

PEOPLE v HEIDEN, No. 98018; Court of Appeals No. 145846.

KOPP v HAMOND YELLOW COACH LINES, No. 98023; Court of Appeals No. 150639.

RILEY and GRIFFIN, JJ. We would grant leave to appeal.

PEOPLE v CHRISTOPHER TODD TAYLOR, No. 98024; Court of Appeals No. 132036.

PEOPLE v DIETZ, No. 98027; Court of Appeals No. 148043.

PEOPLE v HENNRICK, Nos. 98038, 98039; Court of Appeals No. 119385, 135453.

LOGAN v MAC CASTING CORPORATION, No. 98040; Court of Appeals No. 162598.

PEOPLE v MOSS, No. 98042; Court of Appeals No. 135951.

PEOPLE v DANIEL GUTHRIE, No. 98043; Court of Appeals No. 138679.

PEOPLE v SANCHEZ, No. 98044; Court of Appeals No. 139580.

PEOPLE v SHEKO, No. 98048; Court of Appeals No. 150963.

PROGRAIS v CITY OF DETROIT, No. 98049; Court of Appeals No. 160387. Reconsideration denied June 28, 1994.

PEOPLE v PEOPLES, No. 98058; Court of Appeals No. 146943.

PEOPLE v SIMON, No. 98065; Court of Appeals No. 122733.

PEOPLE v MIZELL, No. 98069. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 163361.

Reconsideration denied July 29, 1994.

LANG v TREANOR, No. 98070; Court of Appeals No. 167320.

PEOPLE v KURI TURNER, No. 98080; Court of Appeals No. 137004.

DUDZINSKI v CITY OF LIVONIA, No. 98089; Court of Appeals No. 165992. Reconsideration denied June 28, 1994.

PEOPLE v RONNIE M JOHNS No 1, No. 98101; Court of Appeals No. 164876.

PEOPLE v ROUMPH, No. 98102; Court of Appeals No. 145816.

PEOPLE v ALVIN HARRIS, No. 98107; Court of Appeals No. 133435.

PEOPLE v BEKAERT, No. 98109; Court of Appeals No. 119820.

WARD v FLORISTS TRANSWORLD DELIVERY, No. 98111; Court of Appeals No. 163578.

PEOPLE v BOBBY ALLEN, No. 98116. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 163204.

PEOPLE v CROOK, No. 98117; Court of Appeals No. 131314.

PEOPLE v HEARD, No. 98119; Court of Appeals No. 143373.

PEOPLE v BARTON, No. 98120; Court of Appeals No. 156224.

PEOPLE v WOODS, No. 98124; Court of Appeals No. 166753.

PEOPLE v FLORES, No. 98126; Court of Appeals No. 142590.

JOHNSON v REED, No. 98129; Court of Appeals No. 142313.

STANLEY ESTATE v STANLEY, No. 98130; Court of Appeals No. 140861.

PEOPLE v VREELAND, No. 98132; Court of Appeals No. 151859.

FRASURE v DAKO INDUSTRIES, INC, No. 98139. The sixty days referred to in the Court of Appeals opinion runs from the date of this order. Court of Appeals No. 138913.

PEOPLE v MARCELLO FLOWERS, No. 98141; Court of Appeals No. 140698.

PEOPLE v MARK JOHNSON, No. 98144; Court of Appeals No. 138441.

PEOPLE v CATCHINGS, No. 98146; Court of Appeals No. 144172.

PEOPLE v YOUNAN, No. 98147; Court of Appeals No. 144426.

PEOPLE v CLARK, Nos. 98149, 98150; Court of Appeals Nos. 135918, 135940.

PEOPLE v JAMES CURRY, No. 98152. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165125.

PEOPLE v FOX, No. 98153; Court of Appeals No. 133425.

PEOPLE v DUNHAM-BEY, No. 98154. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165255.

PEOPLE v STANLEY NELSON, No. 98155; Court of Appeals No. 165602. Reconsideration denied July 29, 1994.

PEOPLE v DELGADILLO, No. 98157; Court of Appeals No. 145381.

PEOPLE v NEWSON, No. 98158; Court of Appeals No. 135776.

PEOPLE v WAYBERRY, No. 98162; Court of Appeals No. 149255.

PEOPLE v BRIDGETTE SMITH, No. 98165; Court of Appeals No. 140667.

PEOPLE v VICTOR WILLIAMS, No. 98167; Court of Appeals No. 141518.

PEOPLE v DONALD MALLORY, No. 98168. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165128.

PEOPLE v ORTIZ, No. 98170; Court of Appeals No. 132829.

PEOPLE v WOOD, No. 98174; Court of Appeals No. 140343. Reconsideration denied June 28, 1994.

PEOPLE v HOWZE, No. 98176; Court of Appeals No. 120704. Reconsideration denied July 29, 1994.

PEOPLE v SIERRA-ROMERO, No. 98177; Court of Appeals No. 142553.

PEOPLE v CHARITY, No. 98179; Court of Appeals No. 140773.

PEOPLE v BLAKE, No. 98181; Court of Appeals No. 145669.

PEOPLE v LUCEY, No. 98183; Court of Appeals No. 149504. Reconsideration denied July 29, 1994.

PEOPLE v TYTAR, No. 98185; Court of Appeals No. 129258.

PEOPLE v MCCURDY, No. 98186; Court of Appeals No. 128729.

PEOPLE v RONNIE JOHNS, No. 98187; Court of Appeals No. 161958.

PEOPLE v ANTHONY, No. 98188; Court of Appeals No. 156004.

PEOPLE v ANDREW CARTER, No. 98189. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166866.

PEOPLE v JESSIE JOHNSON, No. 98190; Court of Appeals No. 160729.

SHARP v TALSMA, No. 98191; reported below: 202 Mich App 262.

PEOPLE v MANN, No. 98196; Court of Appeals No. 149954.

PEOPLE v RONALD JOHNSON, No. 98203. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166165.

PEOPLE v HENSLEY, No. 98208; Court of Appeals No. 141568.

PEOPLE v SAMUEL SMITH, No. 98217; Court of Appeals No. 133434.

PEOPLE v COOPER, No. 98218; Court of Appeals No. 145425.

PEOPLE v JEFFERSON, No. 98223; Court of Appeals No. 131772 (after remand).

PEOPLE v BOWMAN, No. 98224. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 167397.

PEOPLE v DIAMOND, No. 98227; Court of Appeals No. 114016.

PEOPLE v MILES, No. 98228; Court of Appeals No. 137518.

PEOPLE v HOLLEY DAVIS, No. 98230. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165610.

PEOPLE v MITCHELL, No. 98234; Court of Appeals No. 142209.

PEOPLE v DRAKE, No. 98236; Court of Appeals No. 138014.

PEOPLE v DOMINIQUE JONES, No. 98237; Court of Appeals No. 148763.

PEOPLE v MONTGOMERY, Nos. 98240, 98241; Court of Appeals Nos. 146648, 146688.

PEOPLE v UNDRA ANDERSON, No. 98243; Court of Appeals No. 138846.

PEOPLE v MARIO HENDERSON, No. 98244; Court of Appeals No. 136746.

PEOPLE v BATEMAN, No. 98247; Court of Appeals No. 110403.

PEOPLE v WILKIE, No. 98248; Court of Appeals No. 153178.

PEOPLE v KHOURY, No. 98249. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165063.

PEOPLE v CALHOUN, No. 98250; Court of Appeals No. 138607.

PEOPLE v JOINER, No. 98251; Court of Appeals No. 152733.

PEOPLE v WELLS, No. 98252; Court of Appeals No. 142559.

PEOPLE v DAVID MARTIN, No. 98253; Court of Appeals No. 139581.

PEOPLE v GUNN, No. 98254; Court of Appeals No. 147055.

PEOPLE v KINNIE, No. 98255; Court of Appeals No. 138531.

GOODROW v SWIFT-ECKRICH, INC, No. 98257; Court of Appeals No. 142040.

GRIFFIN, J. I would reverse this case for the reasons stated by the dissenting Court of Appeals judge.

PEOPLE v LARRY CROCKETT, No. 98264. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165601.

PEOPLE v GREGORY TERRY, No. 98265. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166381.

Reconsideration denied July 29, 1994.

PEOPLE v DALE CARTER, No. 98276; Court of Appeals No. 136585.

PEOPLE v ANTHONY TURNER, No. 98277; Court of Appeals No. 133580.

MORTON v DEPARTMENT OF CORRECTIONS, No. 98280; Court of Appeals No. 162652.

PEOPLE v GOLCAR NO 1, No. 98285; Court of Appeals No. 143752.

PEOPLE v PLATER, No. 98286; Court of Appeals No. 134318.

PEOPLE v MCCLINTON, No. 98289; Court of Appeals No. 153684.

PEOPLE v APPLING, No. 98290; Court of Appeals No. 138616.

PEOPLE v PUTNAM, No. 98291; Court of Appeals No. 133763.

PEOPLE v LEON, No. 98294; Court of Appeals No. 136407.

PEOPLE v GOINES, No. 98296; Court of Appeals No. 150023.

PEOPLE v JAMES MARTIN, No. 98304; Court of Appeals No. 140684.

JOHNSON v DEPARTMENT OF CORRECTIONS, No. 98305; Court of Appeals No. 164419.

PEOPLE v LANSTRA, No. 98308; Court of Appeals No. 145802.

PEOPLE v DONNELL CARTER, No. 98322; Court of Appeals No. 135087.

PEOPLE v HUGUELY, No. 98324; Court of Appeals No. 156861.

PEOPLE v JIMMY BRITT, No. 98329; Court of Appeals No. 148003. Reconsideration denied June 28, 1994.

PEOPLE v CADY, No. 98330; Court of Appeals No. 134599.

WILLIAMS v DEPARTMENT OF CORRECTIONS, No. 98331; Court of Appeals No. 163956.

O'NEILL v O'NEILL, No. 98335; Court of Appeals No. 149318.

PEOPLE v ARMSTRONG, No. 98336; Court of Appeals No. 144174.

PEOPLE v MCCRAY, No. 98349; Court of Appeals No. 145913.

PEOPLE v MCMICHAEL, No. 98354; Court of Appeals No. 139297. Reconsideration denied October 18, 1994.

LEVIN, J. I would direct the appointment of counsel to file on the defendant's behalf a supplemental brief in support of the application for leave to appeal.

PEOPLE v MERRELL, No. 98378; Court of Appeals No. 137566.

PEOPLE v PITTMAN, No. 98387; Court of Appeals No. 140562.

PEOPLE v RONE, No. 98390. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 160178.

PEOPLE v SZCZEPANIUK, No. 98395; Court of Appeals No. 155897.

PEOPLE v MASK, No. 98462; Court of Appeals No. 145711.

PEOPLE v VIRGIL EVANS, No. 98516; Court of Appeals No. 162386.

PEOPLE v HARPER, No. 98927; Court of Appeals No. 136574.

PEOPLE v HUGO MACK, No. 98970; Court of Appeals No. 168150.

PEOPLE v GOLCAR No 2, No. 99260; Court of Appeals No. 143752.

Interlocutory Appeals

Leave to Appeal Denied April 29, 1994:

SAVAGE v SISTERS OF MERCY HEALTH CORPORATION, No. 97884; Court of Appeals No. 166700.

PEOPLE v GAVEL, No. 97990; reported below: 202 Mich App 51. Reconsideration denied June 28, 1994.

WINEGARDNER v OAKLAND COUNTY, No. 98156; Court of Appeals No. 167721.

PEOPLE v FOSTER, No. 98301; Court of Appeals No. 163043.

PEOPLE v HERRING, No. 98373; Court of Appeals No. 154946.

PEOPLE v JACKSON, No. 98973; reported below: 203 Mich App 607.

PEOPLE v JEFFREY JONES, No. 99089; Court of Appeals No. 171928.

Summary Dispositions May 3, 1994:

PEOPLE v KROWL, No. 95343. In lieu of granting leave to appeal, the matter is remanded to the Recorder's Court for a hearing to determine the precise terms of the plea/sentence agreement and for the appointment of new counsel for the defendant. Jurisdiction is retained. Court of Appeals No. 137917.

PEOPLE v MICHAEL EDWARDS, No. 97039. In lieu of granting leave to appeal, that part of the judgments of the Court of Appeals and the Genesee Circuit Court relating to sentencing are vacated, and the case is remanded to the Genesee Circuit Court for reconsideration of the question whether defendant should be sentenced as an adult. MCR 7.302(F)(1). On remand, the court is to order the preparation of one or more psychological reviews and reports, such as those in *People v Dunbar,* 423 Mich 380, 388-389 (1985), and consider the contents before making the court's determination under MCR 6.913(E)(3). This order should not be interpreted as requiring such reports in all cases, but rather is based on the unique facts of this case. Jurisdiction is not retained. Court of Appeals No. 122152.

PEOPLE v MORAIS, No. 97713. In lieu of granting leave to appeal, the defendant's sentence is vacated, and the case is remanded to the Oakland Circuit Court for resentencing for the reasons stated in the dissenting opinion in the Court of Appeals. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 140167.

MIKITAROFF v WAYNE COUNTY, No. 97729. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for considera-

tion as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 162986.

Leave to Appeal Denied May 3, 1994:

MICHIGAN INTRA-STATE MOTOR TARIFF BUREAU, INC v PUBLIC SERVICE COMMISSION, No. 97033. Leave to file a brief amicus curiae is granted. The stay ordered by the Supreme Court on December 22, 1992, is vacated. Reported below: 200 Mich App 381.

LEVIN, J. I would grant leave to appeal.

PEOPLE v CHRISTOPHER ANDRE TAYLOR, No. 97660; Court of Appeals No. 162532.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

PEOPLE v VANDIVER, No. 97673. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 163555.

PEOPLE v WIDGREN, No. 97695; Court of Appeals No. 130099.

LEVIN, J. I would grant leave to appeal.

GOODWILL COMMUNITY CHAPEL v GENERAL MOTORS CORPORATION, No. 97719; reported below: 200 Mich App 84.

AYER v FORD MOTOR COMPANY, No. 97756; reported below: 200 Mich App 337.

BOYLE, GRIFFIN, and MALLETT, JJ. We would grant leave to appeal.

Leave to Appeal Denied May 5, 1994:

PEOPLE v MUNERLYN, No. 97825; Court of Appeals No. 151047.

LEVIN, J. I would grant leave to appeal.

Leave to Appeal Granted May 6, 1994:

PEOPLE v HOUSTON-BEY, No. 96068. Other persons or groups interested in the determination of the appeal may move the Supreme Court for permission to file briefs amici curiae. Court of Appeals No. 117039 (after remand).

ARCO INDUSTRIES CORPORATION v AMERICAN MOTORISTS INSURANCE COMPANY, Nos. 96782-96784; reported below: 198 Mich App 347.

PEOPLE v LEE, Nos. 96876, 96877; Court of Appeals Nos. 149014, 149015.

TURNER v AUTO CLUB INSURANCE ASSOCIATION, Nos. 97016, 97032. The cases are to be consolidated for purposes of filing briefs and appendixes on appeal and presenting oral arguments. Reported below: 198 Mich App 650.

FLETCHER v FLETCHER, No. 97232. Other persons or groups interested in the determination of the appeal may move the Supreme Court for permission to file briefs amici curiae. Reported below: 200 Mich App 505.

MUSSELMAN v GOVERNOR OF MICHIGAN, Nos. 97322, 97915; reported below: 200 Mich App 656 and Court of Appeals No. 166792.

PEOPLE v BAHODA, No. 98041; reported below: 202 Mich App 214.

PEOPLE v MERRIWEATHER No 1, No. 97745. Other persons or groups interested in the determination of the appeal may move the Supreme Court for permission to file briefs amici curiae. Reported below: 201 Mich App 383.

Leave to Appeal Denied May 6, 1994:

PEOPLE v CALL, No. 97481; Court of Appeals No. 140210.

LEVIN, J. I would vacate the judgment of the Court of Appeals and remand to that Court for reconsideration of this appeal.

Because of the inadequacy of the brief on appeal that was filed by William Leo Call's original counsel in the Court of Appeals, he did not receive effective assistance from his appellate counsel. The Court of Appeals should be required to reconsider this appeal and issue a further opinion after allowing further briefing and oral argument from the State Appellate Defender's Office, on behalf of Call, and the Kalamazoo County Prosecutor's Office, on behalf of the prosecutor.

Call was convicted of first-degree criminal sexual conduct and sentenced to serve a term of eight to twenty-two years. Appellate counsel filed a timely appeal and brief with the Court of Appeals. He raised one issue, asserting insufficiency of the evidence, which he explicated in three or four pages. Before the Court of Appeals issued its decision, the lawyer was removed from the appellate assigned counsel roster, on a finding of incompetency, which was affirmed by the Appellate Defender Commission. The lawyer then stipulated the substitution of other appellate counsel.

A month later, April 8, 1993, the State Appellate Defender Office was appointed as appellate counsel. An assistant defender received the file on April 27, 1993. On May 13, approximately two weeks after receiving this assignment, the assistant defender filed a motion requesting leave to file a supplemental brief. The Court of Appeals responded on June 3, 1993, with an order denying the motion and a one sentence decision affirming Call's conviction.

PEOPLE v MERRIWEATHER No 2, No. 97715; reported below: 201 Mich App 383.

Leave to Appeal Denied May 10, 1994:

PEOPLE v BARNEY, Nos. 98912, 98913. Leave to cross appeal is also denied. Court of Appeals Nos. 170736, 170865.

Leave to Appeal Granted May 11, 1994:

PEOPLE v ALBERT REED, No. 96936. The issue is limited to whether defendant has shown cause and prejudice as is required by MCR 6.508(D)(3). Reported below: 198 Mich App 639.

CITIZENS INSURANCE COMPANY OF AMERICA v FEDERATED MUTUAL INSURANCE COMPANY, No. 97159. Leave to cross appeal is also granted. Reported below: 199 Mich App 345.

PEOPLE v UNDERWOOD, No. 97233. The issue is limited to whether defendant was denied due process when the trial court denied his request for the identity and production of the confidential informant who had informed police about another suspect's confession of the crime. Court of Appeals No. 136812.

Leave to Appeal Denied May 12, 1994:

PEOPLE v PATTERSON, No. 97273; Court of Appeals No. 141951.

LEVIN, J. I would grant leave to appeal.

Gerald Patterson was convicted of assault with intent to do great bodily harm less than murder[1] and of possession of a firearm during the commission of a felony.[2] He pleaded guilty of being an habitual offender, third offense,[3] and was sentenced to serve 7½ to twenty years, and two years for felony-firearm.

The convictions arise out of Patterson's shooting of his ex-girlfriend's brother, Randle Jones. Patterson claimed that he acted in self-defense and, alternatively, that the gun discharged accidentally.

The uncontroverted testimony was that Jones was the aggressor, kicking Patterson. Patterson testified that, because of prior threats by Jones, he fled to his bedroom. Jones followed and smashed open the door. Patterson retrieved a gun from underneath a mattress and, as he was emerging from the bedroom, shot Randle in the chest at close range.

The girlfriend, Darlene Danner, was called by the people. She testified that she and Jones went to Patterson's house to retrieve clothing and a television set. She said that Patterson allowed them entry without anger or threats. When she started to take her TV, Patterson said:

> *A.* . . . "Oh, honey, you don't need the TV."
>
> *Q.* [*Prosecutor*]: In the same tone that you're describing . . .
>
> *A.* Yes.
>
> *Q.* . . . right here, the same tone that you're using?

[1] MCL 750.84; MSA 28.279.

[2] MCL 750.227b(2); MSA 28.424(2)(2).

[3] MCL 769.11; MSA 28.1083.

A. Yes.

* * *

Q. Okay, Was there an argument at this point?

A. No.

* * *

Q. And after he said, "Oh, honey, you don't need it," can you tell the jury what happened then?

A. That's when my brother, Jones, jumped and said, "Bitch, she gonna take any motherfucking thing that belongs to her," to Jerry, and he kicked him.

The witness then recounted the sequence of events leading to the shooting.

A. He kicked Patterson.

Q. Okay. Where did he kick him?

A. In his ribs.

* * *

Q. What happened then?

A. That's when Patterson ran out the room, closed the den door. He ran into the bedroom and closed that door.

Q. Okay. What happened then?

A. Then Jones threw the den door open hard enough, put a hole in my[4] den wall, ran into the bedroom, threw that door open in after Patterson.

Q. Did he open up the second door or he threw that one open, in your words?

A. Yes.

Q. And then what happened at that point, please?

A. He went in the bedroom after Patterson.

Q. He went in after Patterson?

A. Right.

* * *

Q. Okay. And what happened then?

---

[4] Patterson and Danner had shared Patterson's apartment for about a year.

A. . . . Jones came out the bedroom still raising sin.

Q. Still doing what now?

A. Arguing at Patterson from the bedroom.

Q. Okay. What happened then?

A. Patterson walked out the bedroom behind Jones.

* * *

Q. Okay. What happens then?

A. That's when he—he asked Jones to leave.

Q. And can you show the members of the jury how—using the same tone and using the same words as much as possible, how did he ask him to leave?

A. He said, "Man, please leave. Please leave my house. Don't make me use this."

Q. Okay. What happened then?

A. Jones told Patterson he had to use it.

Q. I'm sorry. That he had . . .

A. He said, "Bitch, you gonna have to use it."

Q. Okay. What happened then?

A. That's when Jones went towards Patterson and the gun went off.

Q. When you say "the gun went off," you're saying that Mr. Patterson shot Jones?

A. Yes.

Q. Pulled the trigger?

A. Yes.

Danner testified that she first noticed a gun in Patterson's bedroom on December 15. The prosecutor proceeded to ask:

Q. Were you stabbed the week before [by Patterson]?

A. No.

Q. Were you threatened with a knife?

A. No.

Q. Did you ever tell anyone that you were?

A. No.

On re-direct examination, the prosecutor asked the girlfriend to identify "certain scars" on photographs of Patterson's bedroom door apartment. The "scars" appeared to be stab marks. She stated that the door had been damaged before the shooting. Over defense objection, the prosecutor admitted the photographs of a partially destroyed bedroom door. Patterson, in an effort to minimize the damage, testified that he jabbed the door with a knife several times during an argument in which Danner had tried to stab him with a scissors.

The prosecutor then called Danner's daughter, and asked her to tell the jury whether she and Danner had a discussion regarding Patterson stabbing Danner two weeks before Jones was shot. Patterson's lawyer immediately objected. The court instructed the jury that Patterson

> is in no way on trial for having stabbed or cut or any other way engaged in violent conduct towards Darlene Danner. That is not the charge; he's not charged with that; he probably never will be charged with anything arising out of that . . . .
>
> The only value of this testimony will be to shed light on the credibility of Darlene Danner by indicating that she may have at some prior time said something to this witness which is at odds with what she may have said in this courtroom on a point which is not directly relevant to the charge but which is collateral to the charge. So I want the jury to understand that this is not evidence of the guilt of this Defendant in this particular case nor is it being used to establish his guilt of any other crime; it is merely being used to establish that Darlene Danner's credibility may be attacked on this point by way of a prior statement that may be at odds with something she said when she testified here.

The daughter testified that Patterson fought with Danner, and he stabbed her.

Patterson contends that the prosecutor was improperly permitted to impeach on a collateral matter for the purpose of proving Patterson's

violent propensities, contrary to MRE 404(b).[5] The Court of Appeals rejected this argument, stating that Patterson "opened the door" during cross-examination of Jones.[6] The panel's conclusion finds no support in the record. The cross-examination was limited to the following exchange:

> *Q.* [*Defense Counsel*]: Okay. Why did you feel it was necessary to intervene in this conversation and kick Mr. Patterson?
>
> *A.* [*Jones*]: Well, I felt like due to the fact—the problem that they had been having and . . .
>
> *Q.* They were breaking up, correct?
>
> *A.* Yeah, they were breaking up and . . .
>
> *Q.* So you thought it was the right thing to do to kick him in his body somewhere?
>
> *A.* Yes, sir.

Despite the earlier limiting instruction, the trial judge told the jury that they could use evidence of the prior stabbing incidents as substantive evidence. "I think the prosecutor is at liberty to argue that certain facts and circumstances in evidence may characterize a mind set or a method of proceeding in a given set of circumstances." "To the extent that collateral evidence may be helpful in leading us in one direction or another, the parties are at liberty to argue that evidence in this fashion." Instructing the jury, the court stated that prior acts of violence by Patterson could not be used as evidence of Patterson's guilt or innocence. The evidence was to be limited to impeaching Danner's credibility.

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[5] MRE 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The March 1, 1991, amendment deleted "the crime charged" and substituted "the conduct at issue in the case." The rule applies in civil cases, even though it is used more often in criminal cases.

[6] Slip op, p 1.

Prior act evidence is admissible for a proper purpose under MRE 404(b). The evidence must be relevant, and the probative value of the evidence not substantially outweighed by unfair prejudice.[7]

Similarity between the charged and uncharged conduct is not required as set forth in *VanderVliet.* The proponent of similar act evidence must show a "special link or circumstance . . . other than . . . character."[8] Here, there was no link or circumstance other than Patterson's allegedly violent propensity. The prosecutor maintains that Patterson's conduct toward Danner and Jones are "inextricably linked" and as such, necessary and relevant evidence. This reasoning subvert's the meaning and purpose of the rule.

> "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."[9]

The evidence of the alleged stabbing of Danner was irrelevant and prejudicial, and was improperly employed by the prosecutor as substantive evidence to rebut Patterson's theories of self-defense and accident. The cumulative prejudicial effect of the photographs and testimony outweighed the marginal impeachment value of the challenged testimony, diverting the trier of fact from an objective appraisal of defendant's guilt or innocence.

I would, again, grant leave to appeal.

CAVANAGH, C.J. I concur with LEVIN, J., and would grant leave to appeal.

BRICKLEY, J. I would grant leave to appeal.

Summary Dispositions May 13, 1994:

PETERSON AMERICAN CORPORATION v MULTECH, INC, No. 95466. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the judgment of the Berrien Circuit Court is vacated. MCR 7.302(F)(1). The case is remanded to the Berrien Circuit Court for a retrial as to the damage issue addressed in questions 1 and 2 of the jury's special verdict. The Court of Appeals was correct in determining that it was error to allow the jury to learn the contents of the mediation summary. MCR 2.403(J)(4). However, the jury's answers to questions 1 and 2 demonstrate that the error was not harmless.

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[7] *People* v *VanderVliet,* 444 Mich 52 (1993).

[8] *Id.* at 69.

[9] 2 Weinstein & Burger, Evidence, p 404-11, quoting the California Law Revision Commission.

Further, the portion of the Court of Appeals opinion that provides mediation sanctions to the plaintiff, counter-defendant is reversed. Under the circumstances of this case, the violation of the mediation rule by the plaintiff, counter-defendant, caused it to surrender its right to receive sanctions under the rule. In all other respects leave to appeal is denied because the Surpeme Court is not persuaded that the other questions presented should be reviewed. Jurisdiction is not retained. Court of Appeals No. 133190.

LEVIN, J. I would grant leave to appeal to consider whether the error in allowing the jury to learn the contents of the mediation summary was harmless.

I

I adhere to the view that peremptory disposition, without plenary consideration, full briefing, oral argument, and an opportunity for the profession to file briefs as amici curiae, should be reserved for cases in which the law is settled and factual assessment is not required.* In

* *People v Wright,* 439 Mich 914, 914-915 (1992) (LEVIN, J., dissenting); *Roek v Chippewa Valley Bd of Ed,* 430 Mich 314, 322 (1988) (LEVIN, J., separate opinion); *Grames v Amerisure Ins Co,* 434 Mich 867, 868-875 (1990) (LEVIN, J., dissenting); *People v Little,* 434 Mich 752, 769-770 (1990) (LEVIN, J., dissenting); *People v Wrenn,* 434 Mich 885, 885-886 (1990) (LEVIN, J., dissenting); *Harkins v Northwest Activity Center, Inc,* 434 Mich 896, 899 (1990) (LEVIN, J., dissenting); *Dep't of Social Services v American Commercial Liability Ins Co,* 435 Mich 508, 515 (1990) (LEVIN, J., separate opinion); *Yahr v Garcia,* 436 Mich 872, 872-873 (1990) (LEVIN, J., dissenting); *Universal Underwriters Ins Co v Vallejo,* 436 Mich 873, 873-874 (1990) (LEVIN, J., dissenting); *People v Stephens,* 437 Mich 903, 903-910 (1991) (LEVIN, J., dissenting); *People v Berkey,* 437 Mich 40, 54 (1991) (LEVIN, J., dissenting); *Turner v Washtenaw Co Rd Comm,* 437 Mich 35, 38-39 (1991) (LEVIN, J., separate opinion); *Lepior v Venice Twp,* 437 Mich 955, 956-966 (1991) (LEVIN, J., dissenting); *Rochester Hills v Southeastern Oakland Co Resource Recovery Authority,* 440 Mich 852, 852-856 (1992) (LEVIN, J., dissenting); *In re Reinstatement of Eston (Grievance Administrator v Eston),* 440 Mich 1205, 1205-1207 (1992) (LEVIN, J., dissenting); *In re Reinstatement of Callanan,* 440 Mich 1207, 1207-1209 (1992) (LEVIN, J., dissenting); *McFadden v Monroe Civil Service Comm,* 440 Mich 890, 890-891 (1992) (LEVIN, J., dissenting); *Holly Twp v Dep't of Natural Resources (Holly Twp v Holly Disposal, Inc),* 440 Mich 891, 891-893 (1992) (LEVIN, J., dissenting); *Marzonie v ACIA,* 441 Mich 522, 535-539 (1992) (LEVIN, J., dissenting); *People v Waleed,* 441 Mich 902, 902-903 (1992) (LEVIN, J., dissenting); *People v Hardison,* 441 Mich 913, 914-916 (1993) (LEVIN, J., dissenting); *People v Justice,* 441 Mich 916, 917-919 (1993) (LEVIN, J., dissenting).

See *Schweiker v Hansen,* 450 US 785, 791 (1981) (Marshall, J., dissenting) ("A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly

the instant case, as indicated in the majority opinion, factual and legal assessment is required. Peremptory disposition is not appropriate.

II

As earlier stated, I agree with the majority that the trial court erred in allowing the jury to learn the contents of the mediation summary. The majority states that "the jury's answers to questions 1 and 2 demonstrate that the error was not harmless."

Multech sought $95,000 damages incurred to purchase and install large air compressors needed to operate the Teflon-coating machines that Peterson supplied to Multech. The jury awarded Multech $40,000 on its claim for the air compressors:

We the jury answer the question submitted as follows:

> Number 1. Did Multech meet its burden of proof and establish that it is entitled to damages on its $95,000.00 claim in connection with the purchase of the air compressor and related building expense?
>
> Yes.
>
> Question Number 2. If your answer to Question Number 1 is "yes," please state the amount of damages you believe Multech is entitled to on its $95,000.00 claim in connection with the purchase of the air compressor and related building expense.
>
> Answer: 40,000.

The disparity between the $95,000 damages sought and the amount recovered might have been due in part to the use of Multech's summary statement indicating Multech could recoup about half the price if it resold the compressors. Common sense might, however, have led the jury to deduce that the compressors were of some value to Multech, since they remained in its possession. Indeed, if the only fact presented was that Multech still had the compressors without any resale value placed on the items, the jury might have concluded that the compressors were more valuable than Multech claimed, and thus the jury, for that reason, might have awarded Multech less than $95,000.

I read the majority's statement finding that "the error was not harmless" as stating, in effect, that where there is reason to believe that an error might have been harmful, the aggrieved party is

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in error"); *Leis v Flynt,* 439 US 438, 457-458 (1979) (Stevens, J., dissenting) ("Summary reversal 'should be reserved for palpably clear cases of . . . error.' *Eaton v Tulsa,* 415 US 697, 707 [1974] [Rehnquist, J., dissenting]").

entitled to a new trial although there might also be reason to believe that the error might not have been harmful, and, thus, was harmless.

I agree with the majority that that is, or ought to be, the standard. I trust that this standard will be applied by the Court of Appeals and this Court to all litigants, in other civil litigation and in criminal cases as well.

PORT HURON EDUCATION ASSOCIATION, MEA/NEA v PORT HURON AREA SCHOOL DISTRICT, No. 96753. In lieu of granting leave to appeal, the opinion of the Court of Appeals is vacated, and the case is remanded to the Michigan Employment Relations Commission for further consideration. MCR 7.302(F)(1). As a necessary part of its opinion, MERC found that the proration language in this case is inherently ambiguous, because it failed to specify how benefits would be prorated. On remand, the commission is to consider the effect of Article VII, ¶ H on this conclusion, and issue its opinion on remand within ninety days of this order. Jurisdiction is retained. Court of Appeals No. 135908

LEVIN, J. I would deny leave to appeal.

The MERC found an unfair labor practice requiring the defendant school district to reinstate the practice of paying insurance premiums without proration respecting part-year employees, because the school district had established a practice for a number of years of not prorating benefits for those employees, although a clause in the collective bargaining agreement provided for proration for teachers who work less than a full year.

The clause had been in the collective bargaining agreement since 1978. There was testimony indicating that eleven teachers had been hired during the course of various school years between January 1983 and January 1987, and that the health benefits of none of these teachers had been prorated.

In the second semester of the 1987-88 school year, the school district hired eight new teachers. The personnel director observed the proration provision of the collective bargaining agreement. This led to the union filing requests to bargain. The MERC ruled in favor of the union, and the Court of Appeals affirmed.

I

The Court of Appeals, in an unreported opinion per curiam,[1] relied on its decision in *Mid-Michigan Ed Ass'n v St Charles Community Schools,* 150 Mich App 763, 768-769 (1986), and said:

> A past practice which does not derive from a collective bargaining agreement may nevertheless become a term or condition of employment which is binding. *Amalgamated Tran-*

[1] (Docket No. 135908), decided May 12, 1993.

sit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority, 437 Mich 441, 454-455; 473 NW2d 249 (1991). "The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a 'term or condition of employment.' "

If a past practice becomes part of the employer's structure and condition of employment, an employer is prohibited from making subsequent unilateral changes. The practice assumes the same significance as other terms of employment. Thus, where a district institutes a practice and permits it to continue, it cannot later unilaterally change the practice. *Mid-Michigan Ed Ass'n v St Charles Community Schools,* 150 Mich App 763, 768-769; 389 NW2d 482 (1986).

In this case, the school district allowed the practice of paying year-round benefits to all teachers to continue for ten years. There was no isolated mistake or oversight. Accordingly the nature and duration of the practice was sufficient to support a finding that a past practice existed. It also met the reasonable expectation of the parties, in that several times during the ten years they continued to negotiate bargaining agreements. The maintenance of coverage for employees during this summer break time could reasonably be expected. Both parties bargained over the subject matter of health insurance and created provisions for coverage under the collective bargaining agreement.

The school district also argues that because the past practice conflicts with the language of the contract, it cannot be used by the union to force bargaining over payment of insurance benefits. A panel of this Court was faced with a similar argument in *Mid-Michigan, supra.* There, this Court held that even if a practice was contrary to the contract, it still could arise as a term or condition of employment. *Id.* Moreover, where an employer allows such a practice to continue, it cannot later rely on the contractual language to warrant a unilateral change in its employees' working conditions. This Court stated:

"Because the district instituted the practice and permitted it to continue, knowing that it was contrary to the contract, the district cannot now rely on the contractual language to unilaterally change the practice. . . .

"We do not accept the district's contention that a past practice can never be established in the face of a conflicting contractual provision. Rather, we find that when an employer implements and continues a practice which is contrary to a

> contractual provision, the practice may constitute a term or condition of employment which is not subject to unilateral change." [*Id.* at 769.]
>
> The school district attempts to distinguish *Mid-Michigan* because the school district in that case allegedly "knew" that its practice was contrary to the contract. As previously discussed, however, the mutuality or knowing of a practice need only reach a level of being tacit and does not need to be explicit. Moreover, in the instant case, MERC concluded that the contract language—the proration clause—is inherently ambiguous in that it does not specify how benefits are to be prorated. Therefore, the parties' past practice does not clearly conflict with the language of the contract. Further, given the time of ten years and the fact that the school district had total control over its books, policies, and invoices of payment, MERC was justified in finding that no mistake was made.

In *Amalgamated Transit Union v SEMTA, supra,* this Court cited with approval portions of *Mid-Michigan Ed Ass'n v St Charles Community Schools,* but declined to address the issue whether past practice could supersede specific contract language:

> We are not faced today with a practice that is "contrary" to contract, and we do not pass on the correctness of the rule, for which *St Charles* has been cited, that a practice contrary to contract may establish a term or condition of employment. [437 Mich 456, n 14.]

II

The order entered today requires the MERC to consider the effect of Article 7, ¶ H of the collective bargaining agreement on its conclusion. Paragraph H reads as follows:

> The figure of 185 total duty days for a school year will be the basis for computing earned leave time, salary deductions, and pro-rations of benefits for those working less than a full year, or part-time, it being understood that pro-rations for part-time will be made on less than a full-day basis.

Neither the union nor the school district cited paragraph H. The majority is thus remanding to the MERC for reconsideration in light of a paragraph of the collective bargaining agreement that neither party thought to be relevant.

The majority enters its order of remand without asking the parties whether they believe that remand of this controversy, now six years old, to the Court of Appeals or, as ordered by the majority, to the MERC would facilitate resolution of the meritorious question presented by the application for leave to appeal.

The reason stated by the majority, "MERC found that the proration language in this case is inherently ambiguous, because it failed to specify how benefits would be prorated," is wide of the issue presented, namely, whether past practice can supersede a specific term of the collective bargaining agreement.

A reason for remand has not been made to appear in the order being entered today. If the Court wishes to address the issue left open in *Amalgamated Transit,* remand is not necessary. Paragraph H provides guidance only concerning the manner in which proration is to be made, and does not assist in resolving the question whether the MERC erred in concluding that the practice superseded the specific language of the collective bargaining agreement.[2]

CAVANAGH, C.J. I concur with LEVIN, J., and I would deny leave to appeal.

Reconsideration denied July 29, 1994.

LEVIN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

Leave to Appeal Denied May 13, 1994:

PEOPLE v HOLIFIELD, No. 97685; Court of Appeals No. 131963.

LEVIN, J. I would grant leave to appeal to consider whether the defendant, Robert Charles Holifield, was denied a fair trial because the trial court refused to grant him a trial separate from codefendant, Irene Avery, or, alternatively, hold this case in abeyance for *People v Hana* (Docket No. 94542, Calendar No. 3), and *People v Gallina* (Docket Nos. 94877, 94878, Calendar No. 4), which were argued on March 8, 1994.

Four persons were charged with involvement in the death of the decedent. The jury found Holifield guilty of first-degree murder.

Two of the persons charged waived trial by jury. One was found guilty of second-degree murder. The other was found guilty of armed robbery.

Codefendant Avery was tried before a jury with Holifield. Shortly before the prosecutor's last witness was called, she, too, waived a jury trial, and was found guilty of larceny from a person.

Holifield contends that he was denied a fair trial because Avery advanced a duress defense that was antagonistic to Holifield's theory of the case. Avery's lawyer presented an opening statement, which followed up on the allegations of the prosecutor. Avery's lawyer repeated that the assistant prosecutor told the jury that Holifield "was a bad dude, everyone knew it. He threatened, he intimidated, . . . he had a gun." Avery's theory was that Holifield coerced Avery into participating in the events.

The trial court denied Holifield's initial motions seeking a severance of his case, being of the opinion that duress was not a defense to murder and that a right to a severance would not arise unless Avery

[2] Remand might, however, bring about a change in the result at the MERC level because the entire membership of the MERC has changed since it issued its opinion in this case.

intended to testify.* The trial judge indicated that an antagonistic defense would not arise until Avery actually testified.

While Avery waived a jury trial shortly before the testimony of the final prosecution witness, the jury had already been exposed to the antagonistic defensive measures of Avery's lawyer over a lengthy and crucial part of the trial.

The trial court's statement indicating that an antagonistic defense would not arise until Avery actually testified was erroneous.

The judge's failure to recognize that he had the discretion to order a severance before Avery actually testified was a failure to exercise his discretion, and, hence, error.

I would grant leave to appeal, or hold this case in abeyance for *People v Hana* and *People v Gallina*.

PEOPLE v PORTERFIELD, No. 97706; Court of Appeals No. 131820.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

PEOPLE v SPIVEY, No. 97786; Court of Appeals No. 139940.

PEOPLE v LOUIS GREEN, No. 97792; Court of Appeals No. 120159.

CAVANAGH, C.J. I would grant leave to appeal.

LEVIN, J. It is common, or common-place, for defendants to waive jury trial in Recorder's Court in expectation that the judge will find, or reward them with a finding of, guilt of a lesser offense, or with a reduced sentence on the charged offense, or both. It appears that with relatively few exceptions, the expectation is fulfilled. The practice is so endemic that it has become a factor in the decisional process whether to grant leave to appeal.

In the instant case, we should grant leave to appeal to consider whether a trial judge must, at least in a first-degree murder case, affirmatively disabuse the defendant of any such expectation.

We should also grant leave to appeal to consider whether the trial judge should have granted defendant Louis Green's motion to disqualify the judge from presiding at the posttrial hearing on Green's motion for a new trial, which asserted that his trial lawyer had promised that, if he would waive a jury trial, the judge would convict him of an offense less than first-degree murder.

Alternatively, we should grant leave to appeal to consider whether, in the exercise of our supervisory power, we should remand for a hearing before another judge on the issue whether Green's trial lawyer made such a promise, with the obligation imposed on the prosecutor to use diligent efforts to find and produce Green's trial lawyer at such a hearing, either retaining jurisdiction or granting a right of appeal to the Court of Appeals from the determination on remand.

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* Even if duress were not a defense to murder, it is a defense to armed robbery, one of the charges pending against both Holifield and Avery.

I

The Court of Appeals remanded this case to the trial judge for a specific finding whether Green had been misled by his lawyer into believing that he would be treated more leniently by waiving jury trial.

By the time of the remand, Green's lawyer had been suspended from the practice of law.[1] Green's lawyer could not be readily located and did not testify before the judge entered an opinion on remand finding that no such promise had been made. The judge said:

> On the morning of Monday, November 7, 1988, trial by jury was to commence in this case. The trial record shows that defense counsel informed the court that defendant would waive his rights to a trial by jury. The Court then questioned the defendant with regard to the waiver of his rights. Defendant responded that he understood his rights but the Court asked if he had any questions for the Court or for his attorney. The Court recessed to allow the defendant to consult with counsel. Thereafter, the Court advised defendant again as to his rights to a trial by jury and asked if he had any questions. He said that he understood his rights and had no further questions. The trial proceeded without a jury. On Wednesday, November 9, 1988, the Court found the defendant guilty of first degree murder and felony firearm.
>
> At the sentence hearing on December 2, 1988, when defendant was allowed allocution, his first words were that on November 7 (the date of the trial) he "was given a promise of a lesser sentence." The Court developed a record that included the testimony of defendant's wife and mother, defense counsel and a courtroom deputy sheriff.
>
> Defendant, his mother and his wife testified that when the court recessed to allow defendant to consult with counsel, defense counsel said to defendant that if he waived trial by jury, he would get a conviction less than first degree murder. The essence of the allegation is that defense counsel said that counsel had talked to the court clerk, that the clerk had spoken with the judge and the clerk had been told (allegedly by the judge) that he would be convicted of second degree murder or manslaughter. Defendant says that he waived a trial by jury because his attorney told him he would get lenient treatment.
>
> Defense counsel responded that he did not promise or represent to defendant that he would be convicted of a lesser charge.

[1] Green's lawyer has been continuously suspended since May 2, 1991, when he was last suspended for three years in August, 1993. The reasons for the suspension are unrelated to what occurred in this case.

Because of the nature of the case, defense counsel said he was concerned that a jury trial may not have been in the best interest of his client. Counsel indicated that he had discussed the case with the court clerk whom counsel had known a while, when he arrived for trial, to get the clerk's reactions about a jury versus a non-jury trial. (Sentence Hearing, December 2, 1988 p. 9). This, says counsel was a general discussion ". . . about the nature of the case and whether or not it was something that we ought to—Mr. Green and I, ought to consider." (*Supra,* p. 9).

"I will represent to the Court that I discussed with Mr. Green, his mother and his wife, the options involved in this case. I expressed in my opinion that the Court, this Judge, your Honor, would be a—that it would be a better likelihood as a favorable result for waiving the jury, which we had long talks about, which everyone agreed to do. It was entirely left up to Mr. Green, and he made the ultimate decision based on all the input that I gave him and the discussions with his family. I also advised Mr. Green that I felt that we had a good likelihood of prevailing on a,—at least a second degree charge."

I would indicate to the Court on the record and to Mr. Green and his family, that *I never promised Mr. Green any result and always indicated to him that first degree of this charge could carry,—the trial in this case could carry a first degree conviction.* (*Supra,* p. 5, emphasis supplied).

The court officer, Jerry Barker, was in the lock up area during the discussions between the defendant, trial counsel, defendant's wife and mother. He testified under oath that: "I don't recall hearing any promises made, and I just recall hearing Mr. Floyd discuss his rights to a waiver trial as opposed to his rights to a jury trial, and that was it." (Id p. 13)

* * *

Thus, to address the issue on remand; that is, whether defense counsel made statements to the defendant leading defendant to believe that if he waived trial by jury he would receive more lenient treatment, this Court finds that counsel's statements to the defendant were no more than ruminations consistent with decisions of trial strategy—the kind of professional assessments that an attorney discusses with a client regarding presentation of a defense.

Assessments of credibility are critical to this Court's decision. The fact that defendant and his relatives, who seemingly would have been shocked and angered by the finding of first degree murder on November 9, 1988, did not announce the alleged promise of leniency until December 2, 1988, raises serious questions of credibility. This is compounded by the fact that the

court officer corroborates trial counsel's statements on December 2, 1988, that no promises were made.

Additionally, it is a matter of record that the defendant was twice advised of his rights and waived his rights in open court. This Court finds that defendant's waiver was not the result of misleading statements by trial counsel.

I am inclined to agree with Green's appellate lawyer that his trial lawyer "*let the cat out of the bag*" when his trial lawyer said:

> *Mr. Floyd:* Your Honor, if the Court is interested, I'll indicate to the Court that, as the Court well knows, all of us are very familiar and know each other and talk on occasions about things. I would indicate to the Court that I did have some discussion with the Court Clerk prior to the trial in this matter, and I think that I simply had some—some reference was made as to would this look like—*I think I may have asked Leonard, for example, does this look like the kind of case you would think would be a good waiver trial, something like this.* I'm not recalling exactly the conversation, but I think that we were just sort of generally talked about it, there was never any recommendation made by the Court Clerk, it was just general conversation about the nature of the case and whether or not it was something that we ought to—Mr. Green and I, ought to consider. I represent to the Court that your Court Clerk never recommended anything, never indicated to me that this Court had any attitude or position in its mind about this case. It was just general discussion that I would suggest goes on in every courtroom in this building or in this state, had you considered waiving the jury, that sort of issue, and I think it's incumbent upon the Court to ask that question if not formally, informally because we are always concerned with judicial economy. But, there was never any insinuation by your Court Clerk that there would be any disposition made as a result of waiving the jury in this case.[2] [Emphasis added.]

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[2] This statement was made at the time of sentencing, shortly after Green asserted that a promise had been made to him. The colloquy was as follows:

> *The Court:* Thank you, Mr. Floyd.
>
> Mr. Green, if you wish, you may speak before the Court imposes sentencing. Do you have any comments you want to make?
>
> *Defendant Green:* Yes, I do.
>
> I was given a promise of a lesser sentence, me and my family, on November 7th, back in the bull pen.
>
> *The Court:* I'm sorry, what was that again?
>
> *Defendant Green:* I said I was given a promise of a lesser sentence, you know, lesser than first, by my attorney.

The Court: I find that rather hard to believe. I know Mr. Floyd has practiced law for a long time in this Court and other Courts. Now, he can probably give you an opinion of what he thinks the Court, you know, may do and that's certainly within the realm of possibilities there. But, he can't tell you or promise you what the sentence of conviction, you know, [would] be. And I doubt very seriously what happened has happened the way you are saying that it happened. Obviously, an attorney can say, well, I think that our chances may be good to do this before this judge or whatever those opinions may be. But, an attorney is not in a position to make any promises that are binding on anyone as to what the,—what the conviction or the sentence may be.

Defendant Green: Well, all four of us were in the bull pen then.

The Court: Pardon me?

Defendant Green: All—my mother and my wife and four us were in the bull pen when the promise was made.

The Court: If I understand you, you're saying a promise was made, you know, I mean . . .

Defendant Green: A guarantee of a lesser sentence.

The Court: How can he guarantee you a lesser sentence when that's the Court's responsibility?

Defendant Green: Well, I can't say how he can guarantee it. The only thing that I'm saying is that it was—it was proposed to me, that he promised it to me.

Mr. Green also stated:

Mr. Green: Yes, I do. Well, the promise was made and my family was there, and I am telling the truth about the promise. I understand you're saying that it's not likely that he's in a position to bargain like that, but why would he bargain?

The two women testified as follows:

The Court: And who else was, you mentioned somebody else that was supposed to have been present at that time?

Defendant Green: You talking to me?

The Court: Yes.

Defendant Green: My mother, my mother and wife.

The Court: Okay, are they present now?

Defendant Green: Yes, they are.

The Court: Okay. Come forward, please.

Will you come around this way, please. Put them under oath, please.

(Whereupon Mrs. Minnie Green and Marie Green were sworn and testified under oath as follows:)

I agree with the trial judge that credibility was indeed the issue. Because credibility was the issue, it is questionable whether the judge should have decided the scope and extent of the involvement of his court clerk in influencing the decision of Green's trial lawyer to advise Green whether he should waive a jury trial on a charge of first-degree murder.

II

Green's lawyer was not presented with a hopeless case. Green did not have a prior criminal record. Green claimed he shot his next door neighbor shortly after his neighbor had informed Green that he had killed Green's dog a few weeks before, and allegedly said "it was bad enough living around nigger, much less dogs."

On the afternoon of July 9, 1988, the police responded to a call from Green's spouse about a body next door at the rear of the house next door. The police discovered sixty-nine-year-old Joseph Sidur, the owner of the residence. He had been shot and killed. Earlier that day, around noon, Green had called police and reported that his home had been broken into while he and his wife Minnie were away. He reported that, among the items missing, was a 9mm revolver.

Investigation of the breaking and entering, indicated that it was bogus, since the basement window was apparently broken from the

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The Court: Identify yourself for the Court record.

Mrs. Green: I'm Minnie Green, Louis Green's wife.

The Court: Okay, Miss Green, were you—would you state for us, were you present during a time before this trial, as part of some discussion between your husband and other persons?

Mrs. Green: Yes, I was.

The Court: Okay. now who was present and tell me what you think you've heard,—what you overheard?

Mrs. Green: I'm not telling you what I think I heard, I'm telling you what I heard. My husband was in the bull pen, my mother-in-law and Mr. Floyd and I were on the outside. And he told my husband that he had talked to your clerk and that the clerk told him that he had talked to you and you had said if he waived his jury, he could possibly get manslaughter or second degree murder.

The Court: Okay.

Mrs. Green: And that came directly from Mr. Floyd.

The Court: All right. And Miss—what's your name?

Mrs. Green: Marie Green.

The Court: Okay. Miss Green, were you—would you state what you think you know about this or what you know about this?

Mrs. Green: I heard the same thing coming from Mr. Floyd. And Mr. Floyd, I asked him, do you think that this will help my son, and he said, yeah, I overheard it from the clerk. He can't say he didn't say it because he said it.

inside, the wire to the alarm system had been cut at the window, and worked elsewhere, there was insignificant disarray inside. Further, the neighbors' statements were inconsistent with Green's concerning his being away at the time shots were heard, about 9:30 A.M. Thus, shortly after 8:00 P.M. on July 9, 1988, the police took Green and his spouse to the station. The spouse ended up going to the hospital for high blood pressure. The next morning Green gave the following confession to a homicide investigator:

Question: Tell me what happened Saturday?

Answer: Around 8:30 A.M. Saturday morning, I was in my backyard working on my pickup trucks when I saw my next door neighbor, Joe Sidur, watering the grass in the backyard. Joe ask me when was I going to move my other dog. I told him I wasn't planning on moving the dog. Joe than told me he would kill the dog, just like he did my other dog. He said it was bad enough living around nigger, much less dogs. When he said that something click in my head, I went off, I walked into my house, got my gun that was in the kitchen on the counter. I walked out the front door, north to the corner, west to the alley rear of my house, down the alley to Joe house, walk thru the gate into Joe backyard. Joe was standing by a apple tree in his yard. I walked up to him, I grabbed him around the neck, I lost my temper. I pushed him down, and shot him, I think I fired two shots at him. I walked back thru his gate to my backyard, and went inside my house. My wife was in the bedroom, I told her I had shot the guy next door. She told me I had messed up. I didn't know what to do. I thought of making a police report on a B&E and telling the police the gun was taken along with other things. I than got into my truck with the gun and drove to Outer Drive and went west on Outer Drive. I stopped at a sewer just before Conant Street, and drop the gun down the sewer. I stopped at a auto part store, looking for a part for my truck. The store was at 9 Mile and Van Dyke. I purchase the part and return home. My wife than left the house in the truck. I than attempted to make the house appear that there had been a B&E. I broke out the basement window, I pulled out some drawers in the bedroom and than call a friend to come over. When he arrive, I gave him my T.V. and V.C.R and told him to keep them for me. He left. I than called the police to make a B&E report. When the police arrive they took a report and left. My wife arrive back home as the police were leaving. We again discuss the shooting and decided to call the police. My wife called the police and told them there was a body in the yard next to ours.

Question: How far were you from Joe when you shot him?

Answer: I was standing over him, after I had knocked him down.

Question: Describe the gun you used?

Answer: Blue steel automatic, 9 millimeter. The gun was register to me.

Question: Have you and Joe Sidur argued before?

Answer: Yes. We have been arguing back and forth about two years. Most of the time he would complain to my wife and threatened her, about what he would do. Also, two weeks ago one of my dogs that were in my backyard was killed. I knew and thought Joe had done it.

* * *

Question: Did Joe have a weapon in his hands when you shot him?

Answer: I think he was holding a wooden hoe that he was using in the backyard.

Question: Is there anymore you can tell me?

Answer: I regret that I did it.

Green thus asserted that he had shot his next door neighbor shortly after his neighbor had told him that he had shot Green's dog. This, together with a racial slur, might have been viewed by the trier of fact as sufficient provocation to have justified a finding of voluntary manslaughter.

Reconsideration denied July 29, 1994.

LEVIN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons stated on the original application, *ante,* 894, 894-901.

Leave to Appeal Denied May 16, 1994:

ADAMS v PERRY FURNITURE COMPANY (ADAMS v BIC CORPORATION), No. 95875; reported below: (*On Remand*) 198 Mich App 1.

MALLETT, J. I would grant leave to appeal.

LEVIN, J. (*dissenting*). I would grant leave to appeal.

This is one of the many cases nation wide in which parents of children injured or killed in fires started while playing with BIC butane lighters, have brought actions against BIC on a products

liability theory, and on theories of negligent design or failure to warn.[1]

I

Plaintiff's four children died as a result of inhaling the fumes from a burning mattress during a fire started by the children playing with a BIC butane lighter.

The circuit court granted BIC's motion for summary disposition finding as a matter of law that BIC had no duty to warn or to "child proof" the lighter.

The Court of Appeals affirmed,[2] reasoning that a lighter is a simple tool presenting an open and obvious danger of which there is no duty to warn. The Court of Appeals added that whether a danger is open and obvious should be determined from the perspective of the typical or ordinary user and not from the perspective of a child. Additionally, the Court of Appeals found that, despite BIC's knowledge of the danger that children will play with lighters with disastrous consequences, BIC did not have a duty to make the lighter child resistant because the product is intended to be sold to adults, and the lighters carried a warning to keep them out of the reach of children.

II

BIC stipulated, for the purposes of the motion for summary disposition, that it "would have been feasible" to make "a more child resistent lighter at the time that this lighter was manufactured," and that it was foreseeable at the time this lighter was manufactured that lighters could "get into and were getting into the hands of children ultimately as a result of which fires and/or injuries were occurring."

A similar concession was made in *Bean v BIC Corp,* 597 So 2d 1350 (Ala, 1992), in which the Supreme Court of Alabama concluded that there were genuine issues of material fact whether BIC had a duty to offer child resistent lighters and whether the danger posed by a BIC

[1] Plaintiffs assert that the issues presented are: (1) whether in a products liability case, it is reasonable for a manufacturer to foresee that its product will be misused by children, even if the product is designed for use by adults, when the manufacturer had actual knowledge of misuse by children and knows that a safer design minimizing risks to children was feasible; and (2) whether the flame caused by the operation of a cigarette lighter constitutes an open and obvious danger that obviates a manufacturer's duty to warn that the lighter can be successfully operated by young children.

Essentially, BIC contends that because the lighter is intended for use by adults only it had no duty to make the product "childproof," and that the warning that the lighter should be kept out of the reach of children was sufficient.

[2] 198 Mich App 1 (1993).

lighter without a child-resistant feature was open and obvious. The court said:

> BIC concedes foreseeability and feasibility for purposes of this appeal, apparently in order to have this Court hold, as a matter of law, that there can be no duty to child-proof a product intended for adult use. However, we decline to make such a holding. We believe, in the interest of public policy, and following our case precedents, that a finding of legal duty in this State continues to be a function of the foreseeability of the danger, tempered by a consideration of the feasibility of an alternative design.
>
> Because BIC conceded that "it is feasible to design a more child-resistant lighter and also foreseeable that a child may come in contact with the lighter," we assume for purposes of this appeal that BIC foresaw the possibility of a tragedy, such as that befalling the Beans, and also that BIC had the ability to design its lighter so as to forestall the danger. We decline to make the sweeping and decisive pronouncement that a manufacturer of a product that it intends to be used by adults never has a duty to make the product safer by making it child-resistant when the dangers are foreseeable and prevention of the danger is feasible. Duty in this State remains a function of foreseeability of the harm tempered by a consideration of the feasibility of an alternative. [*Id.* at 1352.]

The United States Court of Appeals for the Third Circuit, applying Pennsylvania law, concluded, in *Griggs v BIC Corp,* 981 F2d 1429, 1435 (CA 3, 1992), that a BIC lighter was not "defective" under strict products liability law simply because the lighter was not designed to be "childproof," but said "that the Pennsylvania Supreme Court would reject the proposition that the social policy determination as to product defect in strict liability is the equivalent of a determination of duty in negligence law."

The court continued:

> [T]he gravity of the possible harm, in terms of both personal injury and property damage by childplay fires, is appreciable, recurring, and serious. The social value of the safety to be secured is indisputably high. These statistics suggest further that the likelihood of the occurrence of harm is sufficiently substantial to generate a duty of precaution, a conclusion which is reinforced by BIC's concession of foreseeability. . . . Because BIC has also conceded the feasibility of childproofing the lighter for purposes of its summary judgment motion, it presumably had economic alternatives, unless childproofing the lighter would impair the lighter's usefulness or make it too expensive to maintain its marketability. Tying this conclusion

to social value considerations, if the design change would not make the lighter too expensive to maintain its utility and marketability, then it is reasonable to expect that the consumer would still buy it with the cost of the design change incorporated.

On balance, the high social value placed on the safety of people and property threatened by childplay fires, the high gravity of risk, the considerable probability of risk, and the likelihood of a reasonably available alternative may outweigh BIC's interest in producing its lighters without childproofing features. In such circumstances, the risk of omission would be unreasonable. [*Id.* at 1436-1437.]

A United States district judge, applying Michigan law, similarly concluded that an action could be maintained against BIC in *Bondie v BIC Corp,* 739 F Supp 346, 349 (ED Mich, 1990).[3] The court said:

Applying the risk-utility balancing test adopted in *Prentis* [*v Yale Mfg Co,* 421 Mich 670, 692-693 (1984)], and using the factors relevant to assessing risk from *Swartz* [*v Huffmaster Alarms Systems, Inc,* 145 Mich App 431 (1985)], I hold that Bic has a duty to make its lighter child-resistant. The severity of the risk is assessed by combining the likelihood of injury with the severity of injury. The Bondies claim that the likelihood is high. The severity of injury is great: facial disfigurement, property loss, and possible death. The burden on defendant to make an alternate design has yet to be proven. Yet, Bic admitted at the hearing that it had a child-resistant design in place at the time Amanda Bondie played with the lighter. The societal interest in having Bic's lighters—used primarily to light cigarettes—cannot be said to outweigh the likelihood of injury to a child.

The relationship between the parties is important: Bic has distributed to the marketplace millions of brightly-colored little plastic lighters. Each projects a fairly large-sized flame when its throttle is fully open. I must assume the Bondies' contention as true, that children are attracted to the lighters. I must also assume as true that a warning is not always attached to the lighter at the time of sale, since the lighters are also displayed loosely in bins. There are no age restrictions on purchase or use of these lighters. These attributes of the lighters maximize sales and profit. As a matter of fact, Bic knows that children can and will operate the lighter, despite a parent's reasonable efforts to keep it from the child.[4]

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[3] See also *Carlson v BIC Corp,* 840 F Supp 457 (ED Mich, 1993).

[4] It appears that in the instant case there was a warning on the lighter.

III

While there are arguments and case law to the contrary,[5] I find the reasoning of the courts referenced above to be persuasive. The question is of jurisprudential importance under the circumstance that the decision of the Court of Appeals is binding on trial courts and other panels of the Court of Appeals under the "first out" rule.

BIC may be marketing child-resistant lighters in Alabama and the states comprising the Third Circuit. But BIC might conclude that it need not do so in Michigan when it learns that the decision of the Court of Appeals has in effect become binding precedent as a result of this Court's order denying leave to appeal.

I would, again, grant leave to appeal.

Reconsideration denied August 24, 1994.

LEVIN and MALLETT, JJ. (*dissenting*). We would grant reconsideration for the reasons stated in the original submission of this case, *Adams v BIC Corp,* 445 Mich 901 (1994), and because the analysis of the Court of Appeals appears to be inconsistent with this Court's decisions in *Prentis v Yale Mfg Co,* 421 Mich 670 (1984), and *Glittenberg v Doughboy Recreational Industries (On Rehearing),* 441 Mich 379 (1992). See *Kirk v Hanes Corp,* 16 F3d 705 (CA 6, 1994).

Reconsideration Granted May 17, 1994:

SCOTT v ITT HANCOCK, No. 97630. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals with the direction that it hold the case in abeyance pending a decision in *Marshall v DJ Jacobetti Veterans Facility (On Remand),* Court of Appeals Docket No. 166767. Leave was denied at 444 Mich 959. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 164766.

Summary Dispositions May 17, 1994:

GOFF v BIL-MAR FOODS, INC, No. 97747. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 162351.

GUISE v ROBINSON, No. 98172. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the matter is remanded to the Genesee Circuit Court for further proceedings. MCR 7.302(F)(1). MCL 722.716; MSA 25.496 indicates that a decisive blood typing determination by a qualified expert is entitled to significant weight in a paternity action. In this case, the lower courts have not provided an adequate reason for disregarding the fact that blood tests by two undisputedly qualified laboratories have excluded the defendant from being the biological father of the minor child. Therefore,

[5] *Kirk v Hanes Corp,* 16 F3d 705 (CA 6, 1994); *Todd v Societe BIC, SA,* 9 F3d 1216 (CA 7, 1993); *Sedlock v BIC Corp,* 741 F Supp 175 (WD Mo, 1990) (order); *Eads v BIC Corp,* 740 F Supp 1433 (WD Mo, 1989) (order); *Lasseigne v BIC Corp,* No. GC-G-88-391, slip op (Fla Cir Ct, May 31, 1989) (order granting partial summary judgment).

the trial judge's finding that the defendant is the father of the minor child is reversed because the Supreme Court is left with a definite and firm conviction that a mistake has been committed. *Tuttle v State Hwy Dep't,* 397 Mich 44, 46 (1976). The Court finds that the defendant is not the biological father of the minor child.

On remand, the trial court is to reconsider the issue whether the defendant should be estopped from denying paternity because of undue delay in disputing the matter. In particular, the court is to weigh the reasonableness of the defendant's actions—e.g., whether he signed the acknowledgment of paternity under pressure, whether he acted without the advice of counsel, whether he was led to believe he would not be required to pay child support—against any disadvantages the delay may have imposed upon the plaintiff and the minor child; e.g., whether the passage of time has foreclosed the option of further investigating the identity of the biological father. The court is to make sufficiently detailed findings as will disclose the factual basis of its decision on the estoppel issue. If the court determines that the defendant is not estopped from disputing paternity, then the court is to set aside the acknowledgment of paternity and the order for support, so that the identity of the biological father thereafter may be investigated and determined according to the established procedure. See MCL 722.711 *et seq.;* MSA 25.491 *et seq.* Jurisdiction is not retained. Court of Appeals No. 145581.

Leave to Appeal Denied May 17, 1994:

STOCKLER v RESOURCE DATA SYSTEMS CORPORATION, No. 97636; Court of Appeals No. 165150.

LEVIN and MALLETT, JJ. We would vacate that part of the Oakland Circuit Court May 7, 1993, order imposing $2,000 punitive damages because it does not appear they were warranted under the circumstances.

PEOPLE v RANDY THOMPSON, No. 97781; Court of Appeals No. 155116.

LEVIN, J. I would grant leave to appeal.

QUINN v STATE FARM MUTUAL INSURANCE COMPANY, No. 97797; Court of Appeals No. 141173.

LEVIN, J. I would grant leave to appeal.

HAECK v TRUMLEY, No. 97813; Court of Appeals No. 134912.

LEVIN and GRIFFIN, JJ. We would grant leave to appeal.

MCMANUS v ST JOSEPH HOSPITAL CORPORATION, No. 97833; Court of Appeals No. 154680.

RILEY, J. I would grant leave to appeal.

DOUGLAS v GENERAL MOTORS CORPORATION, No. 97842; reported below: 201 Mich App 501.

RILEY, J. I would grant leave to appeal.

PERFECTION MANAGEMENT COMPANY, INC v VITALE, No. 97904; Court of Appeals No. 161786. Reconsideration denied July 29, 1994.

PEOPLE v MERIMONTI, No. 98090; Court of Appeals No. 155275.

PEOPLE v MAY, No. 98200; Court of Appeals No. 143644.

PEOPLE v WARTHEN, No. 98360; Court of Appeals No. 144133.

PEOPLE v HERSHKOVITZ, No. 98733; Court of Appeals No. 135902.

PEOPLE v CLYDE ANDERSON, No. 99573; Court of Appeals No. 152690.

Reconsideration denied June 28, 1994.

RILEY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

Summary Disposition May 20, 1994:

RINGLER v CONVERSE, No. 98685. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the judgment of the Kent Circuit Court is reinstated. MCR 7.302(F)(1). A circuit court does not err in exercising its jurisdiction to decide a bona fide dispute in a child custody case whether that dispute is brought before the court by a proper petition for custody under the Child Custody Act, MCL 722.21 *et seq.;* MSA 25.312(1) *et seq.,* or by a defendant's counterclaim. See *Bowie v Arder,* 441 Mich 23 (1992). Court of Appeals No. 151901.

LEVIN, J. I concur in the result and dissent from the method of disposition.

The standing analysis was first put forth in *Ruppel v Lesner,* 421 Mich 559 (1984). It was the basis of decision in *Bowie v Arder,* 441 Mich 23 (1992), with the exception adverted to in *Bowie* and today made decisional in the instant case. It was a basis of decision in *In re Clausen,* 442 Mich 648 (1993).

The "third parties" in the earlier cases of *Ruppel, Bowie,* and *Clausen,* were found not to have standing to maintain an action under the Child Custody Act because the other party to the action was the natural parent. The third-party plaintiffs in the instant case are today found to have standing because the natural parent filed a counterclaim seeking custody.

I concur in and welcome the result for the reasons stated in the dissent in *Ruppel, Bowie,* and *Clausen.*

I dissent from the peremptory reversal of the Court of Appeals, and would grant leave to appeal because I adhere to the view that peremptory reversal should be reserved for cases in which the law is settled and factual assessment is not required. In the instant case, legal assessment is required.

Leave to Appeal Granted May 24, 1994:

PEOPLE v JENKINS, No. 96832. The issue is limited to whether the Recorder's Court erred in permitting the impeachment of witness Pennington and the testimony of witness Gale. Court of Appeals No. 128467.

Summary Dispositions May 24, 1994:

GROVELAND TOWNSHIP v BOWREN, No. 97457. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on rehearing granted. MCR 7.302(F)(1). The Court of Appeals acknowledged that the defendant-appellant presented arguments and proofs below regarding the issues whether the application of the challenged ordinance's agricultural zoning was reasonable in precluding her desired use of the land as a kennel and whether such an application violated the Right to Farm Act, MCL 286.471 *et seq.;* MSA 12.122(1) *et seq.* The panel nevertheless concluded that the questions were not preserved for review because the trial court never addressed them, and further declined to review them absent a miscarriage of justice. The fact that the trial court declined to address issues below is an insufficient ground, standing alone, for the Court of Appeals to decline to rule upon otherwise properly preserved questions or to employ a more restrictive (miscarriage of justice) standard for reviewing them. See *Dudewicz v Norris-Schmid, Inc,* 443 Mich 68, 78 (1993). On remand, the Court of Appeals may, while retaining jurisdiction, remand the matter to the trial court for supplemental findings of fact and conclusions of law or for additional proceedings. Jurisdiction is not retained. Court of Appeals No. 135151.

LEE v AUTO-OWNERS INSURANCE COMPANY, No. 98075. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the case is remanded to that Court as on rehearing granted. MCR 7.302(F)(1). On rehearing, the Court is to specify what parts of the insurance contract it thinks are affected by MCL 500.2254; MSA 24.12254 and explain the relationship in detail. The Court is also to consider and resolve such issues as may be raised by the parties. Jurisdiction is not retained. Reported below: 201 Mich App 39.

ROSS v JEM CARPENTRY & BUILDING, INC, No. 98091. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 163405.

Leave to Appeal Denied May 24, 1994:

PEOPLE v JIMMY MACK, No. 97821; Court of Appeals No. 136137. CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal. Reconsideration denied July 29, 1994.

PEOPLE v PHILLIPS-EL, No. 97867; Court of Appeals No. 163418.

PEOPLE v TERRANCE TAYLOR, No. 97885; Court of Appeals No. 165891.

LEVIN, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v PUTMAN, No. 97965; Court of Appeals No. 164309.

LAFEVER v MICHIGAN MUTUAL INSURANCE COMPANY, No. 98020; Court of Appeals No. 147256.

GRIFFIN, J. I would grant leave to appeal.

Reconsideration denied July 29, 1994.

GRIFFIN, J. I would grant the motion for reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v GUMBLE No 1, No. 98825; Court of Appeals No. 131623.

Summary Dispositions May 27, 1994:

GRIFFEN v ST JOSEPH MERCY HOSPITAL, No. 98490. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)*, Court of Appeals No. 166767. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 164190.

TURNER v GENERAL MOTORS CORPORATION, No. 98143. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted in light of *Gardner v Van Buren Public Schools*, 445 Mich 23 (1994). MCR 7.302(F)(1). Court of Appeals No. 163915.

ROBINSON v MAZDA MOTOR MANUFACTURING (USA) CORPORATION, No. 98269. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)*, Court of Appeals No. 166767. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 164187.

PENNELL v SUBSURFACE CONSTRUCTION COMPANY, INCORPORATED, No. 98403. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)*, Court of Appeals No. 166767. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 164278.

GAPA v TECHNICAL METALS, INC, No. 98409. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to hold in abeyance pending its decision in *Marshall v D J Jacobetti Veterans Facility (On Remand)* (current Court of Appeals Docket No. 166767). See also *Charbonneau v General Motors Corp* (current Court of

Appeals Docket No. 169929). Jurisdiction is not retained. Court of Appeals No. 164636.

VANHORN v CHINA TOWNSHIP CLERK, No. 98484. In lieu of granting leave to appeal, the October 1, 1993, order of the Court of Appeals is vacated, and the case is remanded to that Court for plenary consideration. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 166940.

RAPAPORT v CHILINGIRIAN, Nos. 98574, 98575. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to the Oakland Circuit Court for reinstatement of plaintiff's claims against defendant Chilingirian for the reasons stated by the dissenting judge in the Court of Appeals. MCR 7.302(F)(1). In all other respects leave to appeal is denied. Jurisdiction is not retained. Court of Appeals Nos. 132845, 132970.

Reconsideration denied September 2, 1994.

PEOPLE v HARDEN, No. 98876. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for a fuller explanation of the application of the law to the facts in this case. MCR 7.302(F)(1). Jurisdiction is retained. Court of Appeals No. 149361.

CAVANAGH, C.J. In this prosecution for carrying a concealed weapon, arising out of a traffic stop and the subsequent discovery of an open bottle of beer, the trial court conducted an evidentiary hearing, and, while calling it a "close question," determined that the prosecution, on these facts, failed to carry its burden of establishing consent to search. Accordingly, the evidence was suppressed and the case dismissed. Thereafter the Court of Appeals affirmed in an unpublished memorandum opinion, indicating it was not persuaded that the trial court's ruling was clearly erroneous.

A majority of this Court now has determined that this momentous, albeit fact-specific, matter should be revisited by an already burdened Court of Appeals. If this were not a prosecutor's appeal, I cannot imagine this Court pausing for one second on this ball or strike call to afford this defendant any relief from a denial of the motion to suppress. I would deny leave to appeal.

BRICKLEY, J. I would deny leave to appeal.

Leave to Appeal Denied May 27, 1994:

PEOPLE v WHILBY, No. 97463; Court of Appeals No. 162706.

In re LOOSE (LOOSE v WAYNE COUNTY), No. 97733; reported below: 201 Mich App 361.

LEVIN, J. I would remand to the Court of Appeals for reconsideration in light of *In re Payne,* 444 Mich 679 (1994).

Reconsideration granted 447 Mich —.

PEOPLE v MARSHALL, No. 97753; Court of Appeals No. 123726.

LEVIN, J. I would appoint a lawyer to file an application for leave to appeal respecting the question whether, under the circumstance that Freddie Lee Marshall may have been convicted as an aider and abetter, leave to appeal should be granted to consider whether he is entitled to a new trial because of the failure to instruct the jury concerning the need for a finding of fact regarding his knowledge that what was contained in the box was a controlled substance. See *People v Delgado,* 404 Mich 76, 86 (1978).

PEOPLE v ZAMBRANA, No. 97832; Court of Appeals No. 153679.

PEOPLE v KADADU, No. 97947; Court of Appeals No. 140938. Reconsideration denied September 30, 1994.

FROLING v CARPENTER, No. 98015. Leave to cross appeal is denied as moot. Reported below: 203 Mich App 368.

BIGGS v SNACKS, No. 98028; Court of Appeals No. 163397.

ORR v DEPARTMENT OF CORRECTIONS, No. 98036; Court of Appeals No. 165781.

PEOPLE v BERGQUIST, No. 98064; Court of Appeals No. 150437.

GRANT v DEPARTMENT OF CORRECTIONS, No. 98072; Court of Appeals No. 129715.

PEOPLE v FREEMAN, No. 98074; Court of Appeals No. 103276. Reconsideration denied August 29, 1994.

In re COUSINO ESTATE, No. 98086; Court of Appeals No. 164282.

PEOPLE v HIGGINS, No. 98087; Court of Appeals No. 138026.

WISE v ATTORNEY GENERAL (WISE v BIC CORPORATION), No. 98121; Court of Appeals No. 141668.

LEVIN, J. I would grant leave to appeal for the reasons set forth in my statement in *Adams v BIC Corp,* 445 Mich 901, 901-905 (1994).

PEOPLE v ROBINSON, No. 98123; Court of Appeals No. 134021.

PEOPLE v ELMER FERGUSON, Nos. 98127, 98128; Court of Appeals Nos. 137312, 138328.

BARBER v SHM (US), INC, No. 98205; reported below: 202 Mich App 366.

PEOPLE v DANSBY, No. 98207; Court of Appeals No. 138818.

PEOPLE v GRACE, No. 98209; Court of Appeals No. 168328.

BLADZIK v CENTURY BOAT COMPANY, No. 98210; Court of Appeals No. 164036. Reconsideration denied August 29, 1994.

PEOPLE v CLEARY, No. 98212; Court of Appeals No. 118402.

PEOPLE v ERIC WASHINGTON also known as DARNELL MARTIN, No. 98219; Court of Appeals No. 142257.

CARTER v DEPARTMENT OF CORRECTIONS, No. 98220; Court of Appeals No. 163938. Reconsideration denied August 29, 1994.

PEOPLE v WEBERMIN, No. 98239; Court of Appeals No. 140181. Reconsideration denied July 29, 1994.

PEOPLE v CHAMPION, No. 98242; Court of Appeals No. 162829 (on remand).

PEOPLE v NIX, No. 98245; Court of Appeals No. 141599.

PEOPLE v MUSICK, No. 98256. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 167089.

PEOPLE v PHILLIP CROCKETT, No. 98263; Court of Appeals No. 145817.

GAGLIARDI v J C PENNEY LIFE INSURANCE COMPANY, No. 98275; Court of Appeals No. 147453.

PEOPLE v HUTCHERSON, No. 98278; Court of Appeals No. 138491.

PEOPLE v GONZALES, No. 98282. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 167189.

PEOPLE v HUGHES, No. 98292; Court of Appeals No. 145130.

PEOPLE v JAMES GIBSON, No. 98297; Court of Appeals No. 132783.

PEOPLE v FARAJ, No. 98300; Court of Appeals No. 139932.

PEOPLE v VINCENT CROSS, No. 98302; reported below: 202 Mich App 138.

PEOPLE v DONNELL EDWARDS, No. 98303. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165600.

PEOPLE v CARLOS JORDAN, No. 98309. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166167.

Reconsideration denied July 29, 1994.

BLAYLOCK v GENERAL MOTORS CORPORATION, No. 98312; Court of Appeals No. 167646.

PEOPLE v FERRER, No. 98315; Court of Appeals No. 167216.

MANNING v DEPARTMENT OF CORRECTIONS, No. 98317; Court of Appeals No. 166761. Reconsideration denied August 29, 1994.

VORBROKER v NORWEGIAN CARIBBEAN LINES, INC, No. 98328; Court of Appeals No. 131202.

PEOPLE v ANTHONY GRAY, No. 98339; Court of Appeals No. 140473.

PEOPLE v SHIELDS, No. 98340; Court of Appeals No. 147805.

SILVANI v SCHENA ROOFING, No. 98341; Court of Appeals No. 163609.

PEOPLE v BERNARD MARTIN, No. 98346; Court of Appeals No. 141495.

PEOPLE v PINKS, No. 98350; Court of Appeals No. 153861.

PEOPLE v WALKER, No. 98353; Court of Appeals No. 156176.

PEOPLE v WILLIAM CROSS, No. 98355; Court of Appeals No. 134810.

PEOPLE v COUSINS, No. 98358; Court of Appeals No. 143281.

RATKUS v CITY OF DETROIT, No. 98362; Court of Appeals No. 164897.

PEOPLE v ADKINS, No. 98366; Court of Appeals No. 168966.

PEOPLE v KENNETH MARTIN JOHNSON, No. 98368. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166844.

PEOPLE v ALVAREZ, No. 98369. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 163795.

Reconsideration denied July 29, 1994.

PEOPLE v BEAUFORD, No. 98371; Court of Appeals No. 135494.

PEOPLE v COTTINGHAM, No. 98372. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166752.

PEOPLE v CORLISS, No. 98374; Court of Appeals No. 140639.

PEOPLE v DORRIS, No. 98375; Court of Appeals No. 121682.

PEOPLE v DEJESUS, No. 98376; Court of Appeals No. 153956.

PEOPLE v STOVALL, No. 98377; Court of Appeals No. 150776.

JORDAN v DEPARTMENT OF CORRECTIONS, No. 98379; reported below: 202 Mich App 519.

PEOPLE v JASPER GREEN, No. 98380; Court of Appeals No. 119822.

SCHORE v WAYNE STATE UNIVERSITY, No. 98381; Court of Appeals No. 165606.

ROPIAK v MINNERICK LOGGING, INC, No. 98385; Court of Appeals No. 164635.

REARDON v CITY OF ALLEN PARK, No. 98389. Leave to cross appeal is denied as moot. Court of Appeals No. 137091.

PEOPLE v MCDONNELL, No. 98391; Court of Appeals No. 167869.

PEOPLE v FRENCH, No. 98393; Court of Appeals No. 153075.

PEOPLE v SYROCKI, No. 98394; Court of Appeals No. 166933.

PEOPLE v STANFILL, No. 98397; Court of Appeals No. 140229.

PEOPLE v GUIDRY, No. 98401. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166836.

PEOPLE v GILL, No. 98405; Court of Appeals No. 118648.

HANNER v SHUREB, No. 98411. Motion to waive fees is granted. Court of Appeals No. 145139.

PEOPLE v JOHN SMITH, No. 98412. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 162368.

TPG INVESTORS v TARA ESTATES, No. 98413; Court of Appeals No. 139244.

HASSIGAN v HASSIGAN, No. 98416; Court of Appeals No. 142941.

SCOTT v OAKLAND CIRCUIT JUDGE, No. 98418; Court of Appeals No. 166840.

PEOPLE v JUAREZ, No. 98420. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 169081.

Reconsideration denied September 30, 1994.

O'CLAIRE v CLYDE'S CARPETS, No. 98428; Court of Appeals No. 163607.

MILLER v THORN APPLE VALLEY, No. 98435; Court of Appeals No. 164001.

PEOPLE v SPARKS, No. 98443. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 167045.

PEOPLE v LAY, No. 98445; Court of Appeals No. 152692.

BROMLEY v PACKAGING CORPORATION OF AMERICA, No. 98447; Court of Appeals No. 164129.

PEOPLE v RONALD WASHINGTON, No. 98456; Court of Appeals No. 136571.

PEOPLE v FREDRICK WILLIAMS, No. 98458; Court of Appeals No. 135205.

PEOPLE v FARRIS, No. 98459. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166906.

Reconsideration denied August 29, 1994.

PEOPLE v GRIM, No. 98461; Court of Appeals No. 118790.

PEOPLE v STEVENSON, No. 98473; Court of Appeals No. 149536.

PEOPLE v BARBIER, No. 98475; Court of Appeals No. 122952.

PEOPLE v ALBERT, No. 98476; Court of Appeals No. 141718.

PEOPLE v RAWLS, No. 98478; Court of Appeals No. 133629.

PEOPLE v TELECHAN, No. 98481; Court of Appeals No. 154640.

PEOPLE v VON PRICE, No. 98486; Court of Appeals No. 143239.

PEOPLE v STEVE TAYLOR, No. 98487; Court of Appeals No. 128453.

PEOPLE v FIFE, No. 98488; Court of Appeals No. 142408.

PEOPLE v OTIS JOHNSON, No. 98489. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 164425.

Reconsideration denied August 29, 1994.

SAUVOLA v O'NEILL and SAUVOLA v SISTERS OF MERCY HEALTH CORPORATION, Nos. 98495, 98496; Court of Appeals Nos. 129862, 134012.

SAYERS v SAYERS, No. 98499; Court of Appeals No. 155722.

Reconsideration denied October 5, 1994.

MALLETT, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v OSBURN, No. 98500; Court of Appeals No. 153883.

PEOPLE v MASON, No. 98501; Court of Appeals No. 150913.

GARDNER v SHEPHERD PRODUCTS, INC, No. 98508; Court of Appeals No. 165012.

PEOPLE v ROBERT SCOTT, No. 98511; Court of Appeals No. 153729.

PEOPLE v ERIC HARRIS, No. 98512; Court of Appeals No. 133668.

PEOPLE v LESTER WILLIAMS, No. 98513; Court of Appeals No. 139420.

PEOPLE v PARISH, No. 98517; Court of Appeals No. 155605.

PEOPLE v JAMES DAVIS, No. 98518; Court of Appeals No. 128414.

BURGEN v KALAMAZOO STAMPING & DIE COMPANY, No. 98521; Court of Appeals No. 164851.

PEOPLE v TYRONE EDWARDS, No. 98527. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 167713.

Reconsideration denied July 29, 1994.

PEOPLE v ADAMS, No. 98528; Court of Appeals No. 168729.

PEOPLE v PERKINS, No. 98529; Court of Appeals No. 136088.

PEOPLE v ROSS, No. 98530; Court of Appeals No. 153650.

PEOPLE v BRUNSON, No. 98534; Court of Appeals No. 169425.

PEOPLE v HOLT, No. 98537; Court of Appeals No. 145076.

PEOPLE v CLAUDE MOORE, No. 98542; Court of Appeals No. 155092.

PEOPLE v POLK, No. 98543; Court of Appeals No. 153887.

PEOPLE v KENT FLOWERS, No. 98555; Court of Appeals No. 159445.

PEOPLE v COTHER HEARN also known as LARRY SAYYED, Nos. 98563, 98564. Motion to waive fees and costs is granted. Court of Appeals Nos. 150564, 153068.

Reconsideration denied August 29, 1994.

PEOPLE v ESPINOSA, No. 98566; Court of Appeals No. 167157.

PEOPLE v JOHN, No. 98567; Court of Appeals No. 150116.

WHITING v INGHAM CIRCUIT JUDGE, No. 98568; Court of Appeals No. 165528.

PEOPLE v QUINONEZ, No. 98569; Court of Appeals No. 154971.

PEOPLE v BALLA, No. 98600; Court of Appeals No. 156057.

PEOPLE v RONALD MOORE, No. 98604; Court of Appeals No. 158229.

PEOPLE v BREWER, No. 98605; Court of Appeals No. 126591.

PEOPLE v DONALD MOORE, No. 98607; Court of Appeals No. 131766.

PEOPLE v VERNARD JONES, No. 98608; Court of Appeals No. 148755.

PEOPLE v RODRIGUEZ, No. 98609. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 167408.

PEOPLE v WANTWAZ DAVIS, No. 98627; Court of Appeals No. 151456.

NEDELJKOVICH v BOROJA, No. 98651; Court of Appeals No. 141185.

PEOPLE v RICHTER, No. 98652; Court of Appeals No. 153118.

AUTO CLUB INSURANCE ASSOCIATION v WHITE & WHITE, INC, No. 98818; Court of Appeals No. 169808.

PEOPLE v MARK MCCLINE, No. 98897; Court of Appeals No. 142405.

PEOPLE v MCALISTER, No. 98947. Leave to cross appeal is also denied. Reported below: 203 Mich App 495.

PEOPLE v CARL NEAL, Nos. 98963, 98964; Court of Appeals Nos. 143635, 143663.

PEOPLE v WIEST, No. 98990. Leave to cross appeal is also denied. Court of Appeals No. 116063.

PEOPLE v DONALD HARRIS, No. 99018; Court of Appeals No. 135541.

Reconsideration denied October 25, 1994.

BOYLE, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v BEEDLES, No. 99109; Court of Appeals No. 132547.

PEOPLE v KLEIN, No. 99125; Court of Appeals No. 146368.

RILEY, J. I would grant leave to appeal.

PEOPLE v WATKINS, No. 99173; Court of Appeals No. 152722.

BOYLE and RILEY, JJ. We would grant leave to appeal.

PEOPLE v LAWRENCE, No. 99214; Court of Appeals No. 171958.

PEOPLE v MORALES, No. 99254; Court of Appeals No. 133139.

PEOPLE v BAUGHMAN, No. 99272; Court of Appeals No. 144612.

RILEY, J. I would grant leave to appeal.

In re FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN v COMMISSIONER OF INSURANCE and COMMITTEE FOR AUTOMOBILE INSURANCE REFORM v COMMISSIONER OF INSURANCE, Nos. 99269, 99420; reported below: 204 Mich App 361 and Court of Appeals No. 173970.

GRIFFIN, J. I would grant leave to appeal.

RILEY, J. I respectfully dissent from my colleagues' order of denial. I would grant this application because I believe that

1. The language, historical practices, and purposes undergirding the provision reveal that the filing of referendum petitions properly invokes the constitutional process of referendum;

2. 1993 PA 143 is exempt from the constitutional process of referendum because it appropriates more than de minimus funds; and

3. The Insurance Commissioner does not have the authority to issue a declaratory ruling regarding 1993 PA 143 because the issue does not involve insurance law.

Interlocutory Appeals

Leave to Appeal Denied May 27, 1994:

HOLTZER v FISHER PRICE, INC, No. 98274; Court of Appeals No. 165596.

HABLE v EARL KEIM REALTY MIDWEST, INC, No. 98319; Court of Appeals No. 164369.

PEOPLE v CUMMINGS, No. 98507; Court of Appeals No. 169858.

PEOPLE v MARSHALL MCNEIL, No. 98565; Court of Appeals No. 162484.

PEOPLE v MAXIE JOHNSON, No. 98578; Court of Appeals No. 149865.

BOYD v CONTINENTAL BAKING COMPANY, No. 98633; Court of Appeals No. 170467.

PEOPLE v LALONDE, No. 99271; Court of Appeals No. 172439.

Summary Dispositions May 31, 1994:

PEOPLE v RONNIE M JOHNS No 2, No. 98004. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 166626.

PEOPLE v POHL, No. 98034. In lieu of granting leave to appeal, the case is remanded to the Ingham Circuit Court for resentencing. MCR 7.302(F)(1). The Supreme Court finds defendant's sentence disproportionate. *People v Milbourn,* 435 Mich 630 (1990). Reported below: 202 Mich App 203.

BOYLE and RILEY, JJ. We would grant leave to appeal.

PICKARD v BENNINGS PAINTING, No. 98112. On order of the Court, in lieu of granting leave to appeal, the decisions of the Worker's Compensation Appellate Commission are vacated, and the case is remanded to the commission for further proceedings in accordance with this order. Both the majority and dissenting opinions of the commission incorrectly concluded that the magistrate made findings of fact. The magistrate determined only that the testimony of Dr. Chapman would be insufficient as a matter of law to support an award. The opinion does not contain findings of fact. On remand, the WCAC is to remand the matter to the magistrate for findings of fact and is to thereafter perform its review of the case. Jurisdiction is not retained. Court of Appeals No. 162667.

ABRAHAMSON v PANTRY RESTAURANT, No. 98122. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 163589.

BOWDEN v STANDARD PRODUCTS COMPANY, No. 98216. In lieu of granting leave to appeal, the August 11, 1993, decision of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of *Rood v General Dynamics Corp,* 444 Mich 107 (1993). MCR 7.302(F)(1). Court of Appeals No. 146842.

O'BRIEN v WAYNE CENTER, INC, No. 98246. In lieu of granting leave to appeal, the Court of Appeals orders of August 3, 1993, and November 10, 1993, are vacated, and the case is remanded to that

Court for plenary consideration. MCR 7.302(F)(1). Court of Appeals No. 159440.

HERRON v BORGESS MEDICAL CENTER, No. 98455. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 165380.

Leave to Appeal Denied May 31, 1994:

PEOPLE v HOWARD GUTHRIE, No. 97788; Court of Appeals No. 163328.

PEOPLE v CLEO MALLORY, No. 97908. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165257.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

PEOPLE v CLARDY, No. 97934; Court of Appeals No. 135233.

PEOPLE v WARD, No. 97967; Court of Appeals No. 148084.

PEOPLE v MOLE, No. 98006; Court of Appeals No. 140176.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

PEOPLE v ALLAN WILLIAMS, No. 98103. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D), but without prejudice to defendant raising the issue under *People v Sand,* 435 Mich 517 (1990), in the trial court. The motion to waive fees is granted. Court of Appeals No. 165450.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

PEOPLE v GUY, No. 98125; Court of Appeals No. 124268.

MCDOUGAL v MCDOUGAL, No. 98140; Court of Appeals No. 141878.

RILEY and MALLETT, JJ. We would grant leave to appeal.

Reconsideration granted 448 Mich —.

PEOPLE v HOEDEMAN, No. 98166; Court of Appeals No. 151205.

PEOPLE v MOSELER, No. 98180; reported below: 202 Mich App 296.

CAVANAGH, C.J., and LEVIN and GRIFFIN, JJ. We would grant leave to appeal.

COGGINS v FARMERS INSURANCE EXCHANGE, No. 98225; Court of Appeals No. 138280.

Interlocutory Appeal

Leave to Appeal Denied May 31, 1994:

DURANT v DEPARTMENT OF EDUCATION, No. 98986; reported below: (*On Third Remand*) 203 Mich App 507. Reconsideration denied August 29, 1994.

Leave to Appeal Granted June 6, 1994:

PEOPLE v KEVORKIAN and HOBBINS v ATTORNEY GENERAL, Nos. 99591, 99674, 99752, 99758, 99759. The issues to be briefed are limited as follows: (1) In Docket Nos. 99591 (plaintiff's application), 99752, and 99759, whether 1992 PA 270, as amended by 1993 PA 3, is unconstitutional under Const 1963, art 4, § 24; (2) In Docket Nos. 99591 (cross-appeal) and 99758, whether MCL 752.1027; MSA 28.547(127) is unconstitutional under the United States Constitution; (3) In Docket No. 99674, whether the circuit judge erred in quashing the information charging the defendant with murder. Leave to cross appeal is also granted. Reported below: 205 Mich App 180, 194.

Summary Disposition June 7, 1994:

O'SHEA v THE DETROIT NEWS, Nos. 97979, 97980. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *Farrington v Total Petroleum, Inc,* 442 Mich 201 (1993). MCR 7.302(F)(1). Reported below: 202 Mich App 33.

Leave to Appeal Denied June 7, 1994:

SMITH v SMITH, No. 97514; Court of Appeals No. 138748.

LEVIN, J. I would grant leave to appeal.

TOLLERS v AMERISURE COMPANIES, No. 97710; Court of Appeals No. 144505.

RILEY and GRIFFIN, JJ. We would grant leave to appeal.

Leave to Appeal Denied June 10, 1994:

ACKERMAN v GENERAL MOTORS CORPORATION, No. 97973; reported below: 201 Mich App 658.

BOYLE and MALLETT, JJ. We would grant leave to appeal.

PEOPLE v MICHAEL ANDERSON, No. 98076; Court of Appeals No. 162982.

JONES v DEPARTMENT OF CORRECTIONS, No. 98229; Court of Appeals No. 163999.

Reconsideration Granted June 14, 1994:

PEOPLE v DISBROW, No. 96393. On reconsideration, the Supreme Court's order of December 14, 1993, 444 Mich 901, is modified so as to vacate the denial of the defendant-appellant's application for leave to appeal. The matter is to be remanded to the Calhoun Circuit Court for an evidentiary hearing on the defendant-appellant's claim that she received ineffective assistance of counsel because of an alleged conflict of interest due to the fact that the same attorney represented her and Juanita Orlick. After this hearing is conducted, the

trial court is to make findings on this question and is to file such findings, together with a transcript of the evidentiary hearing, with the Clerk of the Supreme Court within ninety days of the date of this order. Jurisdiction is retained. Court of Appeals No. 155073 (on remand).

Summary Dispositions June 14, 1994:

SULLIVAN v FRANCIS, No. 97504. In lieu of granting leave to appeal, the judgments of the Court of Appeals and the Oakland Circuit Court are vacated, and the case is remanded to the Oakland Circuit Court for further proceedings in accordance with this order. MCR 7.302(F)(1). Defendant has repeatedly alleged and plaintiff has either admitted or not denied (1) that the Friend of the Court's report dated January 2, 1990 was based on part, but not all, of the income information provided by defendant to the prosecutor; (2) that the Friend of the Court failed to provide a copy of the report and recommendation to defendant, as required by MCL 552.507; MSA 25.176(7); and (3) that the Friend of the Court made significant computation errors. Although defendant or his former attorney may have been guilty of significant lapses, the Supreme Court does not believe that forfeiting the opportunity to challenge the Friend of the Court's recommendation is appropriate on these unique facts. In addition, the circuit court's opinion of May 6, 1991 denied defendant's motion in part based on findings that defendant was aware that he was the father of the child and avoided his obligations by living in Texas and the United Arab Emirates. Those findings were made without a hearing and despite both the defendant's allegations to the contrary and the allegation in the initial complaint that the act leading to conception occurred in Oklahoma. Jurisdiction is not retained. Court of Appeals No. 140859.

PEOPLE v ANTHONY JOHNSON, No. 98083. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted, limited to the sufficiency of evidence question and the issue concerning the admissibility of testimony of two unavailable witnesses. MCR 7.302(F)(1). Court of Appeals No. 163217.

PEOPLE v SHELTERS, No. 98741. In lieu of granting leave to appeal, the case is remanded to the Oakland Circuit Court for an in-camera review of documents and reports requested by the defendant. MCR 7.302(F)(1). The Oakland Circuit Court is directed to submit to the Supreme Court, within sixty days of the date of this order, its findings regarding the relevance and admissibility of the documents and reports. The motion to seal the exhibits is granted. Jurisdiction is retained. Court of Appeals No. 156195.

Leave to Appeal Denied June 14, 1994:

CONSTANTINE v CONSTANTINE, No. 97777; Court of Appeals No. 137479.

AUTO-OWNERS INSURANCE COMPANY v HOADLEY and HOADLEY v AUTO-OWNERS INSURANCE COMPANY, Nos. 97845, 97846; reported below: 201 Mich App 555.

GRIFFIN, J. I would grant leave to appeal.

MIC GENERAL INSURANCE CORPORATION v GUYER, No. 97926; Court of Appeals No. 135156.

PEOPLE v STRIBLING and PEOPLE v THOMAS, Nos. 98012, 98055; Court of Appeals Nos. 131234, 131825.

PARIS v ST JOSEPH HOSPITAL, No. 98093; Court of Appeals No. 162687.

PEOPLE v KING, No. 98232; Court of Appeals No. 159553.

PEOPLE v DONALD MCCLINE, No. 98233; Court of Appeals No. 165158 (on remand).

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal for the reasons stated in dissent in *People v Fluker,* 442 Mich 891, 892-893 (1993).

PEOPLE v PRIDEY, No. 98279; Court of Appeals No. 136849.

LEVIN, J. I would grant leave to appeal.

PEOPLE v DALE JOHNSON, No. 98321; Court of Appeals No. 142622.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal for the reasons stated in dissent in *People v Fluker,* 442 Mich 891, 892-893 (1993).

PEOPLE v SANDERS, No. 98333; Court of Appeals No. 142428.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

PEOPLE v WEISL, No. 98535; Court of Appeals No. 153676.

RILEY, J. I would grant leave to appeal.

In re WYLIE (DEPARTMENT OF SOCIAL SERVICES v WYLIE), No. 99330; Court of Appeals No. 160234.

LEVIN, J. I would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied June 14, 1994:

In re MCDONALD (MCDONALD v MICHIGAN OSTEOPATHIC MEDICAL CENTER), Nos. 96918, 96942, 96951; Court of Appeals No. 161347.

BOYLE, RILEY, and GRIFFIN, JJ. We would grant leave to appeal.

Summary Disposition June 15, 1994:

PEOPLE v COBBS, No. 97942. In lieu of granting leave to appeal, the defendant's sentence for armed robbery is vacated, and the case is

remanded to the Recorder's Court for resentencing before a different judge. MCR 7.302(F)(1). The intemperate remarks of the trial judge at sentencing prompt the action taken in this order. Jurisdiction is not retained. Court of Appeals No. 131785.

BOYLE, J. I concur in the reversal only because resentencing is dictated by the majority's holding in *People v Moore,* 432 Mich 311 (1989).

Leave to Appeal Denied June 17, 1994:

PEOPLE v HOWE, No. 97112, 9/April 1994. The cause having been briefed and orally argued, the order of January 4, 1994, 444 Mich 913, granting leave to appeal is vacated, and leave to appeal and cross appeal are denied because the Supreme Court is no longer persuaded that the questions presented should be reviewed. Reported below: 200 Mich App 221.

BOYLE, J. (*dissenting*). I dissent from the order dismissing leave. Today's action leaves in place a published Court of Appeals opinion that permits piecemeal waiver of medical privilege when criminal responsibility is placed in issue through the insanity defense. *People v Howe,* 200 Mich App 221 (1993).

Despite the fact that the defendant's mental state at the time of the alleged offense will be the central issue at trial, the Court of Appeals opinion interprets MCL 768.20a; MSA 28.1043(1) to exclude reports, testimony, and discovery, of a psychological evaluation made after the date of the offense and in proximity to it. The majority holds discoverable only those reports prepared on the issue of criminal responsibility for which the county would pay if a defendant were indigent. *People v Howe* at 225-226. Thus, access to highly probative evidence of the defendant's mental state at the time of commission of the crime is within the control of the defendant when it is asserted that the consultation was for treatment. The result permits manipulation of the defense[1] and is inconsistent with the public interest.[2]

I agree with the dissenting judge in the Court of Appeals that a broad reading of the statute authorizes the admission of such evidence and that it is therefore discoverable. I would ascribe to the

[1] Making reports of earlier consultation unavailable encourages "psychologist shopping" in pursuit of the opinion most favorable to the defense before giving notice of an intent to raise the insanity plea. Where, as here, it is the defendant's attorney who sent him to the first psychologist almost immediately after the crime occurred, we can safely assume that the treatment did not disclose longitudinal behavior helpful to the insanity defense.

[2] I do not suggest that use or disclosure would not be subject to the court's authority to protect against overreaching during the discovery process. A discovery request would be subject to a motion for a protective order that would permit the trial court, after receiving reports prepared pursuant to the statute, to evaluate the prejudicial effect versus the probative value.

Legislature the intent to facilitate a complete exploration of the mental state of the defendant in the interest of accurate fact finding.

The present situation can be analogized to the rules of procedure in federal civil matters. Under FR Civ P 35(b)(2), once mental condition is in controversy, an examination has been completed, and the party examined has requested a report of that examination, that party waives any privilege "regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental . . . condition." Similarly, a defendant who raises an insanity defense is fully aware that, under MCL 768.20a; MSA 28.1043(1), he will be ordered to undergo a mental examination relating to his claim, and will receive a written report of that examination. Having chosen to place mental state at the time of the offense in issue, public policy dictates a similar result under the Michigan statute.

In *People v Dobben,* 440 Mich 679 (1992), we rejected the formalistic proposition that only a clinician who had examined the defendant for criminal responsibility could testify regarding criminal responsibility. We held that an independent expert could rely on historical data, including information from prior competency evaluations conducted by other experts, when forming an opinion regarding a defendant's criminal responsibility.

In harmonizing the relevant portions of the Mental Health Code, MCL 330.2028(3); MSA 14.800(1028)(3), the Code of Criminal Procedure, MCL 768.20a(3); MSA 28.1043(1)(3), and the Michigan Rules of Evidence, MRE 703, we noted that in forming an opinion regarding criminal responsibility, it was highly relevant and proper for an expert to consider historical evidence of a defendant's mental state embodied in "reports, charts, records and other data prepared by other medical men. In psychiatry, the patient's past medical and social history is of prime importance."[3] 440 Mich 696 (quoting Weihofen, Mental Disorder as a Criminal Defense, p 287).

Given that MRE 703 recognizes that historical evidence is of critical importance to the expert witness and to the factfinder, we observed that we would not "lightly presume" that the Legislature intended to create a conflict. *Id.* at 697, n 22. Similarly, we should not here assume that the Legislature intends to create a conflict with the Rules of Evidence or, even more importantly, with the procedure governing pretrial discovery.

This leads to my final concern with the Court of Appeals opinion in this case. The majority concludes that the only kind of evidence discoverable under MCL 768.20a; MSA 28.1043(1) is "the kind of

[3] In fact, a moment's reflection about how such a rule would play out at trial highlights the incongruity of the statutory interpretations. The expert in a case like that before us would invariably be asked whether he was aware that the defendant had seen another doctor. If he was and had not examined the records, the expert would be compromised. If the expert was not aware of the prior examination, his testimony likewise would be compromised.

evidence for which the county would have to pay if the defendant were indigent." 200 Mich App 226. Contrary to the implicit concern for the indigent defendant in this analysis, the opinion shields from discovery the unfavorable (at least to a defense of insanity) examination reports received by defendants who can afford multiple examinations, as defendant Howe apparently is. These parties are free to pursue the best examination to support their contention, confident that less favorable results will be barred from access through discovery. The indigent defendant, however, is left to only that examination and report provided under the statute, placing him at a significant disadvantage to his more well-heeled counterpart.

I do not advocate that we carve out a new exception to the psychologist-patient privilege. A privilege may be waived by the party that holds it. See, e.g., MCL 330.1750(2); MSA 14.800(750)(2). My analysis simply flows from an examination of the action by a defendant that accomplishes that waiver. I conclude that the privilege extended to communications with treating psychiatrists and psychologists is waived when the insanity defense is raised. Any other result portends an unnecessary limitation of the evidence available to aid the trier of fact in a reliable resolution of the issue.

Nor would we embark upon a novel course by recognizing that the privilege presently at issue is waived by the assertion of an insanity defense. See, e.g., *State v Lewisohn,* 379 A2d 1192, 1211-1212 (Me, 1977); *People v Al-Kanani,* 33 NY2d 260, 264-265 (1973); *State v Tradewell,* 9 Wash App 821, 822-825 (1973); *People v Givans,* 83 Ill App 2d 423, 429-430 (1967); *State v Sapp,* 356 Mo 705, 712 (1947). Justice Dufresne, of the Supreme Judicial Court of Maine, recognized the severe and unwarranted limitations that would be placed on the truth-seeking function of the trial court by allowing a defendant to successfully assert a psychologist- or psychiatrist-patient privilege after raising an insanity defense:

> [T]he public interest in ascertaining the true condition of persons accused of crime who seek to avoid legal responsibility for their criminal activity by reason of their mental deficiencies is very strong. If a defendant is permitted to escape punishment for his criminal acts on the basis of expert testimony tending to establish that his behavior was the product of mental disease or defect, and the State may not introduce impeaching testimony of other experts who have examined him, on the ground that the privilege prevents the disclosure of such evidence, then the cause of justice would be brought into extreme ridicule.
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> * * *
>
> Once the evidence of his mental condition has been fully aired at the instigation of the patient-defendant, there is no need to protect further disclosures by other psychologist or psychiatrist witnesses called by the State. Any other rule would

simply be an unreasonable and unnecessary obstruction to public justice. [379 A2d 1211.]

GRIFFIN, J. I join in the statement by BOYLE, J.

Interlocutory Appeal

Leave to Appeal Denied June 17, 1994:

JACKSON v DETROIT POLICE CHIEF, No. 97563; reported below: 201 Mich App 173.

LEVIN, J. I would grant leave to appeal.

Leave to Appeal Denied June 21, 1994:

PEOPLE v CHARLES JOHNSON, No. 97385; Court of Appeals No. 152231.

PEOPLE v HELTON, No. 97537; Court of Appeals No. 136818.

LEVIN, J. I would direct the appointment of counsel to file a supplemental brief.

PEOPLE v CURTIS GRAY, No. 97568; Court of Appeals No. 154440.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

PEOPLE v VAUGHN, No. 97646; Court of Appeals No. 150170.

CAVANAGH, C.J., and LEVIN and BRICKLEY, JJ. We would grant leave to appeal.

PEOPLE v JUAN PERRY, No. 97702; reported below: 201 Mich App 347.

GRIFFIN, J. I would grant leave to appeal.

PEOPLE v BROOKS, No. 98625. The Supreme Court further orders that the opinion of the Court of Appeals shall have no precedential force or effect. Reported below: (*On Remand*) 203 Mich App 199.

LEVIN, J. The Michigan Court of Appeals was established by the 1963 Constitution, and the judges of the Court are elected public officials who perform a function set forth in the constitution. Their published opinions are authoritative statements of law, not by grace of this Court, but by the power vested in the Court of Appeals by the constitution.

The prcedential force or effect of an opinion of the Court of Appeals should not be set aside absent a determination by this Court or the United States Supreme Court that the Court of Appeals erred. Such a decision should not be lightly made, and clearly should not be made without plenary consideration, and the resulting notice to other persons who might be favorably or adversely affected by an affirmance or reversal of the decision of the Court of Appeals and who might seek to file a brief as amicus curiae.

Further, this Court's order denying precedential force or effect to an opinion of the Court of Appeals avoids compliance with the constitutional imperative that decisions of this Court "shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal." Const 1963, art 6, § 6.

Reconsideration denied October 25, 1994.

PEOPLE v JERALD KELLY also known as GERALD SHARRIEFF, Nos. 98653, 98654; Court of Appeals Nos. 144414, 144669.

PEOPLE v ASHER, No. 99032; reported below: 203 Mich App 621.

MALLETT, J. I would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied June 21, 1994:

PEOPLE v POWELL, No. 97844; reported below: 201 Mich App 516.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

Leave to Appeal Denied June 24, 1994:

PEOPLE v BRADFORD, No. 97231; Court of Appeals No. 144574.

LEVIN, J. I would direct the appointment of counsel to file a supplemental brief in support of the application.

MILES v RUSSELL MEMORIAL HOSPITAL, Nos. 97977, 97983; reported below: 202 Mich App 6.

CITY OF MIDLAND v RAPANOS, Nos. 98005, 99033; Court of Appeals Nos. 164633, 170668.

LEVIN, J. I would remand this case to the Court of Appeals for consideration as on leave granted or would grant leave to appeal.

PEOPLE v KILBOURN, No. 98063; Court of Appeals No. 128656.

LEVIN, J. I would direct the appointment of counsel to file a supplemental brief in support of the application.

MALLETT, J. I would grant leave to appeal.

Summary Dispositions June 28, 1994:

PEOPLE v LEWIS WILSON, No. 97836. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to the trial court to conduct an evidentiary hearing. MCR 7.302(F)(1). The affidavit of the juror which supports the defendant's claim of juror misconduct provides a sufficient basis for conducting an evidentiary hearing to determine whether the verdict should be set aside particularly since the information provided to the other jurors was extraneous in nature and did not concern mistakes

or misconduct inherent in the verdict. *Hoffman v Monroe Public Schools,* 96 Mich App 256 (1980), lv den 409 Mich 931 (1980). See, also, *In re Beverly Hills Fire Litigation,* 695 F2d 207 (CA 6, 1982). Jurisdiction is not retained. Court of Appeals No. 164345.

VIELE v DCMA INTERNATIONAL, INCORPORATED, No. 97896. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Leave to file a brief amicus curiae is granted. Court of Appeals No. 159383.

PEOPLE v GUMBLE No 2, No. 99377. In lieu of granting leave to appeal, the order of the Court of Appeals dated April 1, 1994, which denied defendant's motion to remand is reversed. MCR 7.302(F)(1). The case is remanded to that Court with the direction that it remand the case to the Oakland Circuit Court to allow the defendant to file a motion for new trial. Since the defendant's appeal of right was filed in the Court of Appeals on August 6, 1992, and is apparently close to decision, the Court of Appeals may, at its option, defer remanding the case to the Oakland Circuit Court until it issues its opinion on the merits. If the Court of Appeals takes that option, the remand is to be treated as if under MCR 7.302(C)(4) for purposes of any subsequent proceedings. The motion for peremptory reversal is denied as moot. Jurisdiction is not retained. Court of Appeals No. 131623.

Leave to Appeal Denied June 28, 1994:

MILLS v ELLIOTT, No. 97892; Court of Appeals No. 143025.

CAVANAGH, C.J. I would grant leave to appeal.

PEOPLE v VAN DORSTEN, No. 98175; reported below: (*After Remand*) 202 Mich App 293.

SZYMANSKI v K MART CORPORATION, No. 98206; reported below: (*On Remand*) 202 Mich App 348.

LEVIN and MALLETT, JJ. We would grant leave to appeal.

GARCIA v BUCHANAN, No. 98215; Court of Appeals No. 146451.

Reconsideration denied August 29, 1994.

PEOPLE v MURPHY, No. 98258; Court of Appeals No. 122262. Reconsideration denied September 30, 1994.

PEOPLE v GOODNER, No. 98261; Court of Appeals No. 135496.

BOYE v PIKE DISTRIBUTORS, INC, No. 98268; Court of Appeals No. 157693.

LEVIN and MALLETT, JJ. We would grant leave to appeal.

ELWARD v KENNEDY, No. 98271; Court of Appeals No. 168033.

PEOPLE v HEILMAN, No. 98299; Court of Appeals No. 139756.

CAVANAGH, C.J., and LEVIN, J. We would grant leave to appeal.

BOYLE, J. I would grant leave to appeal to consider whether the evidence was sufficient.

PEOPLE v PARNELL, No. 98306; Court of Appeals No. 149341.

PEOPLE v CHILDS, No. 98310. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165768.

Reconsideration denied August 29, 1994.

MORRISON v KLOIAN, No. 98314; Court of Appeals No. 152032.

SHA'AOUNI v CITY OF TRENTON, Nos. 98343, 98611; Court of Appeals No. 163446. Reconsideration denied September 30, 1994.

PEOPLE v JAMES JOHNSON, No. 98345; reported below: 202 Mich App 281.

PEOPLE v SHANNON, No. 98357; Court of Appeals No. 125639.

PEOPLE v JOHN BRITT, No. 98402; reported below: 202 Mich App 714.

UTLEY v MONTGOMERY WARD & COMPANY, INC, No. 98404; Court of Appeals No. 164857.

RILEY, J. I would grant leave to appeal.

GRIFFIN, J. I would grant leave to appeal to consider whether MCL 418.301(2); MSA 17.237(301)(2) was properly applied in this case.

FRANCIS v FKS OF DETROIT, INC, No. 98408; Court of Appeals No. 138977.

PEOPLE v ROBERT HARRIS, No. 98410; Court of Appeals No. 166935.

PERKINS v GENERAL MOTORS CORPORATION, No. 98427; Court of Appeals No. 164848.

PEOPLE v SACKEY, No. 98432; Court of Appeals No. 147210.

PEOPLE v SCHAFER, No. 98439. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165795.

PEOPLE v LEAMY, No. 98441; Court of Appeals No. 151134.

PEOPLE v HAZEL, No. 98442; Court of Appeals No. 146428.

PEOPLE v JERRY THOMPSON, No. 98444; Court of Appeals No. 138424.

CAVANAGH, C.J., and LEVIN, J. We would grant for the reasons stated in *People v Fluker,* 442 Mich 891, 892-893 (1993).

PEOPLE v GROTE, No. 98449. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166380.

PEOPLE v JAMES MORRIS, No. 98450. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 166702.

PEOPLE v POSEY, No. 98451; Court of Appeals No. 141614.

PEOPLE v MUSIC, No. 98466; Court of Appeals No. 143142.

PEOPLE v ANTHONY CURRY, No. 98467; Court of Appeals No. 153332.

PEOPLE v DWAYNE SMITH, No. 98474; Court of Appeals No. 143935.

PEOPLE v JAMES CAIN, No. 98477; Court of Appeals No. 133652.

PEOPLE v GARCIA, No. 98480. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165866.

RICHTER VINEGAR CORPORATION v VIKING INSURANCE COMPANY OF WISCONSIN, No. 98483; Court of Appeals No. 139255.

PEOPLE v CHATFIELD, Nos. 98491, 98492; Court of Appeals Nos. 138815, 138826.

PEOPLE v CHAMBERS, No. 98503; Court of Appeals No. 143867.

TROMBLEY v HUTZEL HOSPITAL, No. 98510; Court of Appeals No. 164587.

PEOPLE v GUILES, No. 98514; Court of Appeals No. 128066.

PEOPLE v DERBECK, No. 98531; reported below: 202 Mich App 443.

COCKHAM v GENERAL MOTORS CORPORATION, No. 98533; Court of Appeals No. 166427.

PEOPLE v HATFIELD, No. 98541; Court of Appeals No. 150296.

PEOPLE v EASON, No. 98544; Court of Appeals No. 157345.

PEOPLE v SURLES, No. 98547. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 163168.

Reconsideration denied August 29, 1994.

PEOPLE v HUNDLEY, Nos. 98548, 98549; Court of Appeals Nos. 137425, 144199.

PEOPLE v CORMICAN, No. 98550; Court of Appeals No. 165112.

PEOPLE v RAMIREZ, Nos. 98551, 98552; Court of Appeals Nos. 157167, 157164.

PEOPLE v MURRAY, No. 98571; Court of Appeals No. 126731.

LEVIN, GRIFFIN, and MALLETT, JJ. We would grant leave to appeal.

Reconsideration denied September 30, 1994.

LEVIN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

WEBB v INDUSTRIAL CARTAGE COMPANY, INC, No. 98576; Court of Appeals No. 165160. Reconsideration denied August 29, 1994.

PEOPLE v CHADWICK, No. 98592; Court of Appeals No. 151664.

PEOPLE v ARTHUR HILL, No. 98593; Court of Appeals No. 143636.

PEOPLE v MOSKO, No. 98594; Court of Appeals No. 163391.

PEOPLE v MICHAEL GIBSON, No. 98595; Court of Appeals No. 160105.

PEOPLE v CORLZER, No. 98597; Court of Appeals No. 138604.

KOEHLER v CITY OF GROSSE POINTE PARK, No. 98599; Court of Appeals No. 145223.

PEOPLE v RAU, No. 98606; Court of Appeals No. 157500.

PEOPLE v SIMPSON, No. 98610. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 163852.

PEOPLE v LUCA, No. 98612; Court of Appeals No. 152576.

PEOPLE v FRANCE, No. 98613; Court of Appeals No. 156650.

PEOPLE v PARRISH, No. 98614. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 168400.

PEOPLE v MALCOLM WILLIAMS, No. 98615; Court of Appeals No. 128438.

PEOPLE v CHANDLER, No. 98620. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 168820.

PEOPLE v KEVIN EDWARDS, No. 98623; Court of Appeals No. 139682.

PEOPLE v NATHANIEL EVANS, No. 98624. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 165845.

PEOPLE v ANTHONY SMITH, No. 98628; Court of Appeals No. 144650.

PEOPLE v TERRY GREEN, No. 98632; Court of Appeals No. 165435.

LINVILLE v BOAG COLD STORAGE WAREHOUSE, INC, No. 98635; Court of Appeals No. 147330.

PEOPLE v EARLEY, No. 98637; Court of Appeals No. 156110.

AMCA/KOEHRING COMPANY v JOHN BROWN, INC, No. 98640; Court of Appeals No. 147426.

PEOPLE v PRATT, No. 98642; Court of Appeals No. 131752.

KEENAN v DEPARTMENT OF CORRECTIONS, No. 98649; Court of Appeals No. 165094.

PEOPLE v SHARP, No. 98650; Court of Appeals No. 142558.

PEOPLE v MAXWELL, No. 98657; Court of Appeals No. 156525.

PEOPLE v ECHTINAW, No. 98660; Court of Appeals No. 164332.

CONLEY v WAYNE WESTLAND COMMUNITY SCHOOLS, No. 98667; Court of Appeals No. 165331.

GRIFFIN, J. I would grant leave to appeal.

PEOPLE v BEEMON, No. 98671; Court of Appeals No. 141451.

PEOPLE v DANIELS, No. 98687; Court of Appeals No. 159174.

BENNETT v GENERAL MOTORS CORPORATION, No. 98689; Court of Appeals No. 166490.

GRIFFIN, J. I would grant the application to consider whether § 401(2)(b) of the Worker's Disability Compensation Act was properly applied in this case.

GUIN v NEDA, No. 98690; Court of Appeals No. 148163.

PEOPLE v SAUCEDA, No. 98692; Court of Appeals No. 143079.

PEOPLE v GREGORY GREEN, No. 98693; Court of Appeals No. 152770.

PEOPLE v MCCOY, No. 98696; Court of Appeals No. 156299.

PEOPLE v BRAXTON, No. 98697; Court of Appeals No. 161363.

PEOPLE v HALE, No. 98698; Court of Appeals No. 168235.

PEOPLE v NATHAN HENDERSON, No. 98699; Court of Appeals No. 146967.

PEOPLE v MELOCHE, No. 98703; Court of Appeals No. 150065.

PEOPLE v LANDER DAVIS, No. 98704; Court of Appeals No. 155103.

PEOPLE v WAYNE SMITH, No. 98705; Court of Appeals No. 150372.

PEOPLE v MICHAEL JORDAN, No. 98709; Court of Appeals No. 159021.

PEOPLE v RICHARD EDWARDS, No. 98710; Court of Appeals No. 153284.

PEOPLE v RONALD CRAWFORD, No. 98717; Court of Appeals No. 139023.

PEOPLE v RAMOS, No. 98720. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 167493.

PEOPLE v HOFFMAN, No. 98723; Court of Appeals No. 149752.

PEOPLE v CALVIN EVANS, No. 98724; Court of Appeals No. 129551.

PEOPLE v LONNIE WILLIAMS, No. 98737; Court of Appeals No. 152688.

PEOPLE v LACON WILSON, No. 98738; Court of Appeals No. 153044.

PEOPLE v NAEMI, No. 98763; Court of Appeals No. 119074.

PEOPLE v DODSON, No. 98768; Court of Appeals No. 127833.

PEOPLE v KENNETH EUGENE JOHNSON, No. 98773; Court of Appeals No. 157094.

PEOPLE v IRWIN SMITH, No. 98815; Court of Appeals No. 156668.

PEOPLE v CHARLES SCOTT, No. 98816; Court of Appeals No. 150327.

PEOPLE v DAVID STANLEY, No. 98817; Court of Appeals No. 156972.

PEOPLE v TARPLEY, No. 98823; Court of Appeals No. 157183.

PEOPLE v BURTLEY, No. 98824; Court of Appeals No. 150734.

PEOPLE v VOYDANOFF, No. 98868; Court of Appeals No. 161516.

PEOPLE v WILLIAM SMITH, No. 98872; Court of Appeals No. 164537.

PEOPLE v VERNON, No. 98881; Court of Appeals No. 169290.

BOYLE, J. I would grant leave to appeal.

KATONA v SCHULTZ BOTTLE GAS AND APPLIANCE, INC, No. 99099; Court of Appeals No. 138314.

PEOPLE v SIGOUIN, No. 99217; Court of Appeals No. 171253.

BOYLE, J. I would grant leave to appeal.

PEOPLE v RICHARDSON, No. 99218; reported below: 204 Mich App 71.

PEOPLE v STUBBS, No. 99360; Court of Appeals No. 155250.

CHESNUT v GENERAL MOTORS CORPORATION, No. 99423; Court of Appeals No. 172738.

LEVIN, J. I would hold this case in abeyance pending the decision in *Gross v General Motors Corp,* Nos. 98045, 98046, and *McClain v General Motors Corp,* No. 98806.

PEOPLE v HACKERT, No. 99434; Court of Appeals No. 171677.

PEOPLE v GOMEZ, No. 99487; Court of Appeals No. 149530.

Interlocutory Appeals

Leave to Appeal Denied June 28, 1994:

BARNELL v TAUBMAN COMPANY, INC, No. 99006; reported below: 203 Mich App 110.

RILEY and GRIFFIN, JJ. We would grant leave to appeal.

Reconsideration granted 447 Mich —.

AUTO-OWNERS INSURANCE COMPANY v LANSING IRON & METAL COMPANY, No. 97383; Court of Appeals No. 161947.

LEE v BELL, No. 98361; Court of Appeals No. 168349.

In re ACQUISITION OF LAND FOR MID-CITY REHABILITATION PROJECT (CITY OF DETROIT v WILLIAMS), No. 98572; Court of Appeals No. 167546.

PEOPLE v EVOLA, No. 98618; reported below: 202 Mich App 178.

PEOPLE v JAMES EDWARDS, No. 98681; Court of Appeals No. 154592.

PEOPLE v CALDWELL, No. 99416; Court of Appeals No. 158307.

PEOPLE v DARRYL BELL, No. 99501; Court of Appeals No. 169880.

Leave to Appeal Granted June 29, 1994:

NUMMER v DEPARTMENT OF TREASURY, No. 97343; reported below: 200 Mich App 695.

CHRYSLER CORPORATION v SKYLINE INDUSTRIAL SERVICES, INC, No. 97396; reported below: 199 Mich App 366.

LEMMERMAN v FEALK, Nos. 97839, 97841. The cases are to be argued and submitted with *Williford v Bieske,* No. 98365. Persons or groups interested in the determination of the questions may move the Supreme Court for permission to file briefs amici curiae. Reported below: 201 Mich App 544.

ATTORNEY GENERAL v CONSUMERS POWER COMPANY, Nos. 97863, 98019. Leave to file briefs amici curiae is also granted. Reported below: (*On Rehearing*) 202 Mich App 74.

GARCIA v MCCORD GASKET CORPORATION, No. 97957; reported below: 201 Mich App 697.

PHILLIPS v BUTTERBALL FARMS COMPANY, INC, No. 97976. Leave to cross appeal is also granted. Reported below: (*On Second Remand*) 201 Mich App 663.

DEMEGLIO v AUTO CLUB INSURANCE ASSOCIATION, No. 98197. The issue is limited to whether medical benefits provided under a policy of no-fault automobile insurance purchased in compliance with the laws of another state are "[b]enefits provided or required to be provided

under the laws of any state" within the meaning of MCL 500.3109(1); MSA 24.13109(1). Reported below: 202 Mich App 361.

WILLIFORD v BIESKE, No. 98365. The case is to be argued and submitted with *Lemmerman v Fealk*, Nos. 97839, 97841. Persons or groups interested in the determination of the questions may move the Supreme Court for permission to file briefs amici curiae. Court of Appeals No. 168619.

JEFFREY v RAPID AMERICAN CORPORATION, Nos. 96953-97009; reported below: 200 Mich App 150.

WEEMS v CHRYSLER CORPORATION, Nos. 97725, 97736, 97737; reported below: 201 Mich App 309.

Leave to Appeal Denied June 29, 1994:

BROWNING v CITY OF DETROIT, No. 98325; Court of Appeals No. 142721.

LEVIN, J. I would grant leave to appeal.

PEOPLE v BOURLIER, No. 98882. Because of the death of the defendant, the appeal is moot. Court of Appeals No. 168757.

Leave to Appeal Granted June 30, 1994:

PEOPLE v DATEMA, No. 97758. The issue is limited to whether the State of Michigan should recognize or continue to recognize the form of involuntary manslaughter on which the jury was instructed in this case. Court of Appeals No. 119187.

Reconsideration Granted July 6, 1994:

NOGAMI v FLINT BOARD OF EDUCATION, No. 97401. On reconsideration, the Supreme Court's order of January 28, 1994, 444 Mich 944, is vacated. The application for leave to appeal is again considered and, in lieu of granting leave to appeal, the judgments of the Court of Appeals and the Worker's Compensation Appellate Commission are vacated, and the matter is remanded to the WCAC with the instruction that, while retaining jurisdiction, it remand the matter to the magistrate for the taking of testimony and evidence regarding defendant's claims, based on the affidavit of plaintiff's husband, that a fraud was perpetrated in the securing of this award. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 138331.

Summary Dispositions July 6, 1994:

FOSTER v GENERAL MOTORS CORPORATION, No. 98348. In lieu of granting leave to appeal, the decision of the Worker's Compensation Appellate Commission is vacated, and the case is remanded to the

magistrate for findings in accordance with this order. MCR 7.302(F)(1). The magistrate erred in relying on *Wiltse v Borden's Farm Products Co of Michigan*, 328 Mich 257 (1950). In *Wiltse*, the disability was traceable to a single occurrence, which could have occurred at work, but there was no evidence of when it occurred. Our case is not such an either/or situation. The physicians testified that it is medically possible for work and nonwork causation to have combined in this case. On remand, the magistrate is to make findings of fact on whether plaintiff's employment was a contributing cause or aggravating factor in plaintiff's disability. Jurisdiction is not retained. Court of Appeals No. 164859.

COOK v AUTO CLUB INSURANCE ASSOCIATION, No. 98460. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 165668.

Leave to Appeal Denied July 6, 1994:

PEOPLE v TIGGART, No. 97475; Court of Appeals No. 134261.

PEOPLE v CARLOS WILLIAMS, No. 97868; Court of Appeals No. 139424.

LEVIN, J. I would direct the appointment of counsel to prepare a supplemental brief in support of the application for leave to appeal.

KATINSKY v AUTO CLUB INSURANCE ASSOCIATION, No. 98110; reported below: 201 Mich App 167.

Reconsideration denied October 28, 1994.

RILEY and GRIFFIN, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v LUCAS, No. 98171; reported below: (*After Remand*) 201 Mich App 717.

JOHNSON v AUTO-OWNERS INSURANCE GROUP, No. 98298; reported below: 202 Mich App 525.

LEVIN, J. I would grant leave to appeal.

HANSBOROUGH v GREYHOUND BUS LINES, No. 98422; Court of Appeals No. 141713. Reconsideration denied September 30, 1994.

TEODORESCU v BUSHNELL, GAGE, REIZEN & BYINGTON, No. 98619; reported below: (*On Remand*) 201 Mich App 260.

BOYLE and GRIFFIN, JJ. We would grant leave to appeal.

Interlocutory Appeals

Leave to Appeal Denied July 6, 1994:

PEOPLE v DOUGLAS HILL, No. 97744; Court of Appeals No. 163253.

PEOPLE v BROUS, No. 98352; Court of Appeals No. 152584.

ZUKE v FRITZ ENTERPRISES, INC, No. 98426; reported below: 202 Mich App 572.

BRICKLEY, RILEY, and GRIFFIN, JJ. We would grant leave to appeal.

Summary Dispositions July 12, 1994:

BURNEY v P V HOLDING CORPORATION, No. 97887. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 164709.

PEOPLE v RUSAN, No. 99541. In lieu of granting leave to appeal, the Court of Appeals orders of March 4, 1994, and April 21, 1994, are vacated, and the case is remanded to that Court for plenary consideration. MCR 7.302(F)(1). Court of Appeals No. 171101.

Leave to Appeal Denied July 12, 1994:

In re SUBPOENA DUCES TECUM TO THE WAYNE COUNTY PROSECUTOR (*After Remand*) (EVINA v CITY OF DETROIT), No. 92433, 8/May 1993. The cause having been briefed and orally argued, having been remanded to the Court of Appeals for further consideration, and the Court of Appeals opinion of June 20, 1994, having been considered, the grant of leave to appeal is vacated, and leave to appeal is denied, declining further review of the case. See 444 Mich 860. Reported below: (*On Remand*) 205 Mich App 700.

MICHIGAN MUTUAL INSURANCE COMPANY v BUREAU OF WORKER'S COMPENSATION, No. 95977. This ruling, however, is without prejudice to the defendant-appellant's opportunity to ask the Ingham Circuit Court to enforce its November 23, 1987, Opinion and Order, which granted declaratory relief to the defendant-appellant and held in effect that the plaintiffs-appellees are required to pay the withheld benefits that are the subject of this dispute. Since the Ingham Circuit Court's decision has not been reversed or otherwise modified by a higher court, that court is the appropriate place for the defendant to assert his contention that the plaintiffs-appellees are not entitled to bestow upon themselves the benefit of the "final judgment exception" in *Romein v General Motors Corp,* 436 Mich 515, 533, 540 (1990), where the plaintiffs have failed to raise and obtain a favorable ruling on this issue during these proceedings. The motion to delete Michigan Bell Telephone Company as an intervening plaintiff and appellee is granted. Court of Appeals No. 104980.

PEOPLE v BUCK and PEOPLE v SEGO, Nos. 96229, 96323; reported below: 197 Mich App 404.

LEVIN and MALLETT, JJ. We would grant leave to appeal.

MICHIGAN COUNCIL 25, AFSCME v LOUISIANA HOMES, INC, No. 98221; reported below: (*On Remand*) 203 Mich App 213.

LEVIN, BRICKLEY, and GRIFFIN, JJ. We would grant leave to appeal.

In re ABATE v PUBLIC SERVICE COMMISSION, Nos. 98398-98400; Court of Appeals Nos. 163930, 165005, 165713.

LEVIN, J. I would, in these circumstances, order the Court of Appeals to accept the brief filed by Michigan Municipal Cooperative Group as the brief of an intervenor-appellee.

FORD v DETROIT MEDICAL CENTER, No. 98423; Court of Appeals No. 165373.

LEVIN, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

TAYLOR v CHRYSLER CORPORATION, No. 98469; Court of Appeals No. 164590.

RILEY and GRIFFIN, JJ. We would grant leave to appeal.

PEOPLE v SCHLUTER, No. 99448. Leave to appeal as cross-appellant is denied as moot. Reported below: 204 Mich App 60.

BOYLE, J. I would grant leave to appeal.

Leave to Appeal Denied July 15, 1994:

PEOPLE v MCDONALD, No. 97142; Court of Appeals No. 164145.

CAVANAGH, C.J. In light of the fact that the trial court neglected to advise the defendant of his right to take an appeal and to have appointed appellate counsel at the conclusion of the plea and sentencing proceeding on October 8, 1991, and in light of the fact that the defendant's present counsel neglected to file an application for delayed appeal in the Court of Appeals within eighteen months of the judgment of sentence, MCR 7.205(F)(3), although the eighteen-month deadline did not expire until more than five months after counsel was appointed on October 16, 1992, I would afford this defendant some procedural relief. I would say that this Court's denial order is without prejudice to counsel's promptly filing a motion for relief from judgment in the trial court, pursuant to the requirements of subchapter 6.500 of the Michigan Court Rules, and particularly the requirements of MCR 6.502(C) and MCR 6.508(D).

LEVIN, J. I join in the statement of CAVANAGH, C.J.

PEOPLE v MAYBERRY, No. 97860; Court of Appeals No. 125099.

LEVIN, J. I would grant leave to appeal to consider whether the defendant is entitled to a new trial because the judge refused to allow him to inquire of a prosecution witness whether he had been arrested with the defendant, any charges had been lodged against the witness, and such charges were subsequently dropped.

MALLETT, J. I would grant leave to appeal.

TAYLOR v CITY OF DETROIT, Nos. 98493, 98494; Court of Appeals Nos. 137118, 137119.

LEVIN, J. I would grant leave to appeal to consider the issues raised in both plaintiff's current application for leave to appeal and his earlier application, denied at 436 Mich 875 (1990).

Reconsideration denied September 30, 1994.

LEVIN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

AUTO-OWNERS INSURANCE COMPANY v LEEFERS, No. 98546; reported below: 203 Mich App 5.

MUELLER v AUTO CLUB INSURANCE ASSOCIATION, No. 98577; reported below: 203 Mich App 86.

LEVIN, J. I would grant leave to appeal.

Reconsideration denied September 30, 1994.

LEVIN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v VERNARD CARTER, No. 98722; Court of Appeals No. 154864 (on remand).

LEVIN, J. I would grant leave to appeal to consider whether Vernard Carter was denied the effective assistance of counsel when his lawyer failed to inform him that the prosecution had offered to allow him to plead guilty of second-degree murder and failed to discuss with him the advisability of accepting that offer.

I

Carter and two codefendants were at a party that was broken up following a fight. As the defendants were driving home, with Carter driving, shots were fired from a red car in the direction of the defendants.

Carter drove to the home of a fourth man so they could obtain a shotgun. After they obtained a shotgun, the defendants drove back to the house where the party had been going on in an effort to find the persons who had shot at them. On the way, another defendant fired four shots from the automobile killing an innocent bystander.

Carter was charged with first-degree murder and other offenses. Before trial, the prosecutor informed Carter's lawyer that he would dismiss the first-degree murder and other charges in return for a guilty plea of second-degree murder and possession of a firearm during the commision of a felony, and Carter's acceptance of a twenty-five-year sentence for the murder conviction and two years for the felony-firearm conviction.

Carter's lawyer did not inform him of the plea offer, and did not discuss with Carter the advisability of pleading guilty to the lesser charge.

After a bench trial, Carter was convicted of first-degree murder as an aider and abettor.

The Court of Appeals reversed Carter's conviction on the ground that his lawyer failed to convey the plea offer.

This Court vacated the Court of Appeals decision and remanded to the Detroit Recorder's Court for an evidentiary hearing regarding whether Carter had knowledge of the plea offer, although his lawyer had failed to inform him, and whether Carter would have pleaded guilty had he known of the offer.

On remand, the Recorder's Court found that Carter had actual knowledge of the plea offer and would not have pleaded guilty had he known of the offer.

Carter returned to the Court of Appeals, alleging he had been denied the effective assistance of counsel. The Court of Appeals affirmed.

II

It is undisputed that Carter's lawyer did not convey the plea offer, but that Carter nevertheless knew of the offer.

On remand, Carter's lawyer explained that he did not explore the possibility of a plea bargain with Carter because he thought that he would easily prevail at trial on the basis of a defense of mere presence. Carter's lawyer erroneously believed that Carter could not be convicted as an aider and abettor unless he encouraged the shooter to fire the shotgun.

As a result of the lawyer's misunderstanding of the law of aiding and abetting, he was not in a position to offer Carter sound legal advice concerning the plea offer.

In finding that Carter was not prejudiced by his lawyer's failure to discuss the plea offer with him, the Recorder's Court judge stressed that he did not believe that Carter would have accepted the plea offer had it been discussed with him. The judge's finding did not take into account that Carter apparently had been erroneously informed by his lawyer that he could not be convicted.

In all events, it is axiomatic that a lawyer is obliged to communicate to and discuss with his client an offer of settlement.

There is a substantial body of case law supportive of the view that what occurred in this case constitutes ineffective assistance.*

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* As the California Supreme Court recently said in *In re Alvernaz*, 2 Cal 4th 924, 934-935; 8 Cal Rptr 2d 713; 830 P2d 747 (1992):

> We conclude, *as have all federal and state courts presented with this issue*, that the converse circumstances—where counsel's ineffective representation results in a defendant's rejection of an offered plea bargain, and in the defendant's decision to proceed to trial—also give rise to a claim of ineffective assis-

III

I would grant leave to appeal to consider whether the lawyer's failure to advise Carter of the plea offer, and his failure to discuss with Carter the advisability of accepting the offer, deprived him of the effective assistance of counsel.

CAVANAGH, C.J. I join in the statement of LEVIN, J.

Reconsideration denied September 30, 1994.

LEVIN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

Summary Dispositions July 19, 1994:

TILFORD v CITY OF LIVONIA, No. 98463. In lieu of granting leave to appeal, the April 23, 1993, opinion and order of the Worker's Compensation Appellate Commission are vacated, and the matter is remanded to the commission for reconsideration in light of *Farrington v Total Petroleum, Inc,* 442 Mich 201, 214-216 (1993). MCR 7.302(F)(1). On reconsideration, the commission also is to consider and decide the plaintiff's argument that MCL 481.405(3); MSA 17.237(405)(3) reflects a legislative determination that police work is inherently stressful, and in effect relieves him from satisfying the standard of proof set forth in *Miklik v Michigan Special Machine Co,* 415 Mich 364 (1982), even where the statute's "presumption of 'personal injury' " does not apply. Jurisdiction is not retained. Court of Appeals No. 164277.

Reconsideration denied October 25, 1994.

> tance of counsel. Both alternate decisions—to plead guilty or instead to proceed to trial—are products of the same attorney-client interaction and involve the same professional obligations of counsel. Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea bargain and submit the issue of guilt to the trier of fact.

And, in *Barentine v United States,* 728 F Supp 1241, 1251 (WD NC, 1990), the court said, "[w]here defense counsel has failed to inform a defendant of a plea offer, or where defense counsel's incompetence results in a defendant's deciding to go to trial rather than pleading guilty, the federal courts have been unanimous in finding that such conduct constitutes a violation of the defendant's Sixth Amendment constitutional right to effective assistance of counsel."

See also *Turner v Tennessee,* 858 F2d 1201, 1205-1207 (CA 6, 1988), vacated on other grounds 492 US 902 (1989); *Johnson v Duckworth,* 793 F2d 898, 900-902 (CA 7, 1986); *Commonwealth v Napper,* 254 Pa Super 54 (1978).

The request for clarification of the Supreme Court's order of July 19, 1994, is granted. The defendant should seek a ruling from the Worker's Compensation Appellate Commission regarding the obligation to pay partial interim benefits pursuant to MCL 418.862; MSA 17.237(862).

WRIGHT v MUELLER BRASS COMPANY, No. 98472. In lieu of granting leave to appeal, the judgments of the Court of Appeals and the Worker's Compensation Appellate Commission are vacated, and the case is remanded to the WCAC with directions that it remand the case to the Board of Magistrates for further findings of fact regarding whether plaintiff could perform favored work. See the opinion of dissenting Commissioner Fuller. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 163558.

Leave to Appeal Denied July 19, 1994:

PEOPLE v MELVIN GRAHAM, No. 98526; Court of Appeals No. 167867.

CAVANAGH, C.J., and LEVIN, J. We would hold this case in abeyance for *People v Reed,* lv gtd 445 Mich 880 (1994).

PEOPLE v WHITE, No. 98570; Court of Appeals No. 144666.

PEOPLE v CARNEY, No. 98583; Court of Appeals No. 144393.

LEVIN, J. I would grant leave to appeal.

KIRILA v FORD MOTOR COMPANY, No. 98596; Court of Appeals No. 165771.

STANLEY v TOWN SQUARE COOPERATIVE, No. 98647. Leave to cross appeal is denied as moot. Reported below: 203 Mich App 143.

LEVIN and MALLETT, JJ. We would grant leave to appeal.

PEOPLE v DARRELL NELSON, No. 98736; Court of Appeals No. 142509.

LEVIN, J. I would direct the appointment of counsel to prepare a supplemental brief.

SHARROW v U S MANUFACTURING CORPORATION, No. 98742; Court of Appeals No. 168580.

COVIN v PIONEER FOUNDRY COMPANY, INC, No. 98767; Court of Appeals No. 165452.

PEOPLE v YOUNG, No. 98260; Court of Appeals No. 126401.

LEVIN, J. I would direct the appointment of counsel to prepare a supplemental brief.

PEOPLE v ROGERS, No. 98425. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 164390.

LEVIN, J. I would direct the appointment of counsel to prepare a supplemental brief.

Interlocutory Appeal

Leave to Appeal Denied July 19, 1994:

FAUSCH v J C PENNEY COMPANY, INC, No. 98522; Court of Appeals No. 165455.

Leave to Appeal Granted July 22, 1994:

RISS v STROH BREWERY COMPANY and DROUILLARD v STROH BREWERY COMPANY, Nos. 96422, 96423. The parties are directed to include among the matters briefed: 1) whether Stroh's decision to close its Michigan operation led to the liquidation of its pension plan, 2) whether Stroh employees on worker's compensation were informed in substance, by either Stroh representatives or the pension plan administrator, that by signing the pension plan distribution applications that were prepared for them, their worker's compensation benefits would be reduced one dollar for every dollar of pension benefits distributed pursuant to that application, and 3) on these facts, what is the time period referred to in the statutory phrase "with respect to the same time period for which . . . pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also received or being received by the employee"? MCL 418.354(1); MSA 17.237(354)(1). Reported below: 199 Mich App 67.

PEOPLE v FIELDS, No. 97269; Court of Appeals No. 147473.

HENISER v FRANKENMUTH MUTUAL INSURANCE COMPANY, No. 97462; reported below: 201 Mich App 70.

HURON TOWNSHIP v CITY DISPOSAL SYSTEMS, INC and HURON TOWNSHIP v INLAND WATERS POLLUTION CONTROL, INC, Nos. 97583, 97584. Leave to file a brief amicus curiae is also granted. Reported below: 201 Mich App 210.

PEOPLE v CERVANTES, No. 98917. Leave to cross appeal is denied. Court of Appeals No. 139378.

Leave to Appeal Denied July 22, 1994:

ASHER v EXXON COMPANY, USA, No. 98222; reported below: 200 Mich App 635.

MALLETT, J. I would grant leave to appeal.

LEVIN, J. This action was commenced on April 18, 1989. Plaintiff's last day of employment was May 15, 1987. Plaintiff was thus exposed to defendant's product for over a year, April 18, 1986 to May 15, 1987, a time period within the three-year statute of limitations.

I would grant leave to appeal to consider whether this action is time-barred because plaintiff was also exposed to defendant's product during the nine-month period, July, 1985 (when plaintiff's employer first began using defendant's product) to April, 1986, and to consider

whether plaintiff's alleged comparative negligence in continuing, during the course of his employment, to expose himself to the defendant's product has any bearing on the running of the statute of limitations.

PEOPLE v GREGORY BROWN, No. 99895; reported below: 205 Mich App 503.

RILEY, J. I would grant leave to appeal.

Summary Disposition July 26, 1994:

PEOPLE v LEWIS BELL, No. 98104. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the defendant's conviction and original sentence is affirmed. MCR 7.302(F)(1). The judge at sentencing adequately stated reasons for departing from the guidelines recommendation. *People v Fleming,* 428 Mich 408, 417-418 (1987). It is further noted that because of the timely filed application for leave to appeal by the prosecutor, the trial judge lacked jurisdiction to resentence the defendant. MCR 7.215(F)(1). Accordingly, the second sentence imposed is vacated, and the original sentence is reinstated. Court of Appeals No. 118799.

LEVIN, J. I would deny leave to appeal and dissent from the order of peremptory reversal of the Court of Appeals.

The Court of Appeals stated:

> Defendant next contends that he should be resentenced because the trial court effectively sentenced him as though he were guilty of second-degree murder rather than statutory manslaughter. After reviewing the record, we agree that resentencing is required. A sentencing judge may not make an independent finding of guilt on some other charge. *People v Fleming,* 428 Mich 408, 417; 410 NW2d 266 (1987). Here, the trial court remarked that defendant was "grossly undercharged," was "given a gift," and "got a break." He also recited the elements of second-degree murder and suggested that those elements were satisfied under the facts of the case. Because it is evident that defendant's ten- to fifteen-year sentence was based on the trial court's belief that defendant was guilty of murder rather than manslaughter, we vacate that sentence and remand for resentencing before a different judge. [Unpublished opinion per curiam, decided July 29, 1993 (Docket No. 118799).]

The Court's order today does not comply with Const 1963, art 6, § 6, which requires that all decisions of the Supreme Court "shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . ."

CAVANAGH, C.J. I join in the statement of Justice LEVIN.

Leave to Appeal Denied July 26, 1994:

TOSTIGE v JOHN E GREEN COMPANY, No. 98436; Court of Appeals No. 164765.

LEVIN and MALLETT, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Granted July 27, 1994:

PEOPLE v FISHER, No. 98903. The question is limited to whether the trial court erred in its September 20, 1993, opinion and order granting the people's motion to admit decedent's oral and written statements with conditions. The parties are directed to be as specific as possible in identifying and discussing the testimony and documents they contend should be admitted into or excluded from evidence, as the case may be. Leave to appeal is denied in respect to the defendant's search and seizure and double jeopardy issues, which were not affected by the Court's order of November 25, 1991. The January 24, 1991, decision of the Court of Appeals is the law of this case in respect to these matters. Court of Appeals No. 168977.

WISSWELL v FEDERATED MUTUAL INSURANCE COMPANY, No. 98713. The case is to be argued and submitted together with *Citizens Ins Co of America v Federated Mutual Ins Co,* No. 97159. Court of Appeals No. 140618.

SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Order Entered April 12, 1994:

PROPOSED AMENDMENT OF MCR 2.403 and PROPOSED NEW MCR 2.404. On order of the Court, this is to advise that the Court is considering a proposal to amend Rule 2.403 of the Michigan Court Rules and to adopt a new Rule 2.404. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal. We welcome the views of all who wish to address the proposal or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is to be repealed and replaced by the following language unless otherwise indicated below:]

RULE 2.403. MEDIATION.

(A)-(C) [Unchanged.]

(D) Mediation Panel.

(1) [Unchanged.]

(2) The procedure for selecting mediation panels is as provided in MCR 2.404 ~~must be provided by local administrative order, and may set minimum qualifications for mediators~~.

(3)-(5) [Unchanged.]

(E)-(O) [Unchanged.]

RULE 2.404. SELECTION OF MEDIATION PANELS.

(A) Requirements for Mediation Plans.

(1) Each trial court which submits cases to mediation under MCR 2.403 shall adopt one of the model procedures for establishing mediator pools and selecting mediation panels developed by the State Court Administrator and approved by the Supreme Court. After selecting a procedure, the individual courts shall submit an administrative order implementing it to the State Court Administrator pursuant to MCR 8.112(B). The administrative order may set minimum qualifications for mediators.

(2) Previously adopted administrative orders implementing a model procedure pursuant to Supreme Court Administrative Order 1987-9 remain in effect. A court may begin using a different model procedure by adopting a new administrative order.

(B) Application by Prospective Mediators. Application forms shall be available in the office of the mediation clerk. The form shall include an optional section identifying the applicant's gender and racial/ethnic background. The form shall include a certification that

(1) the mediator meets the requirements for service under the court's selection plan, and

(2) the mediator is aware of the findings of the Michigan Supreme Court task forces on racial/ethnic issues and gender issues in the courts of discrimination in the conduct of mediation and the mediator will not discriminate against parties, attorneys, or other mediators on the basis of race, ethnic origin, or gender.

(C) Lists of Mediators.

(1) In implementing the selection plan, the court, court employees, and attorneys involved in the procedure shall take all steps necessary to assure that as far as reasonably possible the list of mediators fairly reflects the racial, ethnic, and gender diversity of the members of the state bar in the jurisdiction for which the list is compiled.

(2) Separate lists may be maintained for specific categories of cases.

(3) Lists of mediators shall be available to the public in the mediation clerk's office.

(4) Assignments to mediation panels from lists of mediators shall be made without regard to race, ethnic origin, or gender.

(5) The chief judge shall exercise general supervision over the implementation of this subrule and may remove from a list mediators who have demonstrated incompetency, bias, made themselves consistently unavailable to serve as a mediator, or for other just cause.

Staff Comment: The State Bar Representative Assembly submitted a proposal to amend the rules governing mediation, particularly with regard to selection of mediators. It was published for comment. See 72 Mich B J 494 (May, 1993). After reviewing the comments received, the Supreme Court ordered a revised proposal published for comment. In addition to portions of the State Bar proposal, it incorporates provisions now found in Administrative Order No. 1987-9.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the *Michigan Bar Journal.* When submitting a comment, please refer to our file number 92-14.

Leave to Appeal From Attorney Discipline Board Denied April 19, 1994:

GRIEVANCE ADMINISTRATOR v JAFFE, No. 97618.

Rehearings Denied May 19, 1994:

DOWNRIVER PLAZA GROUP v SOUTHGATE, No. 95019. Reported at 444 Mich 656.

LEVIN, J. I would grant rehearing.

In re PEOPLE v ATKINS (THE DETROIT NEWS, INC and THE DETROIT FREE PRESS, INC v RECORDER'S COURT JUDGE), Nos. 98429, 98430. Reported at 444 Mich 737.

LEVIN and MALLETT, JJ. We would grant rehearing.

Order Entered May 19, 1994:

PROPOSED AMENDMENT OF MCR 2.508 and MCR 4.002. On order of the Court, this is to advise that the Court is considering proposed amendments of Rules 2.508 and 4.002 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal. We welcome the views of all who wish to address the proposal or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 2.508. JURY TRIAL OF RIGHT.

(A) [Unchanged.]

(B) Demand for Jury.

(1)-(2) [Unchanged.]

(3)(a) If a case is entirely removed from circuit court to district court, or is entirely removed or transferred from district court to circuit court, a timely demand for a trial by jury in the court from which the case is removed or transferred remains effective in the court to which the case is removed or transferred.

(b) If a case is removed from circuit court to district court, or is removed or transferred from district court to circuit court, but a portion of the case remains in the court from which the case is removed or transferred, then demand for a trial by jury in the court from which the case is removed or transferred is not effective in the court to which the case is removed or transferred. A party who seeks a trial by jury in the court to which the case is partially removed or transferred must file a written demand for a trial by jury within 21 days of the removal or transfer order, and must pay the jury fee

provided by law, even if the jury fee was paid in the court from which the case is removed or transferred.

(c) The absence of a timely demand for a trial by jury in the court from which a case is entirely or partially removed or transferred does not preclude filing a demand for a trial by jury in the court to which the case is removed or transferred. A party who seeks a trial by jury in the court to which the case is removed or transferred must file a written demand for a trial by jury within 21 days of the removal or transfer order, and must pay the jury fee provided by law.

(d) A party who is added to a case after it has been removed or transferred may demand trial by jury in accordance with paragraph (B)(1).

(C)-(D) [Unchanged.]

RULE 4.002. TRANSFER OF ACTIONS FROM DISTRICT COURT TO CIRCUIT COURT.

(A)-(B) [Unchanged.]

(C) Conditions Precedent to Transfer. The action may not be transferred under this rule until the party seeking transfer pays to the opposing parties the costs they have reasonably incurred up to that time that would not have been incurred if the action had originally been brought in circuit court, and pays the statutory circuit court filing fee to the clerk of the court from which the action is to be transferred. If a case is entirely transferred from district court to circuit court and the jury fee was ~~has been~~ paid in the district court, the district court clerk shall forward the fee to the circuit court with the papers and filing fee under subrule (D).

(D)-(E) [Unchanged.]

Staff Comment: The proposed enactment of MCR 2.508(B)(3) and the proposed amendment of MCR 4.002(C) arise from the procedural issue addressed in *Adamski v Cole,* 197 Mich App 124 (1992), *lv den* 445 Mich 863 (1994).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is

published in the *Michigan Bar Journal.* When filing a comment, please refer to our file number 94-17.

Leave to Appeal From Attorney Discipline Board Denied May 27, 1994:

GRIEVANCE ADMINISTRATOR v TUCKER, No. 98471. Reconsideration denied July 29, 1994.

GRIEVANCE ADMINISTRATOR v EVANSKI, No. 98559.

Rehearings Denied May 31, 1994:

LAWRENCE v WILL DARRAH & ASSOCIATES, INC, No. 94885. Reported *ante,* 1.

LEVIN and GRIFFIN, JJ. We would grant rehearing.

GARDNER v VAN BUREN PUBLIC SCHOOLS and BOYLE v DETROIT BOARD OF EDUCATION, Nos. 95531, 95532. Reported *ante,* 23.

Order Entered June 10, 1994:

PEOPLE v VANDERVLIET, No. 93260, 1/December 1992. On order of the Court, on the Court's own motion, the opinion of the Court is amended. The second sentence of the first full paragraph of the text at 444 Mich 52 at 89 is amended to read as follows:

> To assist the judiciary in this extraordinarily difficult context and to promote the public interest in reliable fact finding, we intend to adopt a modification of Rule 404(b). We require the prosecution to give pretrial notice of its intent to introduce other acts evidence at trial, and authorize the trial judge, consistent with the law in ten other states, to require the defendant to articulate his theory or thories of defense.

Order Entered June 14, 1994:

PROPOSED AMENDMENTS OF MCR 2.403 AND MCR SUBCHAPTERS 5.500, 5.600 AND 5.700 AND VARIOUS OTHER PROBATE RULES. On order of the Court, pursuant to a proposal from the Michigan Probate Judges Association Rules Committee, this is to advise that the Court is considering amending Subchapters 5.500, 5.600 and 5.700 of the Michigan Court Rules. Before determining whether the proposed amendments should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits. We welcome the views of all who wish to address the proposed amendments or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication does not mean that the

Court will issue an order on the subject, nor does it imply probable adoption of the proposed amendments in their present form.

[The present language would be amended as indicated below:]

RULE 2.403. MEDIATION.

(A)(1)-(2) [Unchanged.]

~~(3) In a probate proceeding, a court may submit one or more requests for relief to mediation if that part of the proceeding meets the requirements of this rule.~~

(B)-(O) [Unchanged.]

Comment: Former subrule 2.403(A)(3) is deleted. The mediation for probate proceedings is covered in MCR 5.403. Mediation for civil actions in probate court remains under this rule. See MCR 5.101(C).

RULE 5.104. PROOF OF SERVICE; WAIVER AND CONSENT.

(A) [Unchanged.]

(B) Waiver and Consent.

(1) [Unchanged.]

(2) Consent. The relief requested in a A petition or motion may be granted by consent. An interested party who consents to a petition or motion does not have to be served with or waive notice of hearing on the petition or motion. The consent must

(a) be stated on the record at the hearing, or

(b) be in a writing which is dated and signed by the interested party or someone authorized to consent on the interested party's behalf

and must contain a declaration that the person signing has received a copy of the petition or motion.

(3) Who May Waive and Consent. A waiver and a consent may be made

(a) by a legally competent interested party;

(b) by a person designated in these rules as eligible to be served on behalf of an interested party who is a legally disabled person; or

(c) on behalf of an interested party whether competent or legally disabled, by an attorney who has previously filed a written appearance.

However, a guardian, conservator, or trustee cannot waive or consent with regard to on petitions, motions, accounts, or reports made by that person as guardian, conservator or trustee.

(4) [Unchanged.]

RULE 5.117. APPEARANCE BY ATTORNEYS.

(A)-(B) [Unchanged.]

(C) Duration of Appearance by Attorney.

(1)-(2) [Unchanged.]

(3) Termination of Appearance on Behalf of an Independent Personal Representative. In independent probate, the probate register may enter an order terminating an appearance on behalf of an independent personal representative without supervised proceedings if the independent personal representative consents in writing to the termination.

(4) Other Appearance. An appearance on behalf of a client other than a fiduciary or trustee applies until a final order is entered disposing of all claims by or against the client, or an order terminating the appearance is entered.

(54) Substitution of Attorneys. In the case of a substitution of attorneys, the court in a supervised proceeding or the probate register in independent probate may enter an order permitting the substitution without prior notice to the interested persons or fiduciary or trustee. If the order is entered, the substituted attorney must give notice of the substitution to all interested persons and the fiduciary and trustee.

(D) [Unchanged.]

Comment: A new subrule (C)(3) is added to permit withdrawal of an attorney for an independent personal representative without hearing or supervision if the independent personal representative consents in writing.

RULE 5.118. AMENDING OR SUPPLEMENTING PAPERS.

(A) Papers Subject to Hearing. ~~In General.~~ A party who has filed a paper which is subject to a hearing may amend or supplement the ~~a~~ paper

(1) before a hearing if notice is given pursuant to these rules, or ~~under subrule (B). The party may amend or supplement a paper at a hearing only with leave of the court.~~

(2) at the hearing without new notice of hearing if the court determines that material prejudice would not result to the substantial rights of the person to whom the notice should have been directed.

(B) Papers not Subject to Hearing. A party who has filed a paper that is not subject to a hearing may amend or supplement the paper if service is made pursuant to these rules. ~~Amendment of Notice of Hearing or Proof of Service. On terms it deems just, the court may at any time allow amendment of a notice of hearing or proof of service, unless it clearly appears that material prejudice would result to the substantial rights of the person to whom the notice is directed.~~

RULE 5.403. MEDIATION.

The court may submit to mediation one or more requests for relief in any contested proceeding. Procedures of MCR 2.403 shall apply to the extent feasible, except sanctions must not be awarded unless the

subject matter of the mediation involves money damages or division of property.

Comment: This rule is new. Mediation of civil actions in probate court is conducted under MCR 2.403 pursuant to MCR 5.101(C). This rule applies to proceedings. The court has discretion under this rule to order mediation of a broader range of disputes than those listed in MCR 2.403(A)(1).

SUBCHAPTER 5.500. TRIAL PROCEDURE; JURY TRIAL.

RULE 5.501. JURY TRIAL, APPLICABLE RULES.

Jury trials in probate proceedings shall be governed by MCR 2.508 through 2.516 except as modified by this subchapter or MCR 5.740 for mental health proceedings and MCR 5.911 for juvenile proceedings.

Comment: This is a new rule, identifying the various rules applicable to jury trials in probate proceedings.

RULE 5.505. TRIAL OF CLAIMS AGAINST ESTATES.

The judge may consolidate or sever claims against the estate for hearing.

Comment: Consolidation and severance of claims will be handled under the rules applicable to civil cases.

RULE 5.508. JURY TRIAL OF RIGHT IN CONTESTED PROCEEDINGS.

(A) Demand. A party may demand a trial by jury of an issue for which there is a right to trial by jury by filing in a manner provided by these rules a written demand for a jury trial within 28 days after an issue is contested. A party may include the demand in a pleading if notice of the demand is included in the caption of the pleading. The jury fee provided by law must be paid at the time the demand is filed.

(1) An interested party may demand a trial by jury of an issue triable of right by filing a demand in writing with the probate register, separately from any other paper, at least 4 days before the hearing or trial.

(2) An interested party who was not served with notice of the hearing at least 7 days before the hearing may demand a jury trial at any time before the time set for the hearing. The court may adjourn the hearing in order to impanel the jury.

(3) In the demand, a party may specify the issues he or she wishes tried by jury, otherwise, the party is deemed to have demanded trial by jury of all the issues so triable.

(4) The jury fee set by law must be paid into court at the time the demand is filed. If the demand for a jury trial is ineffective. A jury fee is not required from a party demanding a jury trial under the Mental Health Code.

(B) Waiver. A party who fails to file a demand or pay the jury fee as required by this rule waives trial by jury. A jury is waived if trial or hearing is commenced without a demand being filed. *A/party/who does/not/file/a/demand/within/the/time/provided/by/this/rule/waives trial/by/jury.*

(C)/Withdrawal./A/demand/for/trial/by/jury/cannot/be/withdrawn without/the/consent/expressed/in/writing/or/in/court,/of/the/interested/parties.

(D)/Discretion/of/Court/to/Order/Jury/Trial./Notwithstanding/the failure/of/a/party/to/demand/a/jury/as/to/an/issue/so/triable/of/right, the/court/may/order/a/trial/by/jury/of/any/or/all/issues/so/triable.

Comment: Subrule (A) has been rewritten to track more closely with MCR 2.508(B)(1). The term "pleading" is defined in MCR 2.110(A) and MCR 5.001(B)(2). The provision of former subrule (A)(3) is found at MCR 2.508(C)(1). The last sentence of former subrule (A)(4) has been moved to MCR 5.740(D). Subrule (B) has been rewritten by adding language from MCR 2.508(D)(1) with an additional provision on waiver where the hearing is commenced within 28 days of the issue being joined. Subrule (C) is deleted because the same provision is found in MCR 2.508(D)(3). Subrule (D) is deleted because the same provision is found in MCR 2.509(B).

Rule/5.510./Juror/Personal/History/Questionnaire.

(A)/Form./The/form/for/the/juror/personal/history/questionnaire/as provided/by/MCR/2.510/is/used/in/probate/court.

(B)/Completion/of/Questionnaire./The/probate/or/juvenile/register shall/supply/each/juror/drawn/for/jury/service/with/a/questionnaire and/have/the/juror/answer/the/questions/in/the/juror's/own/handwriting/before/the/juror/is/called/for/service./Refusal/to/answer/such questions/or/giving/a/false/answer/to/a/question/is/contempt/of/court.

(C)/Use/of/Questionnaire/From/Another/Court./If/a/juror/called/to serve/has/been/selected/from/a/panel/drawn/for/another/court/of record,/the/register/may/obtain/a/copy/of/the/juror's/questionnaire/on file/in/the/other/court/to/be/used/in/place/of/a/form/completed/under subrule/(B).

Comment: MCR 5.510 is deleted. The topic is governed by MCR 2.510.

Rule/5.512./Verdict/in/Commitment/Proceedings.

In/proceedings/involving/possible/commitment/to/a/hospital/or facility/under/the/Mental/Health/Code,/or/to/a/correctional/or/training facility/under/the/Juvenile/code,/the/jury's/verdict/must/be/unanimous.

Comment: This rule has been moved to MCR 5.740(C).

SUBCHAPTER 5.600. JUDGMENTS AND ORDERS IN PROCEEDINGS.

RULE 5.602. FORM AND SIGNING OF JUDGMENTS AND ORDERS.

(A) Form of Judgments and Orders ~~and Proposed Orders~~. A proposed judgment or order must include the name, address, and telephone number of the attorney or party who prepared it. All judgments and orders of the court must be typewritten or legibly printed in ink and signed by the judge to whom the proceeding is assigned.

(B) Procedure for Entry of Judgments and Orders. In a contested matter, the procedure for entry of judgments and orders is as provided in MCR 2.602(B).

~~(B) Signing by Register. The court may, by an administrative order, authorize the register or a designated deputy register to sign or by device indicate the name of a judge to all orders and letters of authority of the court, with the same force and effect as though the judge had signed them. In all such cases the register or the designated deputy must place his or her initials under the name of the judge.~~

Comment: Subrule (A) has been modified to require parties who prepare orders to list their names, addresses and telephone numbers on the order and that nontypewritten orders be legibly printed in ink. New subrule (B) incorporates the procedure for entry of judgments and orders applicable for civil actions into probate proceedings. Former subrule (B) has been moved to new MCR 8.301(D).

SUBCHAPTER 5.700. PROCEEDINGS IN DECEDENTS' ESTATES.

RULE 5.701. APPLICATION; DEFINITION ~~Construction~~.

(A) Application. The rules in sections 5.701 through 5.710 ~~subchapter 5.700~~ apply to decedent's estate proceedings other than proceedings provided by law for small estates.

(B) Definition. Unless the context dictates otherwise, the term "personal representative" includes a temporary personal representative.

~~(B) Construction. Proceedings must be conducted in as simple a manner as possible, consistent with protection of the rights of the parties affected.~~

Comment: Former subrule (B) is deleted as unnecessary. See MCR 1.105. A new subrule (B) is added defining personal representative to include temporary personal representative.

RULE 5.702. COMMENCEMENT OF ESTATE PROCEEDINGS; TEMPORARY PERSONAL REPRESENTATIVE.

(A) Petition; Written Testimony ~~Contents~~; Multiple Requests ~~Prayers. Determination of Heirs. Form.~~ A ~~petition to commence proceedings must conform to the requirements of MCR 5.113 as to form and allegations pleaded.~~

(1) A proceeding in a decedent's estate is commenced by filing a petition and a written testimony form sufficient to establish the

identity of interested parties. The form must be executed before a person authorized to administer oaths.

(2) A ~~The~~ petition to commence proceedings may conclude with multiple requests for relief, including, but not limited to:

(a~~1~~) the admission of a will (and codicils) to probate,

(b~~2~~) a determination of intestacy, or

(c~~3~~) the appointment of a ~~temporary~~ personal representative~~// or (4) the appointment of a general fiduciary.~~

~~During the administration of a decedent's estate, the court may not require a separate petition or order to determine heirs, if proofs sufficient to establish the identity of interested parties, including heirs, are presented and preserved under MCR 5.703(B). A petition to commence proceedings must be substantially in the form approved by the state court administrator.~~

(B) Temporary Personal Representative~~/~~.

(1) Order of Appointment. A temporary personal representative may be appointed pending the appointment of a ~~general~~ personal representative ~~(1)~~ if requested in a ~~the initial~~ petition~~,// (2) if requested in a separate petition,~~ or ~~(3)~~ on the court's own initiative.

~~The powers of the temporary personal representative are as provided by law.~~

(2) Restriction of Authority. The court may restrict ~~specifically limit~~ the powers and authority of the temporary personal representative ~~to conform to specific needs under~~ as provided in MCR 5.705. ~~Proposed orders and letters of authority submitted to the court must specify limitations.~~

~~(C) Bond and Letters of Temporary Personal Representative. The bond and letters of authority of the temporary personal representative must be substantially in the form approved by the state court administrator.~~

~~(D) Temporary Personal Representative Duties; Combined Accountings; Subject to limitations imposed by the court under this rule, a temporary personal representative has duties and powers as provided by law.~~

(3) Combined Inventories and Accountings. If the same person is subsequently appointed ~~general~~ personal representative, a single inventory and accounting ~~or report~~ may serve for both the temporary personal representative and ~~general~~ the personal representative ~~representation~~.

Comment: New subrule (A)(1) requires filing of two documents to commence a proceeding on a decedent's estate, the petition and a written testimony form identifying the interested parties. The substantive provisions formerly found in the last paragraph of subrule (A) have been moved to MCR 5.708(A), where they more properly belong. The remaining subrules are reorganized.

RULE 5.703. INITIAL HEARING.

(A) Time; Adjournment; Waiver of Notice; Consent. Unless otherwise ordered by the court, an initial petition is to be heard not more than 21 days after filing. If all interested parties waive notice of hearing on a petition for commencement of proceedings, the hearing may be held immediately without publication or service of notice. The court may grant an adjournment under MCR 5.119. If all interested parties consent to the granting of the a petition, no formal hearing is required, and on a showing of proofs under subrule (B), the court may grant the petition without a hearing ex parte.

(B) Proofs Required. Proofs submitted at the hearing must establish allegations in the initial petition. If all interested parties consent in writing to the granting of a petition, no formal hearing is required. The court may grant the petition ex parte on satisfactory proof

(1) by testimony before the judge or register, or

(2) by the filing of a written statement duly executed before a person authorized to administer oaths,

from which it appears that all interested parties have consented in person or by their proper representatives. Proofs included as part of the record are deemed preserved for further administration settlement purposes, including the determination of heirs in an order assigning property in an intestate estate.

(C) Initial Order. Following

(1) a hearing or consent of all interested parties, and

(2) a showing of proper proofs under subrule (B),

the court must shall enter an order consistent with the proofs which also sets the amount of the bond. If a bond is required, the amount must be set in the order.

Comment: Portions of the rule have been deleted because the subject matter is covered elsewhere, see Administrative Order No. 1991-4 on caseflow management and MCR 5.702(A)(1) on written proofs.

RULE 5.704. BOND OF FIDUCIARIES.

(A) Filing and Approval of Bond. If a statute requires a fiduciary to post bond before entering on the execution of the trust, the fiduciary must give to the probate judge a bond with conditions provided by law. Approval of the bond by the judge is based on

(1) the amount and nature of the assets,

(2) a request to waive bond by the testator,

(3) assumption of liability for a reasonably excessive loss by the interested parties,

(4) limitations in the letters of authority under MCR 5.705(C), and

(5) other relevant considerations.

If the testator directs or all interested parties agree that the fiduciary may qualify with a nominal bond, the court may follow that direction. Expiration or suspension of letters does not affect the

~~continuing liability of the fiduciary or surety until the fiduciary or surety is discharged by order of the court.~~

~~(B) Continuation of Bond of Temporary Personal Representative or Temporary Conservator. If a temporary personal representative or temporary conservator subsequently is appointed general fiduciary, and if each surety on the original bond consents in writing to the continuation of the bond, the bond of the temporary personal representative or temporary conservator may be continued for the general fiduciary. The temporary personal representative or temporary conservator may qualify as a general fiduciary by filing an acceptance of trust.~~

~~(C) Form. The bond of a fiduciary must be substantially in the form approved by the state court administrator.~~

Comment: Former MCR 5.704(A) and (B) are stricken because they needlessly duplicate the provisions of MCL 700.502; MCL 27.5502. Former MCR 5.704(C) is stricken because it is redundant in light of MCR 5.113(A)(1)(c).

RULE 5.705. LETTERS OF AUTHORITY.

(A) Issuance. The court shall issue letters of authority after the appointment and qualification of the personal representative ~~fiduciary~~.

(B) Time Limitation; Extensions; Liability. Letters may be limited to a period of time, but the expiration date must conspicuously appear in the letters. The court may extend the date of expiration for a limited period. The expiration of letters does not affect the continuing liability of a personal representative, ~~fiduciary~~ or surety until such person ~~the fiduciary or surety~~ is discharged from liability by order of the court.

(C) Restrictions. The court may impose restrictions in the letters of authority ~~prohibit the fiduciary from performing acts not in the best interest of the estate~~. The restrictions must appear conspicuously on the letters. The court may modify or remove the restrictions with or without a hearing ~~prohibition on~~

~~(1) the request of the fiduciary, which may be granted ex parte,~~

~~(2) the request of an interested party following a hearing, or~~

~~(3) the court's own initiative.~~

~~The limitations of authority must conspicuously appear in the letters.~~

(D) Certification ~~Form. Letters of authority must be substantially in the form approved by the state court administrator.~~ A certification of the letters of authority and a statement that on a given date the letters are in full force and effect may appear on the face of copies furnished to the ~~fiduciary~~ personal representative or interested parties.

Comment: The requirement of subrule (C) that the court must hold a hearing before removing restrictions from letters of authority at the

request of an interested party has been deleted. The court is given discretion on whether to hold a hearing before modifying or lifting restrictions.

RULE 5.706. PUBLICATION AND CLAIMS.

(A) Publication of Notice of Administration of Estate; Contents. Unless the notice has already been published by the petitioner or temporary personal representative, the personal representative must publish in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding with respect to a nonresident was initiated, a A notice of administration settlement of the estate of a decedent or disappeared person and presentment of claims must be published by the petitioner or personal representative in a newspaper, as defined by MCR 2.106(F), in the county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated. The notice must include:

(1) The decedent's name, and, if known, the last known address, date of death, and social security number of the decedent, if known;

(2) That the estate will be assigned and distributed to the persons entitled to it;

(3) In a testate estate, that one or more an instruments have has been admitted or are is proposed to be admitted to probate, including the date or dates of execution;

(4) The name and address of the personal representative, temporary personal representative or proposed personal representative; and

(5) That claims will be forever barred unless presented within 4 months after the publication of the notice to the personal representative, the temporary personal representative or the proposed personal representative, or to both the court and the personal representative, temporary personal representative or proposed personal representative and the probate court.

Except as may be required for making substituted service under MCR 5.105 and as required by MCR 5.104(B)(4) for the entering of an order determining heirs, this is the only notice required to be published during the administration of the estate.

(B) Form of Claims. Claims filed with the court must be substantially in the form approved by the state court administrator.

(BC) Notice to Known Creditors.

(1) Within the time limits prescribed by law, the personal representative must fiduciary shall cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate whose identity who at the time of publication or during the 4 months following publication is known to, or can be reasonably ascertained by the personal representative the fiduciary.

(2) If, at the time of the publication, the address of a creditor is unknown and cannot be ascertained after diligent inquiry, the name of the creditor must be included in the published notice.

(3) In the event no personal representative has been appointed and qualified within 42 days after the date of the publication of the ~~claims~~ notice of administration, the petitioner must file a request for appointment of a temporary personal representative within 56 days after the date of publication. If no request is filed, the court may appoint a temporary personal representative with or without a hearing. The temporary personal representative must ~~the court will appoint a temporary personal representative who will~~ give notice as specified in subrule (B)(1) to each ~~known~~ creditors whose identity is known or can be reasonably ascertained.

(4) No notice need be given to a creditor whose claim has been presented or paid.

(C~~D~~) Small Estates. Such notices are not required if the estate is without assets or qualifies as a small estate under MCL 700.101 or 700.102; MSA 27.5101 or 27.5102.

Comment: Subrule (A) is amended to make clear that the personal representative must publish the notice of administration if it has not already been published. The subrule is also amended to make clear that it refers to the general notice to creditors required by MCL 700.703; MSA 27.5703. Former subrule (B) has been deleted as unnecessary and the following subrules are redesignated. Redesignated subrules (B)(1) and (3) are amended to require personal notice on each creditor whose identity can be reasonably ascertained, in compliance with *Tulsa Collection Services v Pope,* 485 US 478; 108 S Ct 1340; 99 L Ed 2d 565 (1988). Redesignated subrule (B)(3) is amended to place on the petitioner the duty to request appointment of a temporary personal representative, if no personal representative has been appointed and qualified within 42 days. A new subrule (B)(4) indicates that no personal notice need be given to a creditor whose claim has been presented or paid. Redesignated subrule (C) is modified by adding estates without assets as an instance where notices of administration and to creditors are not required.

RULE 5.707. ADMINISTRATION ~~SETTLEMENT~~ OF ESTATES; REPORTING REQUIREMENTS; CLOSING.

(A) Administration ~~Settlement~~ Procedure. The personal representative must keep the interested parties reasonably informed about the estate and its administration and must proceed promptly with the administration ~~settlement~~ of the estate and must perform ~~according to~~ the following procedures.

(1) Inventory; Time Requirements; ~~Service; Proof.~~ Within 56 days from the issuance of the letters of authority, the personal representative must file an inventory describing the property in the estate known to the personal representative. ~~If a valuation by someone other than the personal representative is required by law or by the court on application of an interested party it must be filed with the court within a reasonable time. The personal representative must serve on the interested parties copies of the inventory, valuation, and amendments to the inventory and valuation, and must file proof of service with the court under MCR 5.107.~~

(2) Notice of Rights of Election; Allowances; Filing Election. In the estate of a decedent who was domiciled in Michigan at the time of death, notice ~~Notice~~ of rights of election and of priority allowances must be served on the spouse of the deceased, if any, before the expiration of the published period for presentment of claims ~~and proof of service filed with the court~~. If an election or petition by the spouse is filed, no notice is required. Notice of hearing and the petition for priority allowance must be served personally or by mail on the personal representative in the manner provided by these rules. ~~An election or petition in the form provided by these rules may be filed in lieu of service and filing of proof. Proceedings on a petition filed for priority allowances for the spouse and minor children must be as provided by law; provided that notice of hearing on a petition for an allowance for the support of a spouse or minor children must be personally served on the personal representative of the estate of the deceased at least 7 days before the hearing on the petition, unless the personal representative appears in court or in writing waives the notice.~~ When the spouse is the personal representative, notice of hearing on the petition must be given to interested parties as defined by MCR 5.205(CB)(5).

(34) Accountings; Time for Filing; Contents; Authentication and Service; Tax Information.

(a) Time for Filing. When required, an interim accountings covering the period of a year, unless the court designates a shorter period, must be filed within 56 days after the end of the accounting period. The accounting period ends on the anniversary date of the issuance of the letters of authority; however, ~~unless~~ the personal representative may elects to change the accounting period so that it ends on a date other than the anniversary date of the issuance of the letters. Only one such change is permitted unless otherwise ordered by the court. If the personal representative elects to make such a change, the first accounting period thereafter shall not be more than a year. A notice of the change must be filed with the court. The late filing of an accounting does not affect the end of the next accounting period. A final account, when required, must be filed when the estate is ready for closing.

(b) Contents. All accountings must be itemized, showing in detail receipts and disbursements during the accounting period as well as the form and extent of the property on hand at the end of the accounting period, unless itemization is waived by all interested parties. Approval of compensation of an attorney must be sought pursuant to MCR 8.303. A written description of services performed must be included or appended regarding compensation sought by a personal representative ~~fiduciary~~. This description need not be duplicated in the order. The accounting must include notice that (i) the court does not audit the accounting; (ii) interested parties have a right to review proofs of income and disbursements at a time reasonably convenient to the personal representative and the interested party; (iii) interested parties may object to all or part of an accounting by filing an objection with the court prior to the allowance of the

accounting; and (iv) if an objection is filed and not otherwise resolved, the court will hear and determine the objection.

(c) Proof of Income and Disbursements. After filing and before allowance of an accounting, the personal representative shall make proofs of income and disbursements reasonably available for examination by any interested party who requests to see them. An interested party, with or without examining the proofs of income and disbursements, may file an objection to an accounting with the court. If an interested party files an objection without examining the proofs and the court concludes that such an examination would help resolve the objection, the court may order the interested party to examine the proofs prior to the court's hearing the objection.

(c) Authentication and Service. Accountings must be authenticated by the fiduciary as provided by MCR 5.114(B)(1) and must be served on interested parties as provided by MCR 5.107(B).

(d) Allowance of Accountings. Hearing on each interim accounting may be deferred in the discretion of the court. The court in any case and at any time may require a hearing on an accounting with or without a request by an interested person.

(4d) Tax Information. The personal representative must file with the court proof that no estate taxes are due or that the estate taxes have been paid *of the estate is responsible for filing information required for the timely computation of inheritance taxes.*

(5) [Unchanged.]

(6) *Allowance of Accountings.* Discharge and Closing. *Before the allowance of an accounting, notice must be given of the time and place for the hearing as provided by these rules, unless the notice is waived in writing by all persons interested. Notice and hearing on each interim accounting may be waived in the discretion of the court as provided by law. A party interested and desiring to contest an account may be required by the court to file specific objections in writing as provided by these rules. It is within the discretion of the court in any case and at any time to require an examination of the accounting party with or without application by a party.* On entry of required orders, *presentation of receipts or other proof showing that all disbursements have been made as appear in the accountings filed,* and on filing of receipts for distributive shares, an order of discharge may be entered and the estate closed.

(B) Notice to Personal Representative *Fiduciaries. Follow-Up Procedure.*

(1) Notice to Fiduciaries. Reporting. A personal representative must inform the court promptly of any change in the personal representative's address. *A fiduciary must promptly and efficiently administer an estate.* Except for independent probate, at the time the personal representative *fiduciary* is appointed or qualifies, the court will *shall* send by first class mail the written notice of duties to the personal representative *fiduciary* at the address on the personal representative's *fiduciary's* bond or acceptance of trust or deliver the notice to

the personal representative fiduciary personally. The notice must be substantially as follows:

"Inventories: You are required to file an inventory of the assets of the estate within 56 days from the date your letters of authority are issued.

"Accountings: You are required to file once a year on the anniversary of your qualification, or more often if the court directs, a complete itemized accounting of your administration of the estate, showing in detail all of the receipts and disbursements and the property remaining in your hands, together with the form of the property. When the estate is ready for closing, you are required to file a final accounting and an itemized and complete list of all properties remaining. Subsequent annual and final accountings must be filed within 56 days after the close of the accounting period.

"Change of Address: You are required to inform the court promptly of any change in your address.

"Tax Information: You are required to submit to the court proof that no estate taxes are due or the estate taxes have been paid filé information for timely computation and payment of inheritance taxes."

(C2) Follow-Up Procedures. When it appears to the court from either a written instrument submitted by an interested party in an estate or a review of court files that there has been a failure to comply with procedures required by law or court rule, or that the estate is not being promptly and properly administered the personal representative is not properly administering the estate, the court shall proceed as follows:

(1a) The court must shall notify the personal representative, the attorney for the personal representative, if any, fiduciary and each of the sureties for the personal representative fiduciary of the nature of the deficiency complaint or omission, together with a notice to correct the deficiency or complaint within 28 days; or, in the alternative, to appear before the court or an officer designated by it at a time specified within 28 days for a conference concerning the deficiency complaint or omission. Service is complete on mailing to the last known address of the personal representative. The notice must be sent by registered, certified, or ordinary first-class mail to the fiduciary at his or her last known address appearing in the court file. A copy of the notice must also be mailed to the attorney appearing of record for the fiduciary and to each of the fiduciary's sureties.

(2b) If a conference is held directed, unless a stenographic or electronic record is preserved, the court must prepare a written memorandum setting forth the date of the conference, the persons parties present, and any the steps required to be taken to correct the deficiency. The steps must be taken within the time set by the court but not to exceed 28 days from the date of the conference. A copy of the memorandum must be given to those present at the conference and, if the personal representative is not present at the conference, mailed to the personal representative at the last known address. If

~~any, providing a period not to exceed 28 days to correct the complaint or deficiency, must be prepared and mailed to the fiduciary, the fiduciary's attorney of record, and each of the fiduciary's sureties. The court must review, approve, and sign the memorandum if the order was conducted by staff designated by it.~~

(3c) For good cause, ~~on application of the fiduciary,~~ the court may extend the time for performance of required duties for a further reasonable period or periods, but any extended period may not exceed 28 days and shall only be extended to a day certain. The total period as extended may not exceed 56 days.

(4d) If the personal representative ~~fiduciary~~ fails to perform the duties required within the time allowed, the court may ~~shall~~ appoint a special personal representative ~~fiduciary~~ as provided by subrule (D)(B)(3). If no person is available to act as special personal representative ~~fiduciary~~, the court shall suspend the powers of the dilatory personal representative ~~fiduciary~~ until further order of the court, and notify the personal representative ~~fiduciary~~, the personal representative's ~~fiduciary's~~ attorney of record, if any, each of the personal representative's ~~fiduciary's~~ sureties, and all interested parties appearing of record at their addresses shown in the court file. This rule does not preclude contempt proceedings as provided by law, or other proceedings provided by this rule.

(5e) Each probate judge, or the chief judge in a county or probate court district having more than one probate judge, ~~shall~~ on the first business day of January, ~~May,~~ and July ~~September~~ of each year, must file with the state court administrator a report, on a form established by the state court administrator, identifying all proceedings then pending in the court in which:

(ai) except in independent probate proceedings, the personal representative ~~fiduciary~~ has not filed an inventory of the estate within 56 days after the order of appointment or issuance of the letters of authority and the inventory remains unfiled at the time of the report;

(bii) except in independent probate proceedings, at the time of the report the personal representative ~~fiduciary~~ has not filed an accounting within the preceding 14 months;

(ciii) in independent probate proceedings, 15 months have elapsed since the original appointment of an independent personal representative without the filing of either the closing statement provided by MCL 700.357(3); MSA 27.5357(3) or a detailed statement of the estate's continuing pendency and reasons for the delay in its closing and distribution provided by MCL 700.357(2); MSA 27.5357(2);

(div) there has been any other instance of noncompliance with the requirements of these rules.

The report must ~~shall~~ state, as to each proceeding reported, the nature and facts of the personal representative's ~~fiduciary's~~ noncompliance and the follow-up procedures instituted by the court as required by this rule, including any extensions of time for performance of required duties granted pursuant to subrule (C)(3)(B)(2)(c)

and the reason for the extensions. If no such procedures have been instituted or action taken, the report must *shall* include the reasons.

(6*f*) The judge specified in subrule (C)(5)*(B)(2)(e)* must *shall* file annually *a/report* with the state court administrator on forms provided by the administrator a report of the status of estates that have not previously been reported closed.

(D*3*) Appointment of Special Personal Representative *Fiduciary*. The court must *shall* appoint a special personal representative *fiduciary* on its own initiative, on the notice it directs or without notice in its discretion, in a proceeding pending before it in which the personal representative or independent personal representative *fiduciary* has been removed, has moved from the state, has died, or has become mentally incompetent in the court's opinion, or when the personal representative's or independent personal representative's *fiduciary's* whereabouts are unknown, or when for good and sufficient cause the prompt and proper administration of an estate requires. Upon qualification, the *The* special personal representative *fiduciary/must/give bond/and* has all of the duties and powers provided by law for a temporary personal representative*s*. On the qualification of the special personal representative *fiduciary*, the powers of the previous personal representative or independent personal representative *fiduciary* are suspended. The special personal representative *fiduciary* is an interested party for the purpose of filing a petition for removal of the previous personal representative *fiduciary* and appointment of a successor personal representative *general/fiduciary*, and the special personal representative *fiduciary* must file the petition unless another interested party has done so. The special personal representative *fiduciary* must also file an accounting, and if the estate is ready for closing, the court may proceed without the necessity of appointing a successor personal representative *fiduciary*. The court must *shall* immediately proceed with notice and hearing on the petition and accounting in accordance with the law applicable to the filing of original proceedings.

(E*3*) Assignment of Dower. A petition for the assignment of dower under MCL 558.1-558.29; MSA 26.221-26.245 must include:

(1*a*) a full and accurate description of the land in Michigan owned by a deceased husband and of which he died seized, from which the petitioner asks to have the dower assigned;

(2*b*) the name, age, and address of the widow and the names and addresses of the other heirs-at-law;

(3*c*) the date *time* when the husband died and his domicile at the date *time* of his death; and

(4*d*) the fact that the widow's right to dower has not been barred and that she or some other person interested in the land wishes it set apart.

If there is a *are* minor*s* or other person*s* under legal disability having no legal guardian or conservator other than the widow, there may not be a hearing on the petition until after the appointment of a guardian ad litem for such person *them*.

Comment: A requirement is added to subrule (A) that the personal representative must keep the interested parties informed of the progress of the administration of the estate. This is similar to requirements which the Revised Probate Code places on the independent personal representative, MCL 700.321; MSA 27.5321, and a trustee, MCL 700.814; MSA 27.5814. The second sentence of subrule (A)(1) is struck because it referred to a procedure no longer required by statute. See former MCL 707.2 through 707.4; MSA 27.3178(382) through 27.3178(384). A number of former provisions of subrule (A) are struck because their requirements are covered by rules of general applicability, particularly those in subchapter 5.100. The notice of rights of a spouse's election must now be served before the expiration of the period for publication of claims, subrule (A)(2). Former subrule (A)(3) has been redesignated as subrule (E). Former subrule (A)(4) has been redesignated as subrule (A)(3) and extensive changes have been made to the subrule to indicate that a court normally does not audit an accounting; rather, a procedure is provided for interested persons to examine proofs of income and disbursements and file objections with the court prior to the allowance. The accounting must include notice of these rights. Even without an objection, the court retains discretion to order a hearing on an accounting prior to allowance, new subrule (A)(3)(d). Former subrule (A)(4)(d) is redesignated as subrule (A)(4). Subrule (A)(6) has been split, with the portions relating to allowance of accountings being moved to subrule (A)(3)(d) and the portion relating to discharge and closing remaining as subrule (A)(6). Subrule (B) has been reorganized into subrules (B), (C), and (D). New requirements include: The personal representative must keep the court informed of any change in address, subrule (B). Service on the personal representative of notice of a failure to comply is complete on mailing to the personal representative's last known address, without publication, subrule (C)(1). The court must make a written memorandum of every conference on a failure to comply, but copies need only be given to those present at the conference, subrule (C)(2). The court is given discretion regarding whether to appoint a special personal representative after a finding of a failure to comply, subrule (C)(4). The court may appoint a special personal representative for an independent personal representative under subrule (D). The requirement that a special representative must always post bond has been deleted from subrule (D).

RULE 5.708. DETERMINATION OF HEIRS~~//SEPARATE PROCEEDINGS~~.

(A) Determination in Estate Proceeding. During the administration of a decedent's estate, the court may not require a separate petition or order to determine heirs, if proofs sufficient to establish the identity of interested parties, including heirs, are presented and preserved under MCR 5.702(A)(1) and MCR 5.703(B).

(B) Determination in Separate Proceeding. A proceeding for a determination of heirs not in the administration of an estate is as provided by law. Notice must be published and served under subchapter 5.100 of these rules. The proofs submitted at the hearing may be in the form of a deposition, testimony before a judge or register, or an answer to a written interrogatory ~~duly~~ executed before a person

authorized to administer oaths in the form provided for an initial hearings in a decedent's/ estates.

Comment: New subrule (A) is adapted from provisions formerly found in MCR 5.702(A).

RULE 5.709. INDEPENDENT PROBATE.

(A) Applicability of Other Rules. The rules applicable to decedents' estates apply to independent probate unless they conflict with this rule or with the procedures provided in article 3 of the Revised Probate Code, MCL 700.301-700.3621; MSA 27.5301-27.53621.

(B) Petition Denial Reviewable by Judge. If the probate register denies the petition for independent probate, the petitioner may request in writing that the judge review the order ~~decision~~. The judge must issue an appropriate order.

(C) Effect of Supervised Probate in Another State. The fact that supervised probate has been initiated in the estate of a decedent in another state does not preclude independent probate of the estate of that decedent in Michigan.

(D~~C~~) Notices.

(1) Notice Before Petition. If notice before the filing of a petition is required under MCL 700.309(1)(ef); MSA 27.5309(1)(ef), it must be served in compliance with subchapter 5.100 and proof of service must be filed with the petition.

(2) Notice of Appointment and Fee Agreement; Service.

(a) The independent personal representative must serve the notice of appointment required by MCL 700.315; MSA 27.5315 and the agreement and notice relating to attorney fees required by MCR 8.303(D). ~~The notice of appointment required to be served on interested parties must be in substantially the language of the form approved by the state court administrator. It must be served in the manner and by the method provided in subchapter 5.100 of these rules within 10 days after the appointment of the independent personal representative.~~

(b) The notice of appointment need not be served on an interested party whose name or address is unknown and cannot be ascertained after diligent inquiry if the published notice of administration included

(i) ~~a notice of the last day for the presentment of claims is published, and~~

~~(ii) in addition to the information required by MCR 5.106(A), the published notice regarding claims included~~ the statements that the estate is not being supervised by the probate court, and that any interested party may file a written petition with the court and with the independent personal representative objecting to the appointment and, if applicable, to the admission of the will to probate, and/

(ii) the name of any interested party whose name is known, but whose address cannot be ascertained after diligent inquiry, and a

statement that the result of the hearing may be to bar or affect the party's interest in the estate.

(c) If there are foreign heirs or foreign devisees, the notice of appointment must also be served on the foreign consul within 10 days after the appointment of the independent personal representative ~~the 10-day period~~. This service constitutes the service in independent probate on the foreign consul required by MCL 700.180; MSA 27.5180.

(3) ~~Claims~~ Notice of Administration; Publication. The independent personal representative must publish a notice as provided by MCR 5.706(A) and must give notice to ~~known~~ creditors as provided by MCR 5.706(B~~C~~), except the independent personal representative must be identified as such in the notices. Notices are not required if the estate qualifies for summary proceedings under MCL 700.325; MSA 27.5325.

(4) Responsibility for Giving Notice. A person filing a petition or ~~an~~ objection ~~or petition~~ with the court, including an objection under MCL 700.357; MSA 27.5357, is responsible for giving notice of the hearing on it.

~~(D) Inventory.~~

~~(1) Form. The inventory must be substantially in the form approved by the state court administrator.~~

~~(2) Submission to Court. The independent personal representative shall timely submit to the court for review, but not for filing, the documents and information necessary to compute the court fees and inheritance taxes required by law to be determined by the court.~~

(E) Filing Papers With Court. The following papers must be filed with the court:

(1) any proof of service required by subrule (D)(1),

(2) the petition for commencement of proceedings,

(3) the last will or,

(a) if the will has been admitted to probate in another state, an authenticated copy of a will probated in another state and an authenticated copy of the order admitting that will to probate from the office or court where it was first probated, or,

(b) if the will has become operative in another place that does not provide for probate, an authenticated copy of the will and a certificate verified by the legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place,

(4) proof of service of notice of appointment,

(5) proof of service of the attorney fee agreement and notice required by MCR 8.303(D),

(6) a petition for continuing pendency, if applicable, and

(7) the closing statement.

The court may not require the filing of any other papers, but other proofs ~~Proof~~ of service and publication, copies of notices, inventories, and other papers may be filed with the probate court that appointed the independent personal representative.

(F) Follow-Up Procedures. The court's authority under MCL 700.357(2); MSA 27.5357(2) includes the authority to take the actions provided in MCR 5.707(C)(4) and (D) ~~MCR 5.707(B)(2)(d) and (e) and (B)(3), 15 months after the appointment of an independent personal representative.~~

(G) [Unchanged.]

(H) Changing from Supervised to Independent Probate. At any time during supervised proceedings, any interested party or the personal representative may petition the court for authority to proceed in independent probate. The court must grant the petition if the court finds that proceeding in independent probate is in the best interest of the estate.

(I) Civil Actions. A civil action may be filed without a petition for supervision.

(J) Reopening Proceeding. After the appointment of the independent personal representative terminates, upon the filing of a petition, the probate register, for good cause and without notice, may enter an order reopening the proceeding and appointing the former independent personal representative and issue letters of authority with a specified termination date. Upon completion of the administration, the independent personal representative must file with the court and serve on the interested parties a supplemental closing statement. If an objection is not filed within 30 days after the filing of the supplemental closing statement, the probate register must issue a supplemental certificate of completion.

Comment: Subrule (B) is amended to require that appeals of a register's decision to deny independent probate must be in writing and that the judge must determine the appeal in an order. Subrule (C) is new. Former subrule (C) has been redesignated as subrule (D). Redesignated subrule (D)(2)(a) has been amended to delete duplication of statutory requirements, add a reference to the applicable statute, and add a reference to the requirement of serving copies of an attorney fee agreement and notice relating to attorney fees. Subrule (D)(2)(b)(ii) is new. Former subrule (D) is deleted because it is merely redundant of requirements found elsewhere. See, for instance, MCL 700.322(2); MSA 27.5322(2). Subrule (E) is amended to provide an exclusive list of documents that a court may require be filed with the court. The list does not include papers generated by the court. Authentication of wills, referenced in subrule (E)(3)(a) is provided for by 28 USC 1738. Subrules (H), (I) and (J) are new.

RULE 5.710. ADMINISTRATION OF ESTATES OF $5,000 OR LESS.

(A) Applicability. This rule applies to proceedings pursuant to section 102 of the Revised Probate Code, MCL 700.102; MSA 27.5102.

(B) Determination of Value of Estate. The court must first determine if the gross estate of a decedent less liens and encumbrances on included assets is $5,000 or less. Other claims against the estate must not be considered.

(C) Distribution of Estate.

(1) If the surviving spouse files a petition and no other petition is pending, the property must be assigned to the surviving spouse.

(2) If the person paying the funeral bill files a petition and no other petition is pending, the property must be assigned to the person who paid the funeral expense to the extent of the payment upon filing a funeral receipt documenting the payment. The balance of the assets must be assigned to the surviving spouse and, if there is no surviving spouse, to the heirs of the decedent.

(3) A funeral home with an unpaid funeral bill may be considered a person paying the funeral bill to the extent of the unpaid balance.

(4) If there is no spouse and the funeral bill has been paid, the property must be assigned to the heirs upon filing a funeral receipt documenting the payment.

Comment: This rule is new. It clarifies procedures for estates valued at $5,000 or less. MCL 700.102; MSA 27.5102.

RULE 5.740. JURY TRIAL.

(A)-(B) [Unchanged.]

(C) Verdict in Commitment Proceedings. In proceedings involving possible commitment to a hospital or facility under the Mental Health Code, or to a correctional or training facility under the juvenile code, the jury's verdict must be unanimous.

(D) Fee. A jury fee is not required from a party demanding a jury trial under the Mental Health Code.

Comment: Subrule (C) is former MCR 5.512. New subrule (D) is taken from former MCR 5.508(A)(4).

RULE 5.769. REPORT OF GUARDIAN; INVENTORIES AND ACCOUNTS OF CONSERVATORS.

(A) [Unchanged.]

(B) [Unchanged.]

(C) Accounts. A conservator shall file an annual account unless otherwise ordered by the Court. When required, an accounting must be filed within 56 days after the end of the accounting period. The accounting period ends on the anniversary date of the issuance of the letters of authority, unless the conservator selects another accounting period or unless the court orders otherwise. If the conservator selects another accounting period, notice of that selection shall be filed with the court. The accounting period may be a calendar year or a fiscal year ending on the last day of a month. The conservator may use the same accounting period as that used for income tax reporting, and the first accounting period may be less than a year but not longer than a year. ~~The account must contain an itemization of all receipts and disbursements during the accounting period and a description of the estate remaining and must be substantially in the form approved by the state court administrator.~~ On filing, the account may ~~shall~~ be set

for hearing or the hearing may ~~unless the court determines that the hearing should~~ be deferred to a later time. The accounting is subject to the provisions of MCR 5.707(A)(3)(b) and (c), except that references to a personal representative shall be to a conservator.

(D) Service and Notice. A copy of the account must be sent to the interested parties as provided by these rules. Notice of ~~If~~ a hearing to approve the account ~~is required by law, court rule, or court order, notice~~ must be given to interested parties as provided in subchapter 5.100 of these rules.

(E) ~~Follow-Up~~ Procedures. The procedures prescribed in MCR 5.707(B), (C) and (D) apply to guardianship and conservatorship proceedings, except that references to a personal representative shall be to a guardian or conservator, as the situation dictates.

RULE 8.301. POWERS OF REGISTER OF PROBATE, DEPUTY REGISTERS, AND CLERKS.

(A) [Unchanged.]

(B) Entry of Order Specifying Authority.

(1) [Unchanged.]

(2) The order of the chief judge may refer to the power

(a) [Unchanged.]

(b) to sign or by device indicate the name of a judge to all orders and letters of authority of the court, with the same force and effect as though the judge had signed them. In all such cases, the register or the designated deputy must place his or her initials under the name of the judge ~~to sign the signature of the probate judge on orders and letters of authority pursuant to MCR 5.602(B)~~.

(C) [Unchanged.]

Comment: Former MCR 5.602(B) is incorporated into subrule (B)(2)(b).

Staff Comment: The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is

published in the *Michigan Bar Journal.* When filing a comment, please refer to our file number 94-16.

Orders Entered June 22, 1994:

PROPOSED AMENDMENT OF MCR 2.603(D)(4). On order of the Court, this is to advise that the Court is considering amending Rule 2.603(D)(4) of the Michigan Court Rules. Before determining whether the proposed amendments should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits. We welcome the views of all who wish to address the proposed amendments or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposed amendments in their present form.

[The present language would be amended as indicated below:]

RULE 2.603. DEFAULT JUDGMENT.

(A)-(C) [Unchanged.]

(D) Setting Aside Default.

(1)-(3) [Unchanged.]

(4) An order setting aside the default must be conditioned on the party against whom the default was taken paying the taxable costs incurred by the other party in reliance on the default, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

(E) [Unchanged.]

Staff Comment: The proposed amendment is intended to make clear that attorney fees may be included among the taxable costs on which an order setting aside a default must be conditioned. The Court of Appeals held to the contrary in *Webb v Watts (On Remand)*, 194 Mich App 529 (1992). The Supreme Court vacated the judgment of the Court of Appeals and dismissed the appeal in *Webb* for lack of a proper party defendant. 443 Mich 862 (1993).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the *Michigan Bar Journal.* When filing a comment, please refer to our file number 93-42.

PROPOSED AMENDMENT OF MCR 9.126(A)—AGC CONFIDENTIALITY PROVISIONS. On order of the Court, pursuant to a proposal from the State Bar Board of Commissioners, this is to advise that the Court is considering amending Rule 9.126 of the Michigan Court Rules. Before determining whether the proposed amendments should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits. We welcome the views of all who wish to address the proposed amendments or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposed amendments in their present form.

[The present language would be amended as indicated below:]

RULE 9.126. OPEN HEARINGS; CONFIDENTIAL FILES AND RECORDS.

(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff may not be made public. ~~At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the defendant's answer thereto if a formal complaint has been filed.~~

(1) If a formal complaint is filed, any interested person may view the request for investigation and the respondent's answer thereto.

(2) If the commission concludes an investigation without authorizing a formal complaint, and the respondent files a written request within 28 days, the administrator shall inform the respondent whether any of the respondent's noncomplaining clients were contacted by the commission staff during the investigation. If the respondent then files a written request within an additional 14 days, the administrator shall take any of the following actions that are requested by the respondent:

(a) notify the contacted clients of the disposition of the request for investigation; or

(b) publish in the Michigan Bar Journal a notice of the disposition of the request for investigation.

(B)-(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 9.126(A) would allow respondents who are not formally charged to learn whether any of their noncomplaining clients were contacted during the commission's investigation. Respondents also would have the right to request that the results of the investigation be made public.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the *Michigan Bar Journal.* When filing a comment, please refer to our file number 93-36.

Orders Entered June 24, 1994:

PROPOSED ADOPTION OF RULE 6.201 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering whether to adopt a new Rule 6.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal. We welcome the views of all who wish to address the proposal or who wish to suggest alternatives.

This publication order is being issued along with the decision in *People v Lemcool,* 445 Mich 491 (1994). We invite persons interested in this subject to review the previously proposed subchapter 6.200. 422A Mich 65-106 (1985). Somewhat related to this subject are *People v VanderVliet,* 444 Mich 52, 89 (1993), and the proposed amendment of MRE 404(b) that is being published today, *post,* p 1232, for comment in our Administrative File 94-25. Finally, one should note the recent enactment of 1994 PA 113; MCL 767.94a; MSA 28.1023(194a).*

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* (1) A defendant or his or her attorney shall disclose to the prosecuting attorney upon request the following material or information within the possession or control of the defendant or his or her attorney:

(a) The name and last known address of each witness other than the defendant whom the defendant intends to call at trial provided the witness is not listed by the prosecuting attorney.

(b) The nature of any defense the defendant intends to establish at trial by expert testimony.

(c) Any report or statement by an expert concerning a mental or physical examination, or any other test, experiment, or comparison that the defendant intends to offer in evidence, or

The Court is interested in comments regarding the substance of the proposed discovery rule set forth below (proposed MCR 6.201). In addition, the Court seeks comments concerning more broadly the question whether and how to proceed in the area of criminal discovery. For example, is this area appropriately governed by case law, a court rule, a package of court rules, legislation, or a combination of means?

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The following language would be adopted as a new court rule:]

RULE 6.201. DISCOVERY.

(A) Mandatory Disclosure. In addition to disclosures required by law, a party upon request must provide all other parties:

(1) the names and addresses of all lay and expert witnesses whom the party intends to call at trial;

(2) any written or recorded statement by a lay witness whom the party intends to call at trial, except that a defendant is not obliged to provide the defendant's own statement;

(3) any report of any kind produced by or for an expert witness whom the party intends to call at trial;

(4) any criminal record that the party intends to use at trial to impeach a witness;

(5) any document, photograph, or other paper that the party intends to introduce at trial; and

(6) an opportunity to inspect and, if ordered by the court on good cause shown, to test without destruction any tangible physical evidence that the party intends to introduce at trial.

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that was prepared by a person, other than the defendant, whom the defendant intends to call as a witness, if the report or statement relates to the testimony to be offered by the witness.

(d) Any book, paper, document, photograph, or tangible object that the defendant intends to offer in evidence or that relates to the testimony of a witness, other than the defendant, whom the defendant intends to call.

(2) The defendant or his or her attorney shall comply with the disclosure provisions of subsection (1) not later than 10 days before trial or at any other time as the court directs.

(3) A defendant shall not offer at trial any evidence required to be disclosed pursuant to subsection (1) that was not disclosed unless permitted by the court upon motion for good cause shown. A motion under this subsection may be made before or during trial. [MCL 767.94a; MSA 28.1023(194a).]

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report concerning the case, except a report concerning a continuing investigation;

(3) any written or recorded statements by a codefendant or accomplice, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement or grant of immunity in connection with the case.

(C) Prohibited Discovery. Notwithstanding any other provision of this rule, there is no right to discover:

(1) information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination;

(2) a defendant or defense lawyer's work product in connection with the case, including written or recorded statements made to the defendant or the defense lawyer by a lay witness; or

(3) results of a physical or mental examination of any witness, including the complainant, except there may be discovery of the results of a physical or mental examination of the defendant pursuant to warrant, or ordered by the court in accordance with law or upon good cause shown.

(D) Timing of Discovery. The prosecuting attorney must comply with the requirements of this rule within 7 days of a request under this rule. A defendant must comply with the requirements of this rule within 7 days of a request under this rule or no less than 14 days before trial, whichever is later.

(E) Modification. On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.

(F) Violation. If a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy.

Staff Comment: This publication order was issued with the decision in *People v Lemcool*, 445 Mich 491 (1994), and shortly after the enactment of 1994 PA 113; MCL 767.94a; MSA 28.1023(194a). See also 422A Mich 65-106 (1985), *People v VanderVliet*, 444 Mich 52, 89 (1993), and the accompanying proposal for amendment of MRE 404(b), *post*, pp 1231-1232, published for comment in Administrative File 94-25. The Court wishes comment on whether and how to proceed in the area of criminal discovery.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the *Michigan Bar Journal*. When filing a comment, please refer to our file number 94-28.

PROPOSED AMENDMENT OF RULE 404(b) OF THE MICHIGAN RULES OF EVIDENCE. On further order of the Court, this is to advise that the Court is considering amending Rule 404(b) of the Michigan Rules of Evidence. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal. We welcome the views of all who wish to address the proposal or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

(a) [Unchanged.]

(b) Other crimes, wrongs, or acts.

(1) [Unchanged.]

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. ~~If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state his theory or theories of defense, limited only by the defendant's privilege against self-incrimination.~~ If the defendant contends that the evidence is inadmissible due to the nature of an intended defense, the court may require the defendant to disclose the defense theory as a prerequisite to the court considering the objection. Limited only by the defendant's privilege against self-incrimination, the court also may require either party to disclose additional information that the court needs to rule on the admissibility of the evidence.

Staff Comment: The Court today adopted an amendment of MRE 404(b), *ante,* p 1232, that codified *People v VanderVliet,* 444 Mich 52, 89 (1993). This proposed further amendment would add specifics regarding the obligations of the prosecution, the defense and the court. This is being published along with a somewhat related proposal in Administrative File 94-28 for a new MCR 6.201 governing discovery in criminal cases.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the *Michigan Bar Journal.* When filing a comment, please refer to our file number 94-25.

Leave to Appeal From Attorney Discipline Board Denied June 28, 1994:

GRIEVANCE ADMINISTRATOR v MOURADIAN, No. 98675.

GRIEVANCE ADMINISTRATOR v CRAWFORD, No. 98781.

Rehearing Denied July 5, 1994:

SKINNER v SQUARE D COMPANY, No. 94875. Reported *ante,* 153.

LEVIN, J. I would grant rehearing.

Orders Entered July 6, 1994:

PROPOSED AMENDMENT OF MCR 2.119. On order of the Court, pursuant to a proposal from the Michigan Judges Association, this is to advise that the Court is considering amending Rule 2.119 of the Michigan Court Rules. Before determining whether the proposed amendments should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits. We welcome the views of all who wish to address the proposed amendments or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication does not mean that the

Court will issue an order on the subject, nor does it imply probable adoption of the proposed amendments in their present form.

[The present language would be amended as indicated below:]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) [Unchanged.]

(2) A motion or response thereto that presents an issue of law must be accompanied by a brief citing the authority on which it is based. ~~The~~ Except with the permission of the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages~~//except/with/the/permission/of/the/court~~ double spaced, exclusive of attachments or exhibits. ~~Attachments/or/exhibits/to/the/brief are/not/counted/in/the/20-page/limit.~~ The text may not be smaller than standard pica type. A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(3)-(4) [Unchanged.]

(B)-(G) [Unchanged.]

Staff Comment: The proposed amendment was suggested by the Michigan Judges Association to clarify the intent of MCR 2.119(A)(2).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the *Michigan Bar Journal.* When filing a comment, please refer to our file number 93-29.

PROPOSED AMENDMENT OF MCR 6.302. On order of the Court, this is to advise that the Court is considering amending Rule 6.302 of the Michigan Court Rules. Before determining whether the proposed amendments should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to

comment on the form or the merits. We welcome the views of all who wish to address the proposed amendments or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposed amendments in their present form.

[The present language would be amended as indicated below:]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant under oath and personally carry out subrules (B)-(E).

(B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

(1)-(3) [Unchanged.]

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea.

(C)-(D) [Unchanged.]

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected ~~must do so~~.

(F) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.302 were published for comment by the Supreme Court coincident with the release of its order in *People v Sledge,* Docket No. 97116, 444 Mich 863 (1994), that denied reconsideration but eliminated the precedential force and effect of the opinions of the Court of Appeals at (*On Rehearing*) 200 Mich App 326 (1993), and 198 Mich App 218 (1993). The amendments are intended to further insure that a defendant's plea of guilty or nolo contendere is voluntary, understanding, and accurate, and to decrease the need for postsentencing evidentiary hearings.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the *Michigan Bar Journal.* When filing a comment, please refer to our file number 94-31.

PROPOSED AMENDMENT OF MCR 6.410. On order of the Court, this is to advise that the Court is considering amending Rule 6.410 of the Michigan Court Rules. Before determining whether the proposed amendments should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits. We welcome the views of all who wish to address the proposed amendments or who wish to suggest alternatives.

As whenever this Court publishes an administrative proposal for comment, we emphasize that publication does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposed amendments in their present form.

[The present language would be amended as indicated below:]

RULE 6.410. JURY TRIAL; NUMBER OF JURORS; UNANIMOUS VERDICT.

(A) Number of Jurors. Except as provided in this rule, a jury that decides a case must consist of 12 jurors. ~~After a jury of 12 or more jurors has been impaneled and before~~ At any time before a verdict is returned, the parties may stipulate with the court's consent to have the case decided by a specified number of jurors less than 12. On being informed of the parties' willingness to stipulate, the court must personally advise the defendant of the right to have the case decided by a jury consisting of 12 jurors. By addressing the defendant personally, the court must ascertain that the defendant understands the right and that the defendant voluntarily chooses to give up that right as provided in the stipulation. If the court finds that the requirements for a valid waiver have been satisfied, the court may accept the stipulation. Even if the requirements for a valid waiver have been satisfied, the court may, in the interest of justice, refuse to accept a stipulation, but it must state its reasons for doing so on the record. The stipulation and procedure described in this subrule must take place in open court and a verbatim record must be made.

(B) [Unchanged.]

Staff Comment: Subrule (A) presently provides that, after a jury of twelve has been impaneled and before a verdict is returned, the parties may stipulate with the court's consent to have the case decided by fewer than twelve jurors. In *People v Champion No 1,* 442 Mich 874 (1993), this Court reversed a two to one holding of the Court of Appeals that would have required a new trial where the defendant had stipulated prior to the swearing-in of the jury to have his case decided by fewer than twelve jurors. The amendment would approve expressly the procedure in *Champion* by deleting the requirement that the stipulation not occur until after the jury is impaneled.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the *Michigan Bar Journal.* When filing a comment, please refer to our file number 93-16.

Rehearing Denied July 18, 1994:

NEDERHOOD v CADILLAC MALLEABLE IRON COMPANY, No. 94110. Reported *ante,* 234.

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3. Before a defendant is permitted to proceed pro se, the trial court must advise regarding the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risk involved in self-representation; the waiver must be reaffirmed at each subsequent proceeding; in addition, at the time of the defendant's initial request to proceed pro se, the court must determine that the request is unequivocal; that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the disadvantages of self-representation; and that self-representation will not disrupt, unduly inconvenience, or burden the court; whether a particular departure justifies reversal will depend on the nature of the noncompliance (MCR 6.005[D], [E]). *People v Dennany,* 445 Mich 412.

4. The presence of standby counsel is not an exception to the requirements for waiver of counsel and can never be deemed an unequivocal assertion of the defendant's rights; it will not legitimize a waiver-of-counsel inquiry that does not comport with legal standards (MCR 6.005[D], [E]). *People v Dennany,* 445 Mich 412.

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1. Effective September 1, 1994, the sanction precluding the introduction of evidence of a party's physical condition after the party has asserted that such information is subject to the physician-patient privilege, is applicable to assertions of the privilege at a deposition and in other areas of discovery specified in the court rules (MCR 2.302, 2.306, 2.314[B][2]). *Gibson v Bronson Methodist Hosp,* 445 Mich 331.

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1. To convict an accused of forcible confinement with intent to secretly confine, the prosecution must prove a forcible seizure, confinement, inveigling or kidnapping of another done wilfully,

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maliciously, and without lawful authority with the intent to cause the person to be secretly confined or imprisoned involuntarily (MCL 750.349; MSA 28.581). *People v Jaffray,* 445 Mich 287.

SECRET CONFINEMENT.

2. To be guilty of secret confinement kidnapping, an accused must wilfully, maliciously, and without legal authority, secretly confine or imprison another person by force without the person's consent; the essence of secret confinement is the deprivation of the assistance of others by virtue of the victim's inability to communicate the predicament; it is not predicated solely on the existence of a single factor; rather consideration of the totality of the circumstances is required (MCL 750.349; MSA 28.581). *People v Jaffray,* 445 Mich 287.

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1. A trial court tests the factual support of a claim when it rules upon a motion for summary disposition by considering the affidavits, pleadings, depositions, admissions, and documentary evidence; the court may not assess credibility or determine facts; instead, its task to review the record evidence, and all reasonable inferences to be drawn from it, and decide whether a genuine issue of any material fact exists to warrant a trial; the test is whether the kind of record that might be developed, giving the benefits of reasonable doubt to the opposing party, would leave open an issue about which reasonable minds might differ (MCR 2.116[C][10]). *Skinner v Square D Co,* 445 Mich 153.

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1. A prima facie case for products liability requires proof of a causal connection between an established defect and injury; while the plaintiff bears the burden of proof, the evidence produced need not positively eliminate every other potential cause; rather, the evidence is sufficient if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories. *Skinner v Square D Co,* 445 Mich 153.

CIRCUMSTANTIAL PROOF.

2. In products liability cases, circumstantial proof may be utilized to establish the requisite causal link between a defect and an injury; however, the mere happening of an unwitnessed mishap neither eliminates nor reduces the duty to effectively demonstrate causation; to be adequate, the circumstantial proof must facilitate reasonable inferences of causation, not mere speculation; at a minimum, a causation theory must have some basis in established fact; the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Skinner v Square D Co,* 445 Mich 153.

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1. In accordance with the overriding purpose of MCL 418.371(3); MSA 17.237(371)(3), to provide for a computation of an average weekly wage that fairly and accurately represents an employee's earning capacity as fixed at the time of an injury, in calculating the average weekly wage, the percentage or fraction of work performed in a partially worked week should be included in the denominator where a week was partially worked because the day of hiring or the day of injury fell during the week (MCL 418.371[3]; MSA 17.237[371][3]). *Rowell v Security Steel Processing Co,* 445 Mich 347.

FAVORED WORKERS.

2. A voluntary cessation of favored work per se does not result in a permanent forfeiture of wage loss benefits. *Nederhood v Cadillac Malleable Iron Co,* 445 Mich 234.

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3. To establish a compensable mental disability claim arising on or after January 1, 1982, a claimant must prove a mental disability arising out of the actual events of employment, and not unfounded perceptions of the events, and that the events contributed to, aggravated, or accelerated the mental disability in a significant manner (MCL 418.301[2]; MSA 17.237[301][2]). *Gardner v Van Buren Public Schools,* 445 Mich 23.

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