MICHIGAN. SUPREME COURT

# MICHIGAN REPORTS

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CASES DECIDED

IN THE

# SUPREME COURT

OF

# MICHIGAN

FROM

November 4, 1981 to March 9, 1982

WILLIAM H. LEWIS
SUPREME COURT REPORTER

## VOL. 412

FIRST EDITION

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# SUPREME COURT

CHIEF JUSTICE

| | TERM EXPIRES JANUARY 1 OF |
|---|---|
| MARY S. COLEMAN, BATTLE CREEK | 1989 |

DEPUTY CHIEF JUSTICE

| | |
|---|---|
| JOHN W. FITZGERALD, GRAND LEDGE | 1983 |

ASSOCIATE JUSTICES

| | |
|---|---|
| THOMAS G. KAVANAGH, TROY | 1985 |
| G. MENNEN WILLIAMS, GROSSE POINTE FARMS | 1987 |
| CHARLES L. LEVIN, DETROIT | 1989 |
| JAMES L. RYAN, REDFORD | 1987 |
| BLAIR MOODY, JR., GROSSE POINTE SHORES | 1983 |

COMMISSIONERS' OFFICE

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T. VICTOR JACKSON
FRANK J. GRECO
FREDERICK J. GRIFFITH
JOYCE E. HENSLEY
MICHAEL L. PITTS
MICHAEL MURRAY
GLEN GRONSETH
HARRY ZELIFF

STATE COURT ADMINISTRATOR: RUSSELL L. BAUGH, LANSING

CLERK: HAROLD HOAG, EAST LANSING
CRIER: LOUIS HUSBAND, LANSING

ATTORNEY GENERAL: FRANK J. KELLEY, ALPENA

SOLICITOR GENERAL: ROBERT A. DERENGOSKI, EAST LANSING[1]
LOUIS J. CARUSO, LANSING[2]

[1] Retired February 12, 1982.
[2] From February 15, 1982.

# COURT OF APPEALS

CHIEF JUDGE

| | Term Expires January 1 of |
|---|---|
| ROBERT J. DANHOF, East Lansing, | 1987 |

CHIEF JUDGE PRO TEM

| | |
|---|---|
| VINCENT J. BRENNAN, Detroit, | 1987 |

JUDGES

| | |
|---|---|
| ROBERT B. BURNS, Grand Rapids, | 1983 |
| JOHN H. GILLIS, Grosse Pointe, | 1983 |
| S. JEROME BRONSON, Franklin Village, | 1987 |
| THOMAS M. BURNS, Saginaw, | 1987 |
| GEORGE N. BASHARA, Jr., Grosse Pointe Woods, | 1987[1] |
| GLENN S. ALLEN, Lansing, | 1987 |
| MICHAEL F. CAVANAGH, Lansing, | 1985 |
| DONALD E. HOLBROOK, Jr., Grand Ledge, | 1985 |
| NATHAN J. KAUFMAN, Detroit, | 1983 |
| MICHAEL J. KELLY, Bloomfield Hills, | 1983 |
| RICHARD M. MAHER, Livonia, | 1985 |
| DANIEL F. WALSH, Gaylord, | 1983 |
| WILLIAM R. BEASLEY, Birmingham, | 1983 |
| DOROTHY COMSTOCK RILEY, Grosse Pointe Farms, | 1985 |
| WALTER P. CYNAR, Warren, | 1985 |
| BARBARA MacKENZIE, Petoskey, | 1985 |

COMMISSIONERS:

JACK L. BORST, East Lansing
JOHN H. STENGER, Lansing
MARILYN MORRIS WANGER, Lansing
ALLAN S. FALK, Lansing
TIMOTHY SANDERSON, Lansing
DAVID L. JORDON, East Lansing

CLERK: RONALD L. DZIERBICKI, Lansing
ASSISTANT CLERKS: GEORGE F. WESTERMAN, Lansing[2]
NORBERT G. JAWORSKI, Lansing
JOHN J. HENSEL, Lansing
JAMES E. MAHER, Lansing

DEPUTY CLERKS:

FIRST DISTRICT: ELLA WILLIAMS, Detroit
THIRD DISTRICT: KAREN ZIEGELE, Grand Rapids

[1] To February 12, 1982.

[2] To January 28, 1982.

# CIRCUIT JUDGES

| | Term Expires January 1 of |
|---|---|
| 1. HARVEY W. MOES, Hillsdale, | 1985 |
| 2. ZOE S. BURKHOLZ, St. Joseph, | 1983 |
| CHESTER J. BYRNS, St. Joseph, | 1985 |
| JULIAN E. HUGHES, St. Joseph, | 1987 |
| WILLIAM S. WHITE, Niles, | 1987 |
| 3. VICTOR J. BAUM, Detroit, | 1987 |
| THEODORE R. BOHN, Detroit, | 1983 |
| SUSAN D. BORMAN, Detroit, | 1985 |
| ARTHUR M. BOWMAN, Detroit, | 1983 |
| THOMAS J. BRENNAN, Detroit, | 1985 |
| IRWIN H. BURDICK, Detroit, | 1985 |
| WILLIAM LEO CAHALAN, Detroit, | 1983 |
| ROBERT J. COLOMBO, Detroit, | 1983 |
| MICHAEL J. CONNOR, Detroit, | 1983 |
| HARRY J. DINGEMAN, Jr., Detroit, | 1985 |
| PATRICK J. DUGGAN, Livonia, | 1985 |
| RICHARD D. DUNN, Dearborn Heights, | 1987 |
| CHARLES S. FARMER, Detroit, | 1985 |
| SHARON TEVIS FINCH, Detroit, | 1983[1] |
| THOMAS J. FOLEY, Detroit, | 1985 |
| WILLIAM J. GIOVAN, Detroit, | 1985 |
| ROMAN S. GRIBBS, Detroit, | 1985 |
| JAMES A. HATHAWAY, Detroit, | 1987 |
| JOHN H. HAUSNER, Grosse Pointe Park, | 1983 |
| HAROLD HOOD, Detroit, | 1987 |
| CHARLES KAUFMAN, Detroit, | 1987 |
| RICHARD C. KAUFMAN, Detroit, | 1987 |
| JOHN R. KIRWAN, Detroit, | 1987 |
| JAMES E. MIES, Livonia, | 1983 |
| JOHN D. O'HAIR, Detroit, | 1987 |
| ROLAND L. OLZARK, Grosse Pointe, | 1985 |
| MAUREEN P. REILLY, Detroit, | 1985 |
| THOMAS ROUMELL, Dearborn Heights, | 1987 |
| HAROLD M. RYAN, Detroit, | 1985 |
| MICHAEL L. STACEY, Detroit, | 1983 |
| JOSEPH B. SULLIVAN, Detroit, | 1983 |
| HENRY J. SZYMANSKI, Detroit | 1987 |
| MYRON H. WAHLS, Detroit, | 1983 |

[1] From January 4, 1982.

| | | Term Expires January 1 of |
|---|---|---|
| | LUCILE A. WATTS, Detroit, | 1987 |
| | JOHN M. WISE, Detroit, | 1983 |
| 4. | GORDON W. BRITTEN, Grass Lake, | 1983 |
| | CHARLES J. FALAHEE, Michigan Center, | 1985 |
| | JAMES G. FLEMING, Jackson, | 1987 |
| | RUSSELL E. NOBLE, Jackson, | 1987 |
| 5. | HUDSON E. DEMING, Grand Ledge, | 1983 |
| | RICHARD E. ROBINSON, Eaton Rapids, | 1985 |
| 6. | ROBERT C. ANDERSON, Pontiac, | 1987 |
| | STEVEN N. ANDREWS, Bloomfield Hills, | 1985 |
| | HILDA GAGE, West Bloomfield, | 1987 |
| | ALICE L. GILBERT, Bloomfield Hills, | 1983 |
| | RICHARD D. KUHN, Pontiac, | 1987 |
| | GEORGE H. LaPLATA, West Bloomfield, | 1985 |
| | FRANCIS X. O'BRIEN, Royal Oak, | 1983 |
| | JOHN N. O'BRIEN, Berkley, | 1987 |
| | FARRELL E. ROBERTS, Bloomfield Hills, | 1985 |
| | GENE SCHNELZ, Walled Lake, | 1985 |
| | ROBERT L. TEMPLIN, Birmingham, | 1985 |
| | JAMES S. THORBURN, Royal Oak, | 1983 |
| | ROBERT B. WEBSTER, Birmingham, | 1983[2] |
| | FREDERICK C. ZIEM, Pontiac, | 1987 |
| 7. | OLLIE B. BIVINS, Jr., Flint, | 1983 |
| | EARL E. BORRADAILE, Flint, | 1983 |
| | PHILIP C. ELLIOTT, Flint, | 1987 |
| | DONALD R. FREEMAN, Flint, | 1985 |
| | HARRY B. McARA, Flint, | 1983 |
| | ROBERT M. RANSOM, Flushing, | 1985 |
| | THOMAS C. YEOTIS, Flint, | 1987 |
| 8. | JAMES L. BANKS, Ionia, | 1985 |
| | CHARLES W. SIMON, Jr., Edmore, | 1987 |
| 9. | DONALD T. ANDERSON, Kalamazoo, | 1983 |
| | ROBERT L. BORSOS, Kalamazoo, | 1987 |
| | JOHN E. FITZGERALD, Kalamazoo, | 1987 |
| | C. H. MULLEN, Jr., Kalamazoo, | 1985 |
| 10. | HAZEN R. ARMSTRONG, Saginaw, | 1985 |
| | FRED J. BORCHARD, Saginaw, | 1983 |
| | ROBERT S. GILBERT, Saginaw, | 1987 |
| | GARY R. McDONALD, Saginaw, | 1983 |
| | JOSEPH R. McDONALD, Saginaw, | 1987 |
| 11. | WILLIAM F. HOOD, Manistique, | 1985 |
| 12. | STEPHEN D. CONDON, Hancock, | 1985 |
| 13. | WILLIAM R. BROWN, Traverse City, | 1985 |
| | CHARLES M. FORSTER, Traverse City, | 1987 |
| 14. | R. MAX DANIELS, Muskegon, | 1987 |
| | JAMES M. GRAVES, Jr., Muskegon, | 1989 |
| | RONALD H. PANNUCCI, Muskegon, | 1985 |
| | JOHN H. PIERCEY, Muskegon Heights, | 1987 |
| 15. | THOMAS C. MEGARGLE, Bronson, | 1985 |

[2] To January 15, 1982.

| | Term Expires January 1 of |
|---|---|
| 16. RAYMOND R. CASHEN, Mount Clemens, | 1987 |
| ROBERT J. CHRZANOWSKI, Mount Clemens, | 1987 |
| JAMES C. DANER, Mount Clemens, | 1983 |
| GEORGE R. DENEWETH, Mount Clemens, | 1983 |
| EDWARD J. GALLAGHER, Warren, | 1983[3] |
| FRANK E. JEANNETTE, Mount Clemens, | 1985 |
| JOHN G. ROSKOPP, Mount Clemens, | 1987 |
| KENNETH N. SANBORN, Mount Clemens, | 1985 |
| 17. ROBERT A. BENSON, Grand Rapids, | 1983 |
| GEORGE V. BOUCHER, Grand Rapids, | 1983 |
| GEORGE R. COOK, Lowell, | 1987 |
| STUART HOFFIUS, East Grand Rapids, | 1983 |
| ROMAN J. SNOW, Grand Rapids, | 1985 |
| WOODROW A. YARED, Grand Rapids, | 1987 |
| 18. WILLIAM J. CAPRATHE, Bay City, | 1987 |
| EUGENE PENZIEN, Bay City, | 1989 |
| JOHN X. THEILER, Bay City, | 1985 |
| 19. CHARLES A. WICKENS, Manistee, | 1985 |
| 20. CALVIN L. BOSMAN, Grand Haven, | 1987 |
| JAMES E. TOWNSEND, Holland, | 1985 |
| 21. KURT N. HANSEN, Gladwin, | 1983[4] |
| PAUL F. O'CONNELL, Mt. Pleasant, | 1987 |
| 22. WILLIAM F. AGER, Ann Arbor, | 1983 |
| ROSS W. CAMPBELL, Ann Arbor, | 1987 |
| HENRY T. CONLIN, Ann Arbor, | 1983 |
| PATRICK J. CONLIN, Ann Arbor, | 1985 |
| EDWARD D. DEAKE, Ypsilanti, | 1985 |
| 23. J. RICHARD ERNST, Tawas City, | 1983 |
| 24. ALLEN E. KEYES, Marlette, | 1985 |
| 25. JOHN E. McDONALD, Marquette, | 1985 |
| EDWARD A. QUINNELL, Marquette, | 1987 |
| 26. ROBERT R. FERGUSON, Ossineke, | 1983 |
| JOSEPH P. SWALLOW, Alpena, | 1987 |
| 27. TERRENCE R. THOMAS, Newaygo, | 1985 |
| 28. WILLIAM R. PETERSON, Cadillac, | 1985 |
| 29. TIMOTHY M. GREEN, St. Johns, | 1987 |
| RANDY L. TAHVONEN, St. Johns, | 1985 |
| 30. ROBERT HOLMES BELL, Mason, | 1985 |
| THOMAS L. BROWN, Lansing, | 1987 |
| JAMES R. GIDDINGS, Lansing, | 1987 |
| MICHAEL G. HARRISON, Lansing, | 1983 |
| RAY C. HOTCHKISS, Lansing, | 1983 |
| JAMES T. KALLMAN, Lansing, | 1985 |
| JACK W. WARREN, Lansing, | 1985 |
| 31. JAMES T. CORDEN, Port Huron, | 1989 |
| PETER E. DEEGAN, Port Huron, | 1987 |
| ERNEST F. OPPLIGER, Port Huron, | 1985 |
| 32. DONALD L. MUNRO, Ontonagon, | 1985 |

[3] To January 15, 1982.

[4] To December 31, 1981.

| | Term Expires January 1 of |
|---|---|
| 33. MARTIN B. BREIGHNER, Petoskey, | 1985 |
| 34. CARL L. HORN, Standish, | 1985 |
| 35. PETER J. MARUTIAK, Corunna, | 1985 |
| 36. MEYER WARSHAWSKY, Paw Paw, | 1985 |
| 37. CREIGHTON R. COLEMAN, Battle Creek, | 1985 |
| STANLEY EVERETT, Battle Creek, | 1987 |
| PAUL NICOLICH, Marshall, | 1983 |
| 38. JAMES J. KELLEY, Monroe, | 1989 |
| DANIEL L. SULLIVAN, Monroe, | 1985 |
| WILLIAM J. WEIPERT, Jr., Monroe, | 1987 |
| 39. KENNETH B. GLASER, Jr., Adrian, | 1983 |
| REX B. MARTIN, Adrian, | 1985 |
| 40. NORMAN A. BAGULEY, Lapeer, | 1987 |
| MARTIN E. CLEMENTS, Lapeer, | 1985 |
| 41. V. ROBERT PAYANT, Iron Mountain, | 1985 |
| 42. DAVID S. DeWITT, Midland, | 1985 |
| TYRONE GILLESPIE, Midland, | 1983 |
| 43. JAMES E. HOFF, Dowagiac, | 1987[5] |
| MICHAEL E. DODGE, Cassopolis, | 1983[6] |
| 44. BERT M. HENSICK, Howell, | 1987 |
| PAUL R. MAHINSKE, Howell, | 1983 |
| 45. JAMES P. NOECKER, Centreville, | 1983 |
| 46. WILLIAM A. PORTER, Gaylord, | 1985 |
| 47. CLAIR J. HOEHN, Escanaba, | 1987 |
| 48. GEORGE R. CORSIGLIA, Allegan, | 1987 |
| 49. LAWRENCE C. ROOT, Big Rapids, | 1983 |
| 50. NICHOLAS J. LAMBROS, Sault Ste. Marie, | 1983 |
| 51. RICHARD I. COOPER, Ludington, | 1985 |
| 52. M. RICHARD KNOBLOCK, Bad Axe, | 1985 |
| 53. ROBERT C. LIVO, Cheboygan | 1987 |
| 54. PATRICK REED JOSLYN, Caro, | 1989 |
| 55. KURT N. HANSEN, Gladwin, | 1983[7] |

[5] To January 25, 1982.

[6] From February 9, 1982.

[7] From January 1, 1982.

# RECORDER'S COURT OF DETROIT

| | Term Expires January 1 of |
|---|---|
| EVELYN K. COOPER, | 1985 |
| GEORGE W. CROCKETT, III, | 1983 |
| ROBERT L. EVANS, | 1987 |
| GERALDINE BLEDSOE FORD, | 1987 |
| SAMUEL C. GARDNER, | 1987 |
| JOHN H. GILLIS, Jr., | 1989 |
| JOSEPH A. GILLIS, | 1987 |
| WILLIAM C. HAGUE, | 1983 |
| RICHARD P. HATHAWAY, | 1989 |
| HENRY L. HEADING, | 1985 |
| DONALD LEWIS HOBSON, | 1985 |
| BEVERLEY ANNE JASPER, | 1987 |
| CLARICE JOBES, | 1985 |
| VERA MASSEY JONES, | 1985 |
| DAVID P. KERWIN, | 1987 |
| CLARENCE LASTER, Jr., | 1985 |
| WARFIELD MOORE, Jr., | 1985 |
| JOHN PATRICK O'BRIEN, | 1983 |
| SAMUEL H. OLSEN, | 1987 |
| JUSTIN C. RAVITZ, | 1983 |
| DALTON A. ROBERSON, | 1983 |
| JAMES E. ROBERTS, | 1987 |
| MICHAEL SAPALA, | 1987 |
| M. JOHN SHAMO, | 1985 |
| LAWRENCE D. SILVERMAN, | 1987 |
| CRAIG S. STRONG, | 1985 |
| MICHAEL J. TALBOT, | 1983 |
| EDWARD M. THOMAS, | 1985 |
| LEONARD TOWNSEND, | 1987 |

# JUDICIAL CIRCUITS

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|---|---|---|
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| Allegan | Allegan | 48 |
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| Barry | Hastings | 5 |
| Bay | Bay City | 18 |
| Benzie | Beulah | 19 |
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| Chippewa | Sault Ste. Marie | 50 |
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| Clinton | St. Johns | 29 |
| Crawford | Grayling | 46 |
| Delta | Escanaba | 47 |
| Dickinson | Iron Mountain | 41 |
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| 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 |
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| Monroe | Monroe | 38 |
| Montcalm | Stanton | 8 |
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| Muskegon | Muskegon | 14 |
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| Oakland | Pontiac | 6 |
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| Ottawa | Grand Haven | 20 |
| Presque Isle | Rogers City | 26 |
| Roscommon | Roscommon | 34 |
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# ADMINISTRATIVE ORDER
# No. 1981-4

Entered on November 4, 1981, effective on January 1, 1982.—REPORTER.

This administrative order is to advise that effective January 1, 1982, the requirements of GCR 1963, 853.2(3), concerning delayed applications for leave to appeal, will be strictly enforced by the clerk of this Court with regard to both civil and criminal cases.

# ADMINISTRATIVE ORDER
# No. 1981-5

Entered on November 4, 1981, effective on January 1, 1982.—REPORTER.

To the judges of the circuit court:

On October 29, 1981, the Court adopted new juvenile court rule 15, which provides that effective January 1, 1982, probate court orders terminating parental rights under the juvenile code are appealable to the court of appeals rather than to the circuit court. To facilitate disposition of the appeals of orders pending in the circuit court on December 31, 1981, each circuit judge is directed to:

(1) insofar as possible, expedite the consideration of pending appeals from orders terminating parental rights under the juvenile code; and

(2) on July 1, 1982, and every 6 months thereafter, file a report with the chief justice listing each such appeal that remains pending, including a statement of the reasons the appeal has not been concluded.

# ADMINISTRATIVE ORDER
# No. 1981-6

Entered on November 4, 1981, effective immediately.—REPORTER.

Directed to the clerk of the court of appeals and the clerk of this Court:

On order of the Court, it appearing that there is a need to expedite consideration of appeals terminating parental rights under the juvenile code, the clerk of the court of appeals and of this Court are directed to give priority to such appeals in scheduling them for submission to their respective courts.

# ADMINISTRATIVE ORDER
# No. 1981-7

Entered December 4, 1981, effective February 1, 1982.—REPORTER.

Pursuant to 1978 PA 620, MCL 780.711-780.719; MSA 28.1114(101)-28.1114(109), the Appellate Defender Commission submitted to this Court regulations governing a system for appointment of appellate counsel for indigents in criminal cases and minimum standards for indigent criminal appellate defense services. The Court has considered the submissions and after due consideration we approve them. However, the operation of the system and enforcement of the standards pursuant to the system requires that the Legislature appropriate funds necessary to implement the system. When funds sufficient to operate the system are appropriated, this Court will promulgate an administrative order implementing the system and requiring adherence to it.

The approved regulations governing the system for appointment of appellate counsel for indigents in criminal cases, together with the commentary of the Appellate Defender Commission are as follows:

INTRODUCTION BY THE COMMISSION: In order to meet its charge under MCL 780.711 *et seq.;* MSA 28.1114(101) *et seq.,* to design an appointment system and develop minimum performance stan-

dards, the State Appellate Defender Commission, seeking the broadest possible input, established an advisory committee, which met during 1979 and developed a set of initial proposals. After review by the commission, the proposals were circulated among the bar, presented at public hearings, further refined on the basis of the advice received, and passed on to the Supreme Court for its review, revision, and approval. The commission comments, which follow the sections of the regulations and standards, are designed to briefly present some of the thinking behind the regulations and standards as distilled from these sources.

SECTION 1. ESTABLISHMENT OF THE OFFICE OF THE APPELLATE ASSIGNED COUNSEL ADMINISTRATOR.

(1) The Appellate Defender Commission shall establish an Appellate Assigned Counsel Administrator's Office which shall be coordinated with but separate from the State Appellate Defender Office. The duty of this office shall be to compile and maintain a statewide roster of attorneys eligible and willing to accept criminal appellate defense assignments and to engage in activities designed to enhance the capacity of the private bar to render effective assistance of appellate counsel to indigent defendants.

(2) An appellate assigned counsel administrator shall be appointed by and serve at the pleasure of the Appellate Defender Commission.

(3) The appellate assigned counsel administrator shall:

(a) be an attorney licensed to practice law in this state,

(b) take and subscribe the oath required by the constitution before taking office,

(c) perform duties as hereinafter provided, and

(d) not engage in the practice of law or act as an attorney or counselor in a court of this state except in the exercise of his duties under these rules.

(4) The appellate assigned counsel administrator and supporting personnel shall be considered to be court employees and not to be classified civil service employees.

(5) The salaries of the appellate assigned counsel administrator and supporting personnel shall be established by the Appellate Defender Commission.

(6) The appellate assigned counsel administrator and supporting personnel shall be reimbursed for their reasonable actual and necessary expenses by the state treasurer upon the warrant of the state treasurer.

(7) Salaries and expenses attributable to the office of the appellate assigned counsel administrator shall be paid out of funds available for those purposes in accordance with the accounting laws of this state. The auditor general, under authority of Michigan Const 1963, art 4, § 53, shall perform audits utilizing the same policies and criteria that are used to audit executive branch agencies.

(8) Within appropriations provided by law, the Appellate Defender Commission shall provide the office of the appellate assigned counsel administrator with suitable space and equipment at such locations as the commission considers necessary.

*Commission Comment:* MCL 780.711 *et seq.;* MSA 28.1114(101) *et seq.,* mandates development of a mixed system of appellate defense representation containing both public defender and private assigned counsel components. The assigned counsel component is to be structured around a statewide roster of private attorneys, which the Appellate Defender Commission is to compile and maintain. The commission as an unpaid policy-making body must delegate the performance of ongoing tasks. Since establishing and administering

the newly authorized roster is a large, permanent job, the first issue addressed is the organizational entity to which responsibility for the roster should be delegated.

Two administrative models for mixed systems are widely recognized and approved. The defender-administered model makes supervision of the assigned counsel panel a function of the defender office and is currently used in some states which have statewide trial defender offices. The independently administered model makes each component of the system autonomous while encouraging coordination of training and support services. See ABA Standards for Criminal Justice (2d ed, 1980), 5-1.2 (ABA Standards); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (National Legal Aid and Defender Association, 1976), pp 124-135 (hereafter NLADA); *Report of the Defense Services Committee,* 57 Mich St B J 242 (March 1978), recommendation 9d, p 260; Goldberg & Lichtman, *Guide to Establishing a Defender System* (May 1978), pp 71-79.

The independently administered model was perceived to be most compatible with the statute and the desires of private attorneys. It promotes the independence of assigned attorneys from the defender office and provides them with an administration which can focus exclusively on their special needs. It nonetheless permits the efficient sharing of such resources as training materials, information retrieval systems and supportive services through the coordinating efforts of the Appellate Defender Commission to which both components are ultimately responsible.

## SECTION 2. DUTIES OF THE APPELLATE ASSIGNED COUNSEL ADMINISTRATOR.

The appellate assigned counsel administrator, with such supporting staff as the commission deems appropriate, shall:

(1) After reasonable notice has been given to the members of the State Bar of Michigan, compile a roster of attorneys eligible under § 4 of these regulations and willing to accept appointments to serve as appellate counsel for indigent criminal defendants.

(a) The roster shall be updated semiannually and circulated among all probate, circuit, and appellate courts of the state. It shall also be provided, on request, to any interested party.

(b) The roster shall appear in two parts. Part one shall contain an alphabetized listing by name

of all attorneys in the state who are eligible and willing to accept criminal appellate assignments. Part two shall be subdivided according to the circuits in which the attorneys' primary practices are maintained and shall contain the following information regarding each attorney: name, firm's name, business address, business telephone, and level of assignments for which the attorney is eligible.

(2) Place in the issue of the Michigan Bar Journal to be published after the results of the bar examinations have been released an announcement specifying the procedure and eligibility criteria for placement on the assigned counsel roster.

(3) Distribute by November 1 of every second year to all attorneys on the roster a standard renewal application containing appropriate questions regarding education and experience obtained during the preceding two years and notice that the completed application must be forwarded to the administrator's office within 30 days.

(a) The eligibility level of every attorney on the list shall be reviewed every second year based on the information contained in the renewal application.

(b) Where a renewal application has not been filed or reveals deficiencies in complying with any requirement for continuing eligibility, the administrator shall notify the affected attorney in writing of such deficiencies. The names of all attorneys who fail to correct deficiencies in their continuing eligibility within 60 days after the issuance of notice shall be removed from the roster, except that the administrator shall have the discretion to extend the deadline for correcting deficiencies by an additional 60 days where good cause is shown. Such extensions shall be requested and granted

only in writing and shall include a summary of the pertinent facts.

(4) Notify all recipients of the roster of any change in the eligibility of any attorney within 20 days after the date on which a change occurs. Publication of a semiannual roster which reflects such changes within the time specified shall constitute adequate notice for purposes of this provision.

(5) Receive and take appropriate action as hereafter set forth regarding all correspondence forwarded by judges, defendants, or other interested parties about any attorney on the roster.

(6) Maintain a file for each case in which private counsel is appointed which shall contain:

(i) the order of appointment,

(ii) the cover page and table of contents of all briefs and memorandums filed by defense counsel,

(iii) counsel's voucher for fees, and

(iv) a case summary which shall be completed by counsel on forms provided by the administrator and which shall contain such information about filing dates, oral arguments, case disposition, and other pertinent matters as the administrator requires for statistical purposes.

(7) Forward to the Legal Resources Project copies of all briefs filed by assigned counsel for possible placement in a centralized brief bank.

(8) Select an attorney to be appointed for an appeal when requested to do so by an appellate court or by a local designating authority pursuant to § 3(4).

(9) Compile data regarding the fees paid to assigned counsel and take steps to promote the payment of reasonable fees which are commensurate with the provision of effective assistance of appellate counsel.

(10) Provide, on request of an assigned attorney or an appointing authority, information regarding the range of fees paid within the state to assigned counsel or to expert witnesses and investigators who have been retained by counsel with the prior approval of the trial court. On the request of both the attorney and the appointing authority, the administrator may arbitrate disputes about such fees in particular cases according to prevailing local standards.

(11) Take steps to promote the development and delivery of support services to appointed counsel.

(12) Present to the commission within 90 days after the end of the fiscal year an annual report on the operation of the assigned counsel system which shall include an accounting of all funds received and disbursed, an evaluation of the cost-effectiveness of the system, and recommendations for improvement.

(13) Perform other duties in connection with the administration of the assigned counsel system as the commission shall direct.

*Commission Comment:* The appellate assigned counsel administrator's duties described in § 2 go beyond the performance of ministerial tasks. Other functions include directing focus on efficient systems for delivery of services, adequate support services and other matters of concern to appellate practitioners. The eligibility requirements for the roster are intended to be a vehicle for upgrading as well as organizing the services of private assigned counsel. It is also important, however, that private attorneys who are willing to maintain their eligibility for the roster benefit from an organizational structure dedicated to rationalizing and improving the conditions under which they receive, perform, and are compensated for criminal appellate assignments. The view that the director of the assigned counsel system must be a competent criminal defense attorney as well as a sensitive administrator is widely shared. ABA Standards, 5-2.1; NLADA, pp 236-239; *Guide to Establishing a Defender System,* pp 84-85.

Subsections 2(1)-(4) specify the mechanics of compiling and circulating a roster which is both current and convenient. The semiannual notice and updating provisions are designed especially for new lawyers. Those who pass each bar examination will see the notice in the bar journal in time to seek placement on a semiannual roster.

Eligible attorneys may join, withdraw, or be removed from the list at anytime.

Subsection 2(5) recognizes that once an institutional entity with overall responsibility for assigned counsel exists, it will become the recipient of comments requiring a response. This subsection also reflects a commitment to passive rather than active review of attorneys' performance. Therefore, while the administrator is nowhere charged with overseeing the content of assigned counsel's work on a regular basis, he or she is directed to act when substantive problems come to light. Appropriate action may range from writing a letter of inquiry or clarification to removing an attorney from the roster in accordance with the due process safeguards specified in § 4. See ABA Standards, 5-2.2 and accompanying commentary.

Subsection 2(6) requires the administrator to collect such information as is needed to promote the goals of the assigned counsel system without unduly duplicating the tasks performed by other entities. The items listed in subsections (6)(i)-(iv) are adequate to inform the administrator that a case has been assigned, work is ongoing, and a case has been closed. Tracking of all pleadings in each case for timeliness is not necessary since such oversight is already provided by the courts. Should additional information be needed regarding a particular case, it can be obtained from the appropriate court file. The costly and time-consuming handling of excess paperwork is thus eliminated. On the other hand, the completion of uniform summaries after cases have been closed is a convenient way for the administrator to gather data on the operation of the system as a whole. Such data has not been collected and analyzed to date.

Subsection (7) makes the administrator's office the conduit for assigned counsel's contributions to the Legal Resources Project's brief bank. The brief bank currently serves assigned counsel but primarily contains pleadings prepared by the State Appellate Defender's staff attorneys. By performing this pass-through role, the administrator's office will have a ready means of collecting the items mentioned in subsection (6)(ii).

Subsection (8) functions are fully discussed in the commentary to § 3.

Subsections (9) and (10) reflect the commission's grave concern about the adequacy of current assigned counsel fees. Quality representation is inevitably tied to reasonable compensation. Low fees make it economically unattractive for competent attorneys to seek assignments and expend all the time and effort a case may require, and economically tempting to accept an excessive number of assignments in order to maintain a desirable income. Flat fees per case discourage attorneys from undertaking certain responsibilities, such as client visits or oral arguments, since they will be paid the same amount regardless of the work done.

While the commission recognized that specific suggestions regarding fees were outside the scope of its mandate, it also recognized that setting minimum performance standards without addressing the issue of compensation is unrealistic. Similar views have been expressed by others. See ABA Standards, 5-2.4; *Report of the Defense Services Committee,* recommendation 5, p 249; NLADA, pp 271-275. In addi-

tion, over half of the Court of Appeals judges responding to a questionnaire felt that increased fees would significantly enhance the quality of indigent defense representation. Some judges suggested rates believed to be substantially above those now being paid. Therefore, the commission included among the administrator's enumerated duties the active representation of the interests of assigned counsel and their clients in securing reasonable compensation for assigned counsel.

In subsection (10) the term "arbitrate" was substituted for the originally proposed term "mediate" at the State Bar's request.

Subsection (11) addresses counsel's need for support services in such areas as legal research, factual investigation, expert consultations and witnesses, and prison inmate problems. Some of these needs are already being filled by the Legal Resources Project and the State Appellate Defender Office. It is anticipated that close cooperation between the assigned counsel and defender components will lead to the development of additional shared services as well as continuing legal education programs. See ABA Standards, 5-1.4.

SECTION 3. SELECTION OF ASSIGNED COUNSEL.

(1) The judges of each circuit or group of voluntarily combined circuits shall appoint a local designating authority who shall be responsible for the selection of assigned appellate counsel from a rotating list and shall perform such other tasks in connection with the operation of the list as may be necessary at the trial court level. The designating authority may not be a judge, prosecutor or member of the prosecutor's staff, public defender or member of the public defender's staff, or any attorney in private practice who currently accepts trial or appellate criminal assignments within the jurisdiction. Circuits which have contracted with an attorney or group of attorneys to provide representation on appeal for indigent defendants must comply with these regulations within one year after implementation by the Supreme Court.

(2) Each local designating authority shall compile a list of attorneys eligible and willing to accept criminal appellate assignments as indicated on the statewide roster. In order to receive appellate assignments from a trial court, an attorney's

name must appear on that circuit's local list. The local lists shall be compiled in the following manner:

(a) The name of each attorney appearing on the statewide roster who has identified the circuit in question as his or her circuit of primary practice shall automatically be placed on the local list.

(b) The name of each attorney appearing on the statewide roster who submits a written request to the local designating authority shall also be placed on the local list.

(c) The name "State Appellate Defender Office" shall be placed in every fourth position on each local list.

(3) On receiving notice from a trial judge that an indigent defendant has requested appellate counsel, the local designating authority shall select the attorney to be assigned by rotating the local list in the following manner:

(a) The opportunity for appointment shall be offered to the attorney whose name appears at the top of the list unless that attorney must be passed over for cause.

(b) When the attorney accepts the appointment or declines it for reasons other than those hereafter specified as "for cause", the attorney's name shall be rotated to the bottom of the list.

(c) When an attorney's name is passed over for cause, his or her name shall remain at the top of the list.

(d) An attorney's name must be passed over for cause in any of the following circumstances:

(i) The crime of which the defendant has been convicted carries a possible life sentence or a statutory maximum sentence exceeding 15 years and the attorney is qualified only at Level I as described in § 4(3) of these regulations.

(ii) The attorney represented the defendant at trial or plea and no exception for continued representation as specified in § 3(8) is to be made.

(iii) Representation of the defendant would create a conflict of interest for the attorney. Conflicts of interest shall be deemed to exist between codefendants whether they were jointly or separately tried. Codefendants may, however, be represented by the same attorney if they express a preference for such representation under § 3(7) of these regulations, provided that there is no apparent conflict of interest.

(iv) The attorney did not represent the defendant at trial or plea and an exception for continued representation by trial counsel as specified in § 3(8) is to be made.

(v) The defendant's request for an attorney on the list who is neither trial counsel nor next in order for appointment is to be honored pursuant to § 3(7).

(vi) The appeal to be assigned is from a habitual offender conviction and the designating authority, pursuant to § 3(9), desires to select the attorney assigned to appeal the underlying conviction.

(e) When an attorney is passed over for cause under subsections 3(d)(i), (ii), or (iii), the local designating authority shall continue systematic rotation of the list until reaching the name of an attorney willing and able to accept the appointment.

(f) When an attorney is passed over for cause under subsections 3(d)(iv), (v), or (vi) and an attorney whose name appears other than at the top of the list is selected, on accepting the appointment the latter attorney's name shall be rotated to the bottom of the list.

(g) The local designating authority shall maintain records which reflect all instances where attorneys have been passed over and the reasons therefor.

(4) Where a complete rotation of the local list fails to produce the name of an attorney willing and able to accept appointment in a particular case, the local designating authority shall refer the case to the appellate assigned counsel administrator for assignment.

(5) After selecting an attorney to be assigned in a particular case, the local designating authority shall obtain an order of appointment from the appropriate trial judge and shall forward copies of this order to the attorney named therein, the defendant, and the appellate assigned counsel administrator.

(6) All assignments other than those made to the State Appellate Defender Office shall be considered personal to the individual attorney named in the order of appointment and shall not be attributed to a partnership or firm.

(7) When advising defendants of their right to assigned counsel on appeal pursuant to GCR 1963, 785.11, trial judges shall explain that the defendant may indicate on the written request for the appointment of counsel a preference for a particular attorney. Trial judges shall further explain that the defendant's preference is not controlling and that the eligibility and willingness of the desired attorney to accept appellate assignments are controlling. When the defendant expresses a preference for counsel whose name appears on the local list, the local designating authority shall attempt to honor it.

(8) When the defendant specifically requests the appointment of his or her trial attorney for pur-

poses of appeal and the trial attorney is otherwise eligible and willing to accept the assignment, the defendant shall be advised by the trial judge of the potential consequences of continuous representation. If the defendant thereafter maintains a preference for appellate representation by trial counsel, the advice given and the defendant's waiver of the opportunity to receive new counsel on appeal shall be by waiver on the record or by written waiver placed in the court file.

(9) Where a designating authority treats a habitual offender conviction as a separate assignment, such an assignment may be given to the attorney handling the appeal of the underlying conviction.

*Commission Comment:* The procedures for utilizing the statewide roster which are outlined in this section reflect a number of significant policy decisions. Foremost is the legislature's rejection of the ad hoc system of appointing counsel. This method, which involves the random selection by trial judges of attorneys who happen to be available, has been universally criticized for offering no control over the quality of representation, no basis for organizing and training a private defense bar, and no barriers to reliance on patronage or discrimination as selection criteria. See, for instance, ABA Standards, 5-2.1. MCL 780.711-780.719 meets these criticisms by requiring the selection of counsel from a roster of attorneys screened for eligibility and willingness to serve.

One incident of the ad hoc system which has been particularly troublesome in the appellate context is the practice of having the trial judge in the case select the defendant's representative on appeal. Since claims on appeal frequently allege legal error or abuse of discretion on the part of the trial judge, assigned counsel are put in the delicate position of having to criticize their "employer". Trial judges face the temptation of choosing attorneys willing to be uncritical. Defendants naturally question whether their interests are being vigorously protected. For detailed critiques see ABA Standards, 5-1.3; NLADA, p 142; *Report of the Defense Services Committee,* recommendation 9a, p 260.

MCL 780.712(6); MSA 28.1114(102)(6) states: "The appointment of criminal appellate defense services for indigents shall be made by the trial court from the roster provided by the commission or shall be referred to the office of the state appellate defender". The commission concluded that a significant difference exists between "appointment by the trial court" and "selection by the trial judge". It therefore suggested a system whereby selection of appellate attorneys from the roster would be made by nonjudicial personnel according to standardized procedures. Once designated, the attorney would still be ap-

pointed by the trial court, as opposed, for instance, to an appellate court. This method conforms to the legislative framework while avoiding potential conflicts for lawyers and judges alike. It has the added advantage of efficiency. Delegation of the selection process to a single designating authority in each circuit or in voluntarily combined circuits will relieve judges of what should be a largely ministerial task and will provide a centralized means of using the roster in multi-judge circuits.

Separate use by each circuit of the entire roster obviously would be cumbersome. Moreover, lawyers and judges would presumably be dissatisfied with a system that regularly matched attorneys and courts which are hundreds of miles apart. On the other hand, subdividing the roster into arbitrary geographical sections would preclude an attorney from seeking assignments in any circuit he or she chose. These competing concerns are both met by having shorter local lists drawn from the statewide roster in a manner which leaves to the attorney the choice of which and how many lists include his or her name. The commission assumed that normal laws of supply and demand would assure an adequate distribution of eligible counsel among the circuits. See ABA Standards, 5-2.2; NLADA, pp 239-240.

Simplicity and evenhandedness in the allocation of cases to private counsel is assured by automatically rotating the local list with limited exceptions for cause. The commission's rotation scheme parallels those suggested in numerous published reports. ABA Standards, 5-2.3; NLADA, p 241; *Guide to Establishing a Defender System,* pp 82-83. Rotation has the inherent side effect of limiting the number of assignments available to any one attorney, and the commission chose not to adopt any additional measures for controlling caseload size. Any numerical limitation on the number of appellate assignments would be difficult to enforce and would be inevitably arbitrary since it could not account for the remainder of a private attorney's practice.

Exceptions to strict rotation were limited to those enumerated in order to avoid reintroducing the kind of discretionary decision-making rotation is meant to eliminate. Two of these exceptions bear special mention. In general, trial counsel should not represent defendants on appeal since, like the trial judges, their performance is subject to review. While continuous representation by trial counsel may be preferred by some defendants and be desirable in some cases, it is presumptively disfavored unless the defendant makes an intelligent waiver of the right to a new attorney. Defendants considering such a waiver should therefore be advised that an appellate attorney's role includes identifying errors to which trial counsel may have failed to object and errors made by trial counsel in the first instance. If such errors exist, trial counsel may find it difficult to perceive them or to assert them most effectively on appeal. This view comports with those expressed in *Report of the Defense Services Committee,* recommendation 9b, p 260, and NLADA, p 352.

Another exception is meant to allow consideration of a defendant's preference for particular appellate counsel. While the desired attorney would have to be otherwise willing and eligible to accept the assignment, there is no reason not to accommodate the defendant's choice when possible. But for their indigency the defendants involved

would have complete freedom in selecting their own attorney. Minimizing to the extent possible disparities among defendants which result from differences in financial status is a concern which has also been addressed by other groups. See *Report of the Defense Services Committee,* recommendation 2, alternative F, p 245, and NLADA, pp 477, 481-484.

SECTION 4. ATTORNEY ELIGIBILITY FOR ASSIGNMENTS.

(1) Attorneys who wish to be considered for appointment as appellate counsel for indigent defendants shall file an application with the assigned counsel administrator. Based on the information contained in the application, eligible attorneys will be identified in the statewide roster as qualified for assignments at either Level I or Level II.

(2) All applicants who are members in good standing of the State Bar of Michigan and who:

(a) have been counsel of record in at least six or more appeals of felony convictions in Michigan or federal courts during the three years immediately preceding the date of application, or

(b) in exceptional circumstances, have acquired comparable experience as determined in the discretion of the Appellate Defender Commission,

shall be designated as Level II and may accept appointments to represent indigent defendants convicted of any felony and juveniles appealing their waiver decisions regarding any felony.

(3) All applicants who are members in good standing of the State Bar of Michigan who have not been designated Level II attorneys shall be designated as Level I. A Level I attorney may not be appointed to represent a defendant on appeal if the crime of which the defendant was convicted carries a possible life sentence or a statutory maximum sentence exceeding 15 years or, similarly, on appeal of juvenile waiver decisions where the max-

imum possible sentence for the felony charged is a life sentence or a statutory maximum exceeding 15 years.

(4) A Level I attorney shall be designated as Level II if the attorney has been counsel of record in at least two appeals of felony convictions within an 18-month period.

(5) Attorneys who are employed full time by the State Appellate Defender Office at or above the status of assistant defender need not individually prove their qualifications as Level II attorneys in order to perform the duties of their employment and may not individually appear on the statewide roster as eligible for accepting assignments during the course of their employment at the State Appellate Defender Office.

(6) In addition to demonstrating eligibility for a particular level of practice, attorneys who wish to maintain their names on the roster shall, by the filing of an application, agree to comply with the following regulations:

(a) Each attorney shall meet and shall strive to exceed the Minimum Standards for Indigent Criminal Appellate Defense Services approved by the Supreme Court and adopted by the Appellate Defender Commission.

(b) Each Level II attorney shall demonstrate continued participation in the field of criminal appellate practice by appearing as counsel of record in two felony appeals during the two years immediately preceding each eligibility renewal statement.

(c) Each attorney, in each case to which he or she is assigned as appellate counsel, shall timely forward to the assigned counsel administrator copies of the following:

(i) all briefs and memorandums filed in the

defendant's behalf,

(ii) his or her voucher for fees,

(iii) a completed case summary as described in § 2(6).

(d) Each attorney shall file an eligibility renewal statement as required by § 2(3) of these regulations within 30 days after receipt of the appropriate forms from the appellate assigned counsel administrator.

(e) Each attorney shall respond promptly to notice from the appellate assigned counsel administrator that defects in the attorney's eligibility exist or that complaints about the attorney's performance have been received. Deficiencies in eligibility must be corrected within 60 days subject to the grant in writing of one 60-day extension by the administrator for good cause shown.

(f) Each attorney shall complete an educational program in criminal appellate advocacy to be prepared by the administrator and approved by the Supreme Court.

(7) Pursuant to § 3(2)(a) and (b) each attorney on the statewide roster will automatically be placed on the local list of the circuit he or she has designated for primary practice and may, in addition, request placement on the local lists of his or her choice.

(8) The name of an attorney may be removed from the roster by the administrator for failure to comply with the preceding regulations. The administrator must give the affected attorney 60 days' notice that removal from the roster is contemplated. The attorney shall have a *de novo* appeal of right from the administrator's decision to the Appellate Defender Commission. If the right to appeal is exercised within the 60-day notice period, removal from the roster shall be stayed pending

decision by the commission. The administrator's recommendations to the commission and the commission's findings shall be in writing.

(9) Any attorney whose name is removed from the roster for a reason other than a finding of inadequate representation of a client shall complete his or her work on any cases pending at the time of removal and shall be entitled to voucher for fees in those cases in the usual manner. Where removal is predicated on a finding of inadequate representation of a client as defined in the Minimum Standards for Indigent Criminal Appellate Defense Services, the appellate assigned counsel administrator shall move the trial court for substitution of counsel, with notice to the defendant, in any pending case assigned to the attorney affected. If substitution of counsel is granted, the trial court shall determine the amount of compensation due the attorney being replaced. No attorney may accept criminal appellate defense assignments after such time as removal of his or her name from the roster has become final.

(10) Any attorney whose name has been involuntarily removed from the roster may apply for reinstatement at any time after a period of six months from the removal date has elapsed and shall be reinstated whenever renewed eligibility has been demonstrated to the satisfaction of the administrator. Refusals to reinstate by the administrator are appealable *de novo* to the commission. The reasons for the administrator's refusal and the commission's findings shall be in writing.

(11) Any attorney formerly eligible for assignments at Level II who has allowed his or her eligibility to lapse solely for failure to meet the continuing participation requirement of § 4(5)(b) may, on application, be reinstated at Level II if the administrator finds on review of the circumstances

that reinstatement at Level I is not required to protect the quality of representation received by defendants.

*Commission Comment:* Establishing criteria for eligibility for the roster posed difficult and controversial questions. Criteria which were arbitrary, subjective or discriminatory in effect had to be avoided. Those which had no clear relationship to ability or which could prove misleading or unduly burdensome had to be identified. As a result, such indicators as years of membership in the bar, references, written examinations and a complicated point system were all considered and rejected. Criminal appellate experience was selected as the sole criterion which is both relevant and readily measurable.

The eligibility requirements accomplish the single but important purpose of preventing the least experienced attorneys from representing the defendants facing the most serious consequences. They serve only to prohibit attorneys with little or no criminal appellate experience from representing defendants convicted of crimes which carry an actual or potential maximum prison sentence in excess of 15 years. Attorneys who have handled a total of six felony appeals during the three years immediately preceding their initial application are automatically "grandfathered in" at Level II, *i.e.,* they are eligible for assignment in any case. All other applicants are eligible for assignments only at Level I, *i.e.,* to cases with actual or potential maximum sentences of 15 years or less. But the move to Level II may be made rapidly. A lawyer need only be counsel in two "Level I" appeals within an 18-month period to attain the designation "Level II".

Drawing the line dividing Levels I and II at 15 years is arbitrary and troublesome. It is not suggested that defendants with relatively lower maximum sentences are somehow less deserving of effective representation or that their appeals necessarily raise less complex legal issues. The 15-year breakpoint was selected for purely practical reasons. The most common offenses tend to divide between those which carry maximum sentences of 15 years or less, and those which have "floating" maximums (life or any term of years). While the desire to safeguard defendants is the paramount object of the entire regulatory scheme, if a sufficient number of cases is not defined as Level I, attorneys may be denied the opportunity to gain the experience required for Level II. If movement from Level I to Level II were thus systematically discouraged, the number of Level II attorneys available for appointment could become inadequate and defendants, as well as lawyers, would suffer. The 15-year demarcation is meant to insure a large enough pool of Level I appeals while still limiting the assignment of cases involving the most serious offenses and longest sentences to the more experienced appellate counsel.

Subsection (5) exempts staff attorneys employed by the State Appellate Defender Office from having to prove their qualifications as Level II attorneys for two reasons. First, they are by definition not private assigned counsel subject to the operation of the roster. They are prohibited by MCL 780.711-780.719 from accepting outside employment and therefore cannot appear on the roster as individuals. The courts' appointments in the cases they handle are made to the State

Appellate Defender Office as an entity, not to them personally. Second, the State Appellate Defender Office has internal hiring and promotional procedures which provide far greater quality control than the assigned counsel system is designed to afford. Pursuant to the statute, assistant defenders must, of course, conform to the minimum standards of performance.

Having achieved eligibility for the roster, an attorney must meet certain minimal requirements in order to remain eligible. Level II attorneys are required to handle at least two felony appeals (assigned or retained) during the two years immediately preceding each eligibility renewal statement. All participating attorneys are expected to complete a course in criminal appellate advocacy. They are also expected to perform those tasks necessary to maintain the assigned counsel system as a whole, *e.g.,* completing case summaries and renewal applications and contributing to the brief bank. Finally, they must continue to represent their clients in conformity with the minimum standards.

Failure to maintain eligibility obviously has significant consequences to the affected attorneys. Due process safeguards are built into the administrative design through the mechanisms of written notices and findings of fact and *de novo* appeals to the Appellate Defender Commission. It must be remembered, however, that the potential consequences are limited to the attorney's eligibility for criminal appellate assignments. Civil work, criminal trial work, and even retained criminal appeals are not implicated. The ability of the state to set conditions on eligibility for appellate assignments stems from both the state's right to select and pay for attorneys in appointed cases and its responsibility to insure the effectiveness of counsel it selects to represent indigent defendants. The eligibility criteria and continuing participation requirements selected by the commission are in accord with the recommendations of its predecessor groups. See ABA Standards, 5-2.2. NLADA, pp 239-241; *Report of the Defense Services Committee,* recommendation 10, pp 260-261.

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The approved minimum standards for indigent criminal appellate defense services, together with the commentary of the Appellate Defender Commission, are as follows:

1. Counsel shall, to the best of his or her ability, act as the defendant's counselor and advocate, undeflected by conflicting interests and subject to the applicable law and rules of professional conduct.

*Commission Comment:* The standard was adapted from the ABA Standards for Criminal Justice (2d ed, 1980), 4-1.1(b) and 4-1.1(c) (ABA Standards). It is meant to remind counsel of their ethical and profes-

sional responsibilities as the defendant's representative in an adversary system. The United States Supreme Court has emphasized that appellate defense counsel's task is to be an advocate, not amicus curiae. *Anders v California,* 386 US 738, 744; 87 S Ct 1396; 18 L Ed 2d 493 (1967). Speaking for a majority of the Michigan Supreme Court, Justice WILLIAMS has stated: "We hold as a fundamental precept that a lawyer's duty to his client in a criminal case is judged by the same standard regardless of the fact that his client may be indigent. * * * The application of our Code of Professional Responsibility and Canons is not dependent upon the size of the retainer which an attorney receives." *Holt v State Bar Grievance Board,* 388 Mich 50, 60 (1972).

2. Counsel shall not represent more than one of multiple codefendants on appeal regardless of whether the codefendants were jointly or separately tried, unless the codefendants express a preference for joint representation and there is no apparent conflict of interest.

*Commission Comment:* This standard parallels GCR 1963, 785.4(4), which is intended to avoid conflicts of interest arising from the joint representation of codefendants at trial. Appellate counsel, like trial counsel, must scrupulously avoid being placed in a position where promoting the interests of one client requires minimizing or violating the interests of another client. See *State Appellate Defender v Saginaw Circuit Judge,* 91 Mich App 606 (1979). Just as at trial, arguments about the relative culpability of codefendants may be relevant to claims about the sufficiency of the evidence or the propriety of a sentence. If conflicts of interest are not investigated adequately in advance, defendants may have to face the difficulty of receiving substitute counsel weeks or months after a claim of appeal has been filed. The disrupted attorney-client relationship then must be replaced and substantial time may be added to the appellate process.

3. Except in extraordinary circumstances, counsel shall interview the defendant in person on at least one occasion during the initial stages of representation.

*Commission Comment:* Client interviews serve numerous purposes. They may reveal significant facts not on the record or even the fact that parts of the record are missing. They may confirm or eliminate claims of error. Interviews serve to alert counsel to circumstances which make dismissing the appeal the defendant's wisest choice. They afford the defendant the opportunity to meet the person upon whose performance his or her future depends. Personal interviews are crucial to establishing the trust and rapport which are the essence of a successful attorney-client relationship. Meeting one's client for a discussion of the case seems on its face to be a fundamental aspect of

professional conduct. The commission felt strongly that attorneys must be prepared to visit their clients wherever they may be incarcerated. Compensation for travel expenses must be considered a basic cost of providing assigned appellate counsel. Court of Appeals judges who responded to a questionnaire also felt that client interviews are important to effective representation on appeal.

4. Counsel shall fully apprise the defendant of the reasonably foreseeable consequences of pursuing an appeal in the particular case under consideration.

*Commission Comment:* The decision whether or not to appeal belongs to the defendant, but it is a decision that can only be made intelligently with the advice of counsel. In certain circumstances, success on appeal may expose a defendant to the risk of a longer sentence or conviction on higher or additional charges. An attorney who obtains reversal of a client's conviction but fails to foresee that the client will be worse off as a result does not "conscientiously protect his client's interest". *Beasley v United States,* 491 F2d 687, 696 (CA 6, 1974). To help the defendant make a realistic choice about appealing, counsel must explain the nature of the appellate process, the average time involved, the kind of remedies which may result, and the potential disadvantages such remedies may present. In accord see: ABA Standards, 4-8.2; *Stewart v Wainwright,* 309 F Supp 1023 (MD Fla, 1969); *Smotherman v Beto,* 276 F Supp 579, 585 (ND Tex, 1967).

5. In any appeal of right, counsel shall comply with the applicable court rules regarding the timely and proper filing of claims of appeal and shall take any other steps which may be necessary to protect the defendant's right to review.

*Commission Comment:* Once a defendant chooses to exercise his state constitutional right to appeal, counsel's first duty must be to take the procedural steps necessary to protect the continued existence of that right. Despite their general reluctance to find counsel ineffective, appellate courts have not hesitated to do so when a lawyer's negligence has caused a defendant to lose even the opportunity for an appellate review provided by law. See Const 1963, art 1, § 20; GCR 1963, 803; ABA Standards, 4-8.2(b) and 4-8.4(a); *Boyd v Cowan,* 494 F2d 338 (CA 6, 1974); *Chapman v United States,* 469 F2d 634 (CA 5, 1972).

6. Counsel shall promptly request and review all transcripts and lower court records.

*Commission Comment:* While the necessity to review the record in order to perfect an appeal is self-evident, this standard reminds

counsel of two additional points. First, promptness in obtaining and reviewing the record is necessary if all issues are to be researched and all facts clarified in time to prepare a thorough brief. Second, the record includes more than the bare transcript of the trial or guilty plea. Such items as docket entries, charging documents, search warrants, competency and sanity evaluations, judicial orders and presentence reports may reveal or support claims of error. Familiarity with the total record is therefore crucial to effective appellate representation. See GCR 1963, 812, and *Entsminger v Iowa,* 386 US 748; 87 S Ct 1402; 18 L Ed 2d 501 (1967).

7. Counsel shall investigate potentially meritorious claims of error not reflected in the trial court record when he or she is informed or has reason to believe that facts in support of such claims exist.

*Commission Comment:* Some attorneys feel that appellate representation is bound by the four corners of the record and that there is no place for factual investigation on appeal. Such a view is belied by GCR 1963, 817.6, which establishes the procedure for developing a record for appeal when the existing record is inadequate to support a claim of error. Information provided by the defendant or trial counsel or unanswered questions raised by the existing record may lead conscientious appellate counsel to the identification of potentially reversible error. This standard does not place on counsel the duty to actively search for every off-record claim that might conceivably be developed. It does, however, require counsel to be alert to the possibility of off-record claims, to verify facts which would be significant if proven, and to investigate circumstances which a criminal lawyer would recognize as potentially prejudicial to his or her client. Ignoring nonrecord claims on appeal when a procedure exists for asserting them is the equivalent of failing to "investigate all apparently substantial defenses" at trial. *Beasley v United States, supra.* See also ABA Standards, 4-4.1.

8. Counsel shall move for and conduct such evidentiary hearings as may be required to create or supplement a record for review of any claim of error not adequately supported by existing records which he or she believes to be meritorious.

*Commission Comment:* This standard is a necessary corollary to the preceding one. If investigation reveals facts off the record which would support a claim on appeal, it then becomes appellate counsel's duty to develop a testimonial record for review as GCR 1963, 817.6 provides. See *People v Ginther,* 390 Mich 436, 443-444 (1973).

9. Counsel should assert claims of error which are supported by facts or record, which will benefit

the defendant if successful, which possess arguable legal merit, and which should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research.

*Commission Comment:* The fundamental purpose served by providing counsel on appeal is to interpose between client and court the judgment of a professional familiar with the criminal law, who has assessed the facts and brought to the court's attention any errors which might entitle the defendant to relief. Competent exercise of this professional judgment is the crucial duty owed by appellate counsel to the defendant. The standard does not require that every innovative issue conceivable be raised in every case. It is addressed to the level of competence which can reasonably be expected of a conscientious criminal appellate practitioner who is not a full-time specialist. It does, however, stress the assertion of all arguably meritorious claims rather than the preselection by counsel of the one or two issues which in counsel's own opinion will in fact be successful. The "reasonableness" test of *Beasley v United States, supra,* was expressly adopted by the Michigan Supreme Court in *People v Garcia,* 398 Mich 250, 266 (1976). Although *Beasley* specifically addresses the conduct of trial counsel, its references to the assertion of "all apparently substantial defenses" and to "strategy and tactics which lawyers of ordinary training and skill * * * would not consider competent" are useful and have been applied to appellate counsel. See *Rook v Cupp,* 18 Or App 608; 526 P2d 605 (1974).

Before enunciation of the *Beasley* standard, the Michigan Supreme Court remanded for consideration by the State Bar Grievance Board a defendant's complaint against his assigned appellate counsel. The lawyer had failed to assert as error a claim identical to one then pending consideration by the Supreme Court, even though the defendant himself had pointed out the problem. Emphasizing the need for "proper legal research", the Court found "substantial evidence * * * that suggests [the defendant] may have been inadequately represented". *Holt v State Bar Grievance Board, supra,* 62. The California Supreme Court requires appellate counsel to raise "all issues that are arguable". *People v Feggans,* 67 Cal 2d 444, 447; 62 Cal Rptr 419; 432 P2d 21 (1967). The United States Supreme Court has said that indigent defendants must be afforded counsel to argue on appeal "any of the legal points arguable on their merits". *Anders v California, supra.*

10. Counsel should not hesitate to assert claims which may be complex, unique, or controversial in nature, such as issues of first impression, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law.

*Commission Comment:* This standard complements the preceding one. While recognition of unique or complex issues cannot be re-

quired, assertion of such issues when recognized is encouraged. The attorney who, through expertise or inspiration, identifies a claim which may be conceptually difficult or controversial is obligated to pursue it in the defendant's behalf. This standard also specifically cautions appellate lawyers against avoiding legitimate ineffective assistance of counsel claims out of undue deference to their peers. In accord, see ABA Standards, 4-8.6(a) and 4-8.6(b).

11. When a defendant insists that a particular claim be raised on appeal against the advice of counsel, counsel shall inform the defendant that he or she has the right to present that claim to the appellate court *in propria persona.* Should the defendant choose to proceed in such manner, counsel shall provide procedural advice and such clerical assistance as may be required to conform the defendant's pleadings for acceptability to the court.

*Commission Comment:* This standard is the product of three strongly felt concerns. One is that the case belongs to the defendant and clients should not be foreclosed from the opportunity to act upon disagreements with their professional representatives. Nonindigent defendants who wish to have particular claims asserted are able to select retained counsel based upon the lawyer's willingness to comply with their wishes. Indigent defendants should at least be provided the aid minimally necessary to present such claims by themselves. The second concern is that in every dispute between defendants and lawyers about the merits of a claim, the defendant is not necessarily wrong. *Holt v State Bar Grievance Board, supra,* is a case on point. This standard is intended to protect not only the defendant's dignity, but his or her right to prevent meritorious claims from being buried by an attorney's mistake. On the other hand, the attorney's role is to exercise professional judgment, and appellate counsel cannot be required to pursue claims which he or she had in good faith rejected as lacking any arguable merit. Counsel is only expected to provide such assistance as an indigent client, particularly one who is incarcerated, may reasonably need to place such claims before the court. The commission anticipates that compliance with other standards, particularly those that serve to promote trust and rapport between attorney and client, will result in this standard being implemented infrequently.

12. Assigned counsel shall not take any steps towards dismissing an appeal for lack of arguably meritorious issues without first obtaining the defendant's informed written consent.

*Commission Comment:* This standard addresses the situation where, based on the advice of counsel that no arguable grounds for relief exist, the defendant agrees to dismiss his or her appeal. Unlike cases in which an *Anders* brief is filed or a brief raising some but not all potential claims is submitted, a stipulation dismissing an appeal results in no judicial review on the merits. Nor does it result in substitution of counsel. The defendant's right to appeal is simply abandoned.

The decision to dismiss, like the decision to proceed, is ultimately the client's. Thus, counsel is prohibited from taking any unilateral action to dismiss. Counsel is obligated to be certain that the defendant understands what dismissal means and why it is being recommended. All relevant legal and factual considerations should be explored. The defendant's questions about any aspect of the proceedings which led to conviction should be answered. The practice of obtaining written consent protects the lawyer as well as the client. See ABA Standards, 4-8.2(a) and 4-8.3.

13. Counsel should seek to utilize publicly funded support services designed to enhance their capacity to present the law and facts to the extent that such services are available and may significantly improve the representation they can provide.

*Commission Comment:* This standard encourages counsel to avail themselves of publicly funded defense support services, *e.g.*, the Legal Resources Project, investigative services, expert witness files. To the extent that services are provided at state expense in order to equalize the opportunities of indigent and nonindigent defendants, clients should not be denied the benefits of these services by the ignorance or negligence of attorneys who have also been provided at public expense.

14. Counsel shall be accurate in referring to the record and the authorities relied on in both written and oral presentations to the court.

*Commission Comment:* Accuracy is, of course, required by both court rule and professional ethics. Counsel's personal reputation for accuracy may also affect the credence given by the court to defendants' cases. Court of Appeals judges responding to a questionnaire ranked accurate representation of the facts as the most crucial aspect of appellate representation and accurate representation of the law as only marginally less crucial. See also GCR 1963, 813, and ABA Standards, 4-8.4(b).

15. Counsel shall comply with all applicable court rules regarding the timely filing of pleadings

and with such other timing requirements as may be specified by the court in a particular case.

*Commission Comment:* It is apparent that minimum performance must include compliance with court rules and orders specifying filing dates for pleadings, hearing dates, etc. Failure to comply can have consequences to the defendant ranging from loss of oral argument to dismissal of the appeal for lack of progress. See GCR 1963, 815-819.

16. Counsel should request and appear for oral argument. In preparation for oral argument counsel shall review the briefs of both parties, file supplemental pleadings as warranted, and update his or her legal research.

*Commission Comment:* While opinions vary about the extent to which oral arguments affect the outcome of most appeals, defendants are entitled to have their attorneys pursue every available avenue of persuasion. Argument provides the opportunity for counsel to present recent cases, counter the prosecution's position, and answer the court's questions. Utilizing this opportunity obviously depends upon preparation. At the other extreme, counsel's failure to appear not only precludes these potential benefits but diminishes the apparent seriousness of claims which the defendant's own lawyer does not think worthy of argument.

17. Counsel shall keep the defendant apprised of the progress of the case and shall promptly forward to the defendant copies of pleadings filed in his or her behalf and orders and opinions issued by the court in his or her case.

*Commission Comment:* Assigned criminal appellate defense counsel represent poor clients who are usually in prison. It is an inherently unequal relationship, with the clients having little control over, and limited access to, their lawyers. It is easy for well-intentioned but busy attorneys to lose sight of the significance of a particular appeal to an individual defendant. Correspondence may be put off, phone calls unanswered, delays left unexplained. This standard reminds counsel that their clients are wholly dependent upon them for information and requires them to minimize their client's inevitable anxieties by providing such information as it becomes available. It also insures that defendants will have the opportunity to assess the work being performed on their behalf and to express satisfaction or dissatisfaction at appropriate times on an informed basis. In accord see ABA Standards, 4-3.8, and NLADA, p 353.

18. Upon disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action which may be pursued as a result of that disposition, and the scope of any further representation counsel will provide.

*Commission Comment:* This standard requires appellate attorneys to complete the tasks of the counselor as well as those of the advocate. It prohibits abrupt abandonment of the attorney-client relationship upon judicial disposition of the case without due regard to the defendant's need for information and guidance. It does not require counsel to provide legal representation beyond the scope of the original order of appointment. It does assume that the original order includes a responsibility to explain the consequences of the representation already provided. When appropriate, the means and advisability of pursuing such avenues as applications to the Supreme Court or habeas corpus petitions in federal court should be discussed. Clients who have had their convictions reversed and are awaiting retrial should be represented by appellate counsel until it is clear that no further appeals will occur and trial counsel has been obtained. The goal of the standard is to prevent defendants from losing potential sources of relief because they have been left ignorant of available procedures. See ABA Standards, 4-8.5.

19. At whatever point in the postconviction proceedings counsel's representation terminates, counsel shall cooperate with the defendant and any successor counsel in the transmission of records and information.

*Commission Comment:* This standard merely reminds counsel that even after the attorney-client relationship has been terminated certain ethical obligations remain. To the extent that counsel possesses transcripts, documents or information which the defendant needs to pursue other avenues of relief, counsel has the duty to transmit them promptly and fully at the defendant's request.

20. Counsel shall not seek or accept fees from the defendant or from any other source on the defendant's behalf other than those authorized by the appointing authority.

*Commission Comment:* Throughout their discussions commission members expressed deep concern about the low rates at which assigned counsel are compensated. Individuals interested in a defendant's welfare occasionally approach appointed attorneys offering supplemental fees as an incentive to hard work. Recognizing the

inevitable temptation such offers present, the commission believed that the obvious ethical point made by this standard was worthy of separate attention.

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To provide adequate notice of the Court's approval of the minimum standards for indigent criminal defense services, the minimum standards will apply to all counsel appointed to represent indigents on appeal after February 1, 1982.

We repeat here that the implementation of the regulations governing the system for appointment of appellate counsel for indigents in criminal cases requires legislative appropriation of funds sufficient to operate the system. In such event, another administrative order will be promulgated implementing the system and requiring adherence to it.

We further note that the comments of the commission are not a construction by the Court. The comments represent the views of the commission.

COLEMAN, C.J., and FITZGERALD and RYAN, JJ., state:

We would defer implementation of the standards until the system has been funded because the enforcement of the standards depends on the operation of the system.

# AMENDMENTS TO THE GENERAL COURT RULES OF 1963

Adopted on December 21, 1981, effective on December 21, 1981.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 701. APPEALS TO CIRCUIT COURT.

.1—.7 (Unchanged.)

.8 Stay of Proceedings.

(a) Civil Cases.

(1) (Unchanged.)

(2) Unless a bond is waived under GCR 1963, 120 or the appellant is exempted by law from filing a bond, the appellant shall file a bond with the claim of appeal, claim of cross appeal, or order granting leave to appeal. The appeal bond must:

(A) be at least $200, and

(i) except for an appeal from probate court, if the appellant seeks a stay of proceedings to enforce a money judgment, it must be not less than one and one-quarter times the amount of the judgment; or

(ii) (Unchanged.)

(B)-(D) (Unchanged.)

(3) (Unchanged.)
(b) (Unchanged.)

.9—.13 (Unchanged.)

Staff Comment: In *Wright v Fields,* 412 Mich 227 (decided December 21, 1981), the Supreme Court interpreted GCR 701.8(a)(2)(A)(i) as requiring a bond in the amount of one and one-quarter times the amount of a judgment only if the appellant seeks a stay of proceedings. The December 21, 1981, amendment clarifies the intent of the rule.

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Adopted on January 28, 1982, effective on March 1, 1982.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 862. MOTIONS IN THE SUPREME COURT.

.1—.5 (Unchanged.)

.6 Motion for Reconsideration. To move for reconsideration of a court order, a party must file the items required by subrule 862.1 within 20 days after the date of certification of the order. The clerk shall refuse to accept for filing any motion for reconsideration of an order denying a motion for reconsideration. The filing of a motion for reconsideration does not stay the effect of the order addressed in the motion.

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Adopted on January 28, 1982, effective on March 1, 1982.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 912. DISQUALIFICATION OF A JUDGE.

.1—.2 (Unchanged.)

.3 Procedure.

(a)-(b) (Unchanged.)

(c) Ruling. The challenged judge must decide the motion. If the challenged judge denies the motion,

(1) in a court having two or more judges, the challenged judge shall on request refer the motion to the chief judge, who shall decide the motion *de novo.*

(2) in a single-judge court, or if the challenged judge is the chief judge, the challenged judge shall on request refer the motion to the state court administrator for assignment to another judge, who shall decide the motion *de novo.*

(d) (Unchanged.)

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*Adopted on January 28, 1982, effective on March 1, 1982.*—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 961. REQUESTS FOR INVESTIGATION.

.1—.2 (Unchanged.)

.3 Handling by Administrator.

(a)-(b) (Unchanged.)

(c) Request for Investigation of a Member or Employee of the Commission or Board. Except as modified by rule 980, the procedures of rules 950-979 apply to a request for investigation of a lawyer who is a member of or is employed by the board or commission.

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Adopted on January 28, 1982, effective on March 1, 1982.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 964. HEARING PANEL PROCEDURE.

.1—.10 (Unchanged.)

.11 Stay of Discipline. If the respondent petitions the board for review and a stay of the discipline order before the panel's order is effective, the discipline order does not take effect until ordered by the board.

.12—.13 (Unchanged.)

*Staff Comment:* The amendment to GCR 1963, 964.11 provides an automatic stay of discipline orders on the timely filing of a petition for review and for a stay. This is consistent with the practice before the 1978 amendment of the disciplinary procedures (see former State Bar Rule 16.13) and similar to the stay provision applicable on appeals to the Supreme Court, GCR 1963, 971.3. The discipline board would have the authority to remove the stay before the final decision on the petition for review.

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

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Adopted on January 28, 1982, effective on March 1, 1982.—REPORTER.

RULE 980. INVESTIGATION OF MEMBERS OR EMPLOYEES OF THE COMMISSION OR BOARD.

.1 Commission Members and Employees. The following provisions apply to a request for investigation of a lawyer who is a member or employee of the commission. If the request is for the investiga-

tion of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.

(a) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 20 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming with rule 962. The administrator shall send a copy of the answer to the person who filed the request for investigation.

(b) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk.

(c) The Chief Justice shall appoint volunteer legal counsel to investigate the matter.

(d) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent, and the person who filed the request for investigation. Review of a decision not to file a formal complaint is limited to a proceeding under rule 971.1(b). After appointed counsel determines not to file a complaint, the administrator shall close and maintain the file. Rule 975.1 governs the release of information regarding the investigation.

(e) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under rule 964.2.

(f) Further proceedings shall be conducted as in other cases except that the complaint shall be prosecuted by appointed counsel rather than by the administrator.

.2 Board Members and Employees. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:

(a) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.

(b) The Chief Justice shall appoint a hearing panel and may appoint a master to conduct the hearing. Hearing procedure is as provided in rule 964 or 966, as is appropriate, except that no matters shall be submitted to the board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the Chief Justice.

(c) The order of the hearing panel is effective 20 days after it is filed and served as required by rule 964.10, and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk.

(d) Rule 967 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by rule 971.

*Staff Comment:* Former rule 961.3(c) provided that a request for investigation of a lawyer-member of the board or commission, together with the respondent's answer, would be presented to the Supreme Court "for resolution", without establishing the procedure to be followed. The amended rule 961.3(c) refers to new rule 980, which sets forth the procedures for processing such requests. In addition, the rule covers requests for investigation of lawyers employed by the board and the commission.

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

# AMENDMENTS TO THE DISTRICT COURT RULES

Adopted on January 28, 1982, effective on March 1, 1982.—REPORTER.

## DC RULE 791. PROBATION REVOCATION.

Probation revocation procedure is governed by GCR 1963, 791 when the maximum possible sentence for the offense that led to the probation is six months or more.

*Staff Comment:* The statutory requirements, including notice and right to a hearing, continue to be applicable to offenses punishable by incarceration for a term of less than six months. MCL 771.4; MSA 28.1134.

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

# AMENDMENTS TO THE PROBATE COURT RULES

Amendments adopted on October 29 and certified on November 5, 1981, effective January 1, 1982.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 106. PUBLICATION.

.1 (Unchanged.)

.2 Contents of Published Notice. If notice is given to a known person by publication because the person's address or whereabouts is not known and cannot be ascertained after diligent inquiry, the published notice must include the name of the person to whom the notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the estate. If the names of some or all of the persons are unknown, the notice shall describe the relationship of the unknown persons to the matter to be litigated in the best way possible, for example, as unknown claimants, unknown owners, or unknown heirs, devisees, legatees, or assigns of a named person.

.3—.4 (Formerly .2 & .3, renumbered but otherwise unchanged.)

RULE 109. INTERESTED PARTIES DEFINED.

.1 Special Parties. In addition to parties named in PCR 109.2 with respect to specific proceedings, officers and representatives must be served according to law and court rules, including, but not limited to, the following:

(1)-(2) (Unchanged.)

(3) Administrator of Veterans Affairs. On a petition for the appointment of a guardian or conservator of a person on whose account benefits are payable by the veterans administration, the administrator of veterans affairs must be served through the administrator's Michigan district counsel.

(4)-(5) (Unchanged.)

.2 Specific Proceedings. Subject to PCR 109.1 and PCR 105.8 and to a specific determination made by the court if the interested parties are not defined by statute or court rule, interested parties in a

(1)-(4) (Unchanged.)

(5) Proceeding for spouse's allowance if the spouse is the fiduciary are

A. Devisees of a testate estate

B. Trustees and beneficiaries of a trust under the will

C. Heirs of an intestate estate

D. Persons whose claims have been duly filed and remain undetermined or unpaid

(6) Proceeding for examination of an account of a fiduciary or in regard to an election not to have hearings on periodic accounts are

A. Devisees of a testate estate

B. Trustees and beneficiaries of a trust under the will

C. Heirs of an intestate estate

D. The ward and presumptive heirs of the ward in a conservatorship

E. Persons whose claims have been duly filed and remain undetermined or unpaid

(7) Proceeding for examination of a closing statement of a fiduciary are

A. Devisees of a testate estate

B. Trustees and beneficiaries of a trust under the will

C. Heirs of an intestate estate

D. Persons whose claims have been duly filed and remain undetermined or unpaid

(8)-(23) (Formerly [6]—[21], renumbered but otherwise unchanged.)

(24) Petition for appointment of a guardian of a legally incapacitated person are

A. Legally incapacitated person

B. Legally incapacitated person's spouse

C. Legally incapacitated person's children or, if no child is living, parents

D. If no spouse, child, or parent is living, the presumptive heirs of the person

E. Person who has the care and custody of the legally incapacitated person

(25) Petition for the appointment of a conservator or for a protective order are

A. Person to be protected if 14 years of age or older

B. Spouse of the person to be protected

C. Children of the person to be protected or, if no child is living, the person's parents

D. If no spouse, child, or parent is living, the presumptive heirs of the person

E. Persons who, pursuant to law, have filed a request for notice

F. Agent or attorney in fact having a power of attorney (meeting the requirements of MCL 700.495; MSA 27.5495) of the person to be protected

(26)-(27) (Formerly [24]-[25], renumbered but otherwise unchanged.)

.3 Father of a Child Born Out of Wedlock. Except as otherwise provided by law, the natural father of a child born out of wedlock need not be served notice of proceedings as to which the child's parents are interested parties unless his paternity has been determined in a manner provided by law.

RULE 201. APPLICATION OF GENERAL COURT RULES.

Chapter 20 of the General Court Rules of 1963 governs proceedings in probate court where applicable.

RULE 202. GUARDIAN AD LITEM; VISITOR.

.1 Appointment; Duties.

(a) The court shall appoint a guardian ad litem as provided by law in connection with a petition for appointment of guardian of an alleged legally incapacitated person or with a petition for appointment of a conservator or a protective order for reasons other than minority.

(b)(1) The court may, if it deems necessary, appoint a guardian ad litem to appear for and represent in the proceeding a minor, a protected person, or one who is or is alleged to be a legally incapacitated person or a developmentally disabled person. The court may appoint a visitor as provided by law. The court shall state the purpose of the appointment in the order of appointment. The order may be entered with or without notice, as

the court may direct. On the application of the minor or the next of kin of the ward, or for any reason in its discretion, the court may revoke the appointment and appoint another guardian ad litem or visitor.

(2) Before the date set for hearing, the guardian ad litem or visitor shall conduct an investigation and shall make a report in open court or file a report of the investigation and recommendations. He or she need not appear personally at the hearing unless required by law, directed by the court, or requested by an interested party.

.2 Appearance by Attorney General. If the attorney general appears in an estate proceeding on behalf of unknown or unascertained heirs or presumptive heirs, the court may not appoint a guardian ad litem for the interest, and, if a guardian ad litem was previously appointed for the interest, the appointment is terminated by the attorney general's appearance.

RULE 707. SETTLEMENT OF ESTATES; REPORTING REQUIREMENTS; CLOSING.

.1 (Unchanged.)

.2 Follow-up Procedures.

(a) Notice to Fiduciaries; Reporting.

(1)-(4) (Unchanged.)

(5) 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 September of each year file with the state court administrator a report, on a form established by the state court administrator, identifying all cases then pending in the court in which:

(A) except in independent probate proceedings, the fiduciary has not filed an inventory of the estate within 60 days after the order of appointment or issuance of the letters of authority and the inventory remains unfiled at the time of the report;

(B) except in independent probate proceedings, at the time of the report the fiduciary has not filed an accounting within the preceding 14 months;

(C) in independent probate proceedings, 15 months have elapsed since the original appointment of an independent personal representative without the filing of 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);

(D) there has been any other instance of noncompliance with the requirements of these rules.

The report shall state, as to each case reported, the nature and facts of the 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 under subrule .2(a)(3) and the cause shown for the extensions. If no such procedures have been instituted or action taken, the report shall include the reasons.

(6) (Unchanged.)

(b) (Unchanged.)

RULE 709. INDEPENDENT PROBATE.

.1—.2 (Unchanged.)

.3 Notices.

(a) (Unchanged.)

(b) Notice of Appointment; Service.

(1) 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 chapter 10 of these rules within 10 days after the appointment of the independent personal representative.

(2) 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

(A) a notice of the last day for the presentment of claims is published, and

(B) in addition to the information required in PCR 709.3(c), the published notice regarding claims includes 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.

(3) If there are foreign heirs or foreign devisees, the notice of appointment must also be served on the foreign consul within the 10-day period. This service constitutes the service in independent probate on the foreign consul required by MCL 700.180; MSA 27.5180.

(c) Claims Notice; Publication. An independent personal representative must publish one time in a newspaper as defined by GCR 1963, 106.4, in the county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice that claims must be presented to the independent personal representative, who must be identified as such. The notice must state

(1) the last known address, the date of death, and the social security number, if known, of the decedent;

(2) that the estate will be assigned and distributed to the persons entitled to it; and

(3) in a testate estate, that an instrument has been admitted to probate, including the date of execution.

This notice is not required if the estate qualifies as a small estate under MCL 700.325; MSA 27.5325.

(d) (Unchanged.)

.4—.5 (Unchanged.)

.6 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 PCR 707.2(a)(4) and (5) and 707.2(b) 15 months after the appointment of an independent personal representative.

RULE 722. TESTAMENTARY TRUSTEE ACCOUNTING; FOLLOW-UP PROCEDURES.

.1 Time for Filing. Within 60 days after the end of the accounting period, the trustee of a testamentary trust shall file an authenticated annual account and proof that a copy has been served on each presently vested beneficiary. The accounting period may be a calendar year or a fiscal year ending on the last day of a month. The trustee may use the same accounting period as that used for income tax reporting, and the first accounting period may be less than a year.

.2 (Unchanged.)

.3 Notice of Hearing. If a hearing to approve a trustee's account is required by law, or if the jurisdiction of the court is invoked by an interested party for a hearing to settle a trustee's account, notice must be given to interested parties as provided in chapter 10 of these rules.

.4 (Formerly .5, renumbered but otherwise unchanged.)

.5 Election Not to Have Hearings on Accounts; Notice. If a trustee of a testamentary trust, whether in existence on June 30, 1979, or established thereafter, elects not to request periodic hearings on the allowance or settlement of the trustee's accounts, further hearings may not be required by the court unless a hearing is otherwise required by law or requested in writing by an interested party. The trustee shall send a written notice of this election to each presently vested beneficiary and shall file with the court a copy of the notice and a proof of service of the notice on the interested parties. The notice must include a statement that the court will not review the trustee's accounts unless requested in writing to do so by an interested party.

RULE 801. APPEALS TO OTHER COURTS.

.1 Right to Appeal. A party aggrieved by an order of the probate court may appeal as provided by this rule.

.2 Orders Appealable to the Court of Appeals. Orders appealable of right to the court of appeals are defined as and limited to the following:

(a) an order in an adoption proceeding;

(b) a final order in a condemnation proceeding under the Drain Code of 1956, MCL 280.1-280.630; MSA 11.1001-11.1630;

(c) a final order affecting the rights or interests of an interested person in a decedent's estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of a developmentally disabled person, or an inter vivos or testamentary trust. These are defined as and limited to orders resolving the following matters:

(1) appointing or removing a personal representative, conservator, or trustee or denying such an appointment or removal;

(2) admitting or denying to probate of a will, codicil, or other testamentary instrument;

(3) interpreting or construing a testamentary instrument or inter vivos trust;

(4) approving a settlement of a contest relating to an inter vivos trust or a testamentary instrument;

(5) discharging a surety on a bond from further liability;

(6) allowing or rejecting claims;

(7) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;

(8) authorizing or denying the continuation of a business;

(9) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, a family allowance, or the right to remain in a dwelling;

(10) authorizing or denying rights of election;

(11) determining heirs or devisees;

(12) determining title or claims to property;

(13) authorizing or denying partition of property;

(14) authorizing or denying specific performance;

(15) ascertaining survivorship of parties;

(16) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;

(17) granting or denying a petition to determine cy pres;

(18) directing or denying repayment of distributions;

(19) determining or denying a constructive trust;

(20) determining or denying oral contract relating to will;

(21) allowing or disallowing an account, fees, or administration expenses;

(22) authorizing disclaimers;

(23) authorizing federal estate tax apportionment;

(24) distributing proceeds recovered for wrongful death under MCL 600.2922; MSA 27A.2922;

(25) determining or directing payment of inheritance taxes;

(26) assigning residue;

(27) granting or denying a petition for instructions;

(d) other appeals as may be provided by statute.

.3 Final Orders Appealable to the Circuit Court. All final orders not enumerated in subrule 801.2 are appealable of right to the circuit court. These include, but are not limited to:

(a) a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding; and

(b) except for a final order affecting the rights or interests of a person in the estate of a developmentally disabled person, a final order affecting the

rights or interests of a person under the mental health code.

.4 Interlocutory Orders. An interlocutory order, such as an order regarding discovery, ruling on evidence, appointing a guardian ad litem, or removing a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the circuit court and only by leave of that court. The circuit court shall pay particular attention to a motion for leave to appeal an interlocutory order if the probate judge has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.

.5 Transfer of Appeals from the Court of Appeals to the Circuit Court. If an appeal of right within the jurisdiction of the circuit court is filed in the court of appeals, the court of appeals may transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court.

.6 Appeals to the Court of Appeals on Certification by the Probate Court. Instead of appealing to the circuit court, a party may appeal directly to the court of appeals if the probate judge certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal directly to the court of appeals may materially advance the ultimate termination of the litigation. An appeal to the court of appeals under this subrule is by leave only under the provisions of GCR 1963, 806.3. In lieu of granting leave to appeal, the court

of appeals may remand the appeal to the circuit court for consideration as on leave granted.

RULE 802. APPELLATE PROCEDURE; STAYS PENDING APPEAL.

.1 Record. An appeal from the probate court is on a written transcript of the record made in the probate court or on a record settled and agreed to by the parties and approved by the court. The appeal is not de novo.

.2 Procedure. Appeals from the probate court are governed by applicable General Court Rules of 1963.

.3 Stays Pending Appeals. An order removing a fiduciary; appointing a temporary personal representative, a temporary guardian, or a temporary conservator; granting a new trial or rehearing; granting an allowance to the spouse or children of a decedent; granting permission to sue on a fiduciary's bond; or suspending a fiduciary and appointing a special fiduciary is not stayed pending appeal unless ordered by the court on motion for good cause shown.

*Staff Comment:* Rule 106.2. New Rule 106.2 requires that the published notice include the name or description of the person to whom it is directed and a statement of the possible consequences of the hearing.

Rule 109.1. New rule 109.1(3) prescribes the manner of giving notice to the administrator of veterans affairs when required by MCL 35.73; MSA 4.971(3).

Rule 109.2. Separate subsections (5)-(7) are created for the three kinds of petitions formerly included in (5). Also subsection (6) specifies the interested parties in regard to an election not to have hearings on periodic accounts.

The amendments to former rules 109.2(22)-(23) (renumbered as [24] & [25]) are to assure that the presumptive heirs are included as interested parties.

Rule 109.3. There are specific statutes calling for notice to the natural father of a child born out of wedlock. See, *e.g.*, MCL 710.36;

MSA 27.3178(555.36) (adoption proceedings). In the absence of a specific statute, new rule 109.3 would control.

Rules 201-202. The guardian ad litem provisions of former rule 201.2 are renumbered as rule 202 and amended in accordance with the relevant provisions of the revised probate code. See MCL 700.24, 700.443, 700.467; MSA 27.5024, 27.5443, 27.5467.

Rule 707. The amendment to rule 707.2(a)(5) states more precisely when reports of delinquent estates are required and specifies the content of the reports.

Rule 709. Under amended rule 709.3(b)(2) the claims notice may serve as the notice to an interested party whose name or address is not known if specified information is included.

Rule 709.3(b)(3) clarifies the matter of notice to a foreign consul in independent probate proceedings when there are foreign heirs or devisees.

Rule 709.6 clarifies the availability of follow-up procedures in independent probate proceedings.

Rule 722. The procedures for accountings by testamentary trustees are modified in view of provisions of chapter 8 of the revised probate code.

Rule 801. Amended rule 801 is designed to clarify appellate procedure in the light of the recent division of appellate jurisdiction over appeals from probate court. Some matters are appealable to the Court of Appeals (MCL 600.861; MSA 27A.861), while others are appealable to the circuit court (MCL 600.863; MSA 27A.863). However, the statutes leave uncertainty as to the kinds of orders that are appealable to each court.

The rule also creates a procedure for transferring certain appeals from the Court of Appeals to the circuit court, and implements the statutory provision allowing an application for leave to appeal directly to the Court of Appeals in lieu of an appeal to the circuit court on certification by the probate judge. See MCL 600.863(3); MSA 27A.863(3).

Rule 802. The appellate procedure provisions of former rule 801.2-.4 are renumbered as rule 802.

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

# AMENDMENTS TO JUVENILE COURT RULES OF 1969

New rules adopted on October 29 and certified on November 5, 1981, effective January 1, 1982.—REPORTER.

## RULE 14. ORDERS TERMINATING PARENTAL RIGHTS: FINDINGS.

An order terminating parental rights under the juvenile code may not be entered unless the court makes findings of facts, states its conclusions of law, and includes the statutory basis for the order. Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient. The court may state the findings and conclusions on the record or include them in a written opinion.

## RULE 15. APPEALS.

An order terminating parental rights under the juvenile code is appealable by right to the Court of Appeals. Other orders entered in the juvenile division are appealable to the circuit court. The procedure on appeal is governed by the rules applicable to appeals generally.

*Staff Comment:* New juvenile court rules 14 and 15 are designed to expedite appeals of orders terminating parental rights under the juvenile code.

Rule 14 creates a requirement that orders terminating parental rights be accompanied by findings of fact and conclusions of law to avoid the necessity for remands from the appellate courts for more specific findings.

Rule 15 provides that appeals of orders terminating parental rights under the juvenile code are to the Court of Appeals while other juvenile court orders are appealable to the circuit court. See MCL 600.308(2); MSA 27A.308(2).

When the various proposals for expediting such appeals were published for comment (see 60 Michigan Bar Journal 492 [July 1981]), several proposed amendments were included that would have applied the half-time requirements of GCR 1963, 803.6 and 864.6 to this class of appeals. However, those proposals were not adopted.

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

# AMENDMENTS TO LOCAL COURT RULES

## SIXTH JUDICIAL CIRCUIT

Approved on November 20, 1981, effective on November 30, 1981.—REPORTER.

### RULE 10. MISCELLANEOUS CALENDAR.

Motions and petitions shall be heard on Wednesday mornings unless otherwise ordered by the court. An attorney desiring to have a hearing on any pro confesso, default, motion, or miscellaneous matter shall file a praecipe with the assignment clerk on or before the Wednesday preceding the Wednesday of the desired hearing. Each Thursday the assignment clerk shall, under the direction of the chief judge, prepare a list of all such matters that are to be heard the following Wednesday. The list shall show the name of the judge before whom the matter will be heard. A copy of the list shall be published in a newspaper as defined in GCR 1963, 106.4 before the Wednesday on which the matters will be heard.

FRIEDMAN v DOZORC

Docket Nos. 61534, 61547. Argued October 2, 1979 (Calendar No. 2).—Decided November 23, 1981.

Seymour Friedman, M.D., brought an action against Peter Dozorc and Robert H. Golden, attorneys, for damages arising from being compelled to defend himself against a medical malpractice action brought by a plaintiff who was represented by Dozorc and Golden. The medical malpractice action, for the death of Leona Serafin, resulted in a directed verdict for Dr. Friedman, which was affirmed on appeal. The plaintiff physician alleged that an attorney owes a duty to an opponent in a lawsuit to avoid negligence in pursuing his client's claims. He also alleged that the civil proceedings against him constituted malicious prosecution because the attorneys had a duty to investigate the facts and law for their client before bringing a lawsuit against him, and that the defendant attorneys were

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4-6, 9] 7 Am Jur 2d, Attorneys at Law § 232.

Attorney's liability, to one other than his immediate client, for consequences of negligence in carrying out legal duties. 45 ALR3d 1181.

[2] 57 Am Jur 2d, Negligence §§ 9, 34.

[3] 7 Am Jur 2d, Attorneys at Law §§ 147, 197, 202.

[4] 7 Am Jur 2d, Attorneys at Law §§ 184, 198.

[7] [No Reference]

[8, 9] 57 Am Jur 2d, Negligence § 37.

[10] 1 Am Jur 2d, Abuse of Process § 4.

Civil liability of attorney for abuse of process. 97 ALR3d 688.

[11] 1 Am Jur 2d, Abuse of Process §§ 2, 21.

[12, 13] 52 Am Jur 2d, Malicious Prosecution §§ 9-11.

[14] 52 Am Jur 2d, Malicious Prosecution §§ 29, 45, 50.

[15] 52 Am Jur 2d, Malicious Prosecution § 159.

[16] 52 Am Jur 2d, Malicious Prosecution § 72.

[17] 52 Am Jur 2d, Malicious Prosecution §§ 51, 53.

Liability of attorney acting for client, for false imprisonment or malicious prosecution of third party. 27 ALR3d 1113.

[18] 7 Am Jur 2d, Attorneys at Law § 56.

[19] 52 Am Jur 2d, Malicious Prosecution § 141.

[20] 52 Am Jur 2d, Malicious Prosecution §§ 152, 159.

guilty of abuse of process in that they intended to coerce the plaintiff into settling a groundless malpractice claim in order to obtain a contingent fee in the matter. The Oakland Circuit Court, Frederick C. Ziem, J., granted summary judgment for the defendants on the ground that the plaintiff had not stated a cause of action. The Court of Appeals, D. C. Riley, P.J., and D. F. Walsh and A. C. Miller, JJ., reversed and remanded for further proceedings on the count of malicious prosecution (Docket No. 31244). The parties appeal.

In an opinion by Justice Levin, joined by Justices Kavanagh, Williams, and Ryan, the Supreme Court *held:*

An attorney owes no duty of care to an adverse party in litigation. The plaintiff has also failed to state a claim for abuse of process because there is no allegation that the defendants committed an irregular act in the use of process, and has failed to state a claim for malicious prosecution because he did not allege the element of special injury necessary to that cause of action.

1. The plaintiff argues that the Code of Professional Responsibility and the General Court Rules of 1963 create a duty in an attorney to his client's adversary and all other foreseeable third parties to conduct a reasonable investigation of the facts and law so that he has an adequate basis for a good-faith belief that the client has a tenable claim, and a duty to act within the bounds of the law and thus to refrain from asserting frivolous claims. "Duty" concerns the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other. Assuming that an attorney has an obligation to his client to conduct a reasonable investigation before bringing an action, that obligation is not the functional equivalent of a duty of care owed to the client's adversary; such a duty of care is inconsistent with the basic precepts of the adversary system.

2. The duty owed to a client by an attorney as an advocate and adviser is broader than the obligation of reasonable investigation. It is likely that, if a duty to the attorney's adversary were imposed, an attorney would be faced with a case in which it would be in the client's best interest to proceed in one way and in the adversary's best interest to proceed in another way. Creation of a duty in favor of an adversary would create a conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client, and the attorney's justifiable fear of being sued for negligence would detrimentally interfere with the attorney-client relation. The conflict of interest could not be resolved simply by allowing the attorney to

resolve all doubts in favor of the client, because the existence or reasonableness of the doubts might themselves become questions for the jury.

3. There is a public policy of encouraging free access to the courts. Recognition of a cause of action for negligence in favor of a client's adversary might unduly inhibit attorneys from bringing close cases or advancing innovative theories, or taking action against defendants who can be expected to retaliate. The adversary system intends, and expects, lawyers to search for a more efficacious remedy, or a more successful defense.

4. The plaintiff argues that the doctrine of privity of contract has slowly been eroded in Michigan and no longer imposes a bar to the liability of a professional person to third parties who the professional could reasonably foresee would rely on the professional person's conduct. However, the decision in this case does not rely on the doctrine of privity of contract but on the public policy respecting the attorney's role in the adversary system and the importance of preserving free access to the courts. The plaintiff also argues that attorneys ought to be liable for negligence to all foreseeable third parties, and that reliance or intended benefit are not factors. Reliance is an appropriate factor to be considered in deciding whether a duty is owed to another party by a professional. In this case, there can be neither reliance by the plaintiff, nor benefit intended by the defendants or their client flowing to the plaintiff, because the relation of the parties is adversarial.

5. To recover for the tort of abuse of process the plaintiff must plead and prove, in addition to damages, that the defendant had an ulterior purpose and that there was an act in the use of process which is improper in the regular prosecution of the proceeding. The plaintiff in this case has failed to allege that the defendants committed some act that is irregular in the use of process. The only act that the plaintiff alleges is the issuance of a summons and complaint in the malpractice action, but a summons and complaint are properly used for the institution of a civil suit. The action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue.

6. Special injury, in the nature of an interference with person or property, remains an essential element of the tort of malicious prosecution of civil proceedings. No decision of the Court holds that an action for malicious prosecution of civil proceedings can be maintained absent special injury, whatever the precise boundaries of that concept. The requirement of special injury should be retained to limit the circumstances in which

an action for the malicious prosecution of civil proceedings can be maintained.

7. Three reasons are commonly advanced for adhering to the rule that requires special injury: 1) costs to the prevailing party are intended as the exclusive remedy for damages caused by wrongful litigation, 2) an unrestricted tort of wrongful civil proceedings will deter honest litigants, and 3) recognition of the tort action would produce interminable litigation. These reasons have been criticized, but they retain validity.

8. Expanding the availability of such an action would not merely provide a remedy for those defendants required to defend groundless actions for medical malpractice, but would arm all prevailing civil defendants with an instrument of retaliation, whether the prior action sounded in tort, contract, or another area of law. That would be a remedy which is too strong for the affliction which it is intended to cure. Even if the plaintiff and his attorney have abundant cause for bringing and continuing an action and act without malice, the foreseeable expense and annoyance of even a successful defense of a countersuit might induce them to abandon a problematic claim or to settle the case for less than they would otherwise accept.

9. The prospect of a large verdict including damages for lost business, injury to reputation, and emotional distress will loom large indeed, especially since many parties or their attorneys do not have or are unable to obtain insurance against such liability. The cost of insurance for legal malpractice is bound to increase, assuming that coverage against such liability is available. Permitting a tort action for wrongful civil proceedings absent special injury to the plaintiff could easily generate a significant number of such actions. The cure for an excess of litigation is not more litigation. Meritorious as well as frivolous claims are likely to be deterred. There are sure to be parties who would use the courts and such an expanded tort recovery as a retaliatory or punitive device without regard to the likelihood of recovery or who seek a means of recovering the actual costs of defending the first action without regard to whether it was truly vexatious.

10. The Legislature could create a special cause of action in favor of physicians without the imposition of a general cause of action for wrongful civil proceedings. However, no court has been persuaded that a principled distinction could be drawn on the ground that injury to the reputation of a doctor is a special injury warranting solicitude not accorded other aggrieved litigants.

11. The elements of a tort action for malicious prosecution of

civil proceedings, in addition to special injury, are the termination of prior proceedings in favor of the present plaintiff, the absence of probable cause for bringing those proceedings, and malice, or a purpose other than that of securing the proper adjudication of the claim. The absence of probable cause in bringing a civil action may not be established merely by showing that the action was successfully defended. To require an attorney to advance only those claims that will ultimately be successful would place an intolerable burden on the right of access to the courts. Time will not always permit a reasonable investigation and industrious search by legal authority before the lawyer must file a complaint to preserve the client's claim. In medical malpractice actions the facts relevant to an informed assessment of the defendant's liability may not emerge until well into the process of discovery. An attorney's evaluation of the client's case should not be inhibited by the knowledge that perseverance may place the attorney personally at risk; the next fact or the next medical opinion which the attorney encounters may be the one that makes the case. A lawyer may proceed in the good-faith belief that his proofs will establish a prima facie case of medical malpractice without expert testimony, only to find that the court disagrees. Such conduct is not the equivalent of proceeding without probable cause.

12. Whether an attorney acted without probable cause in initiating, defending, or continuing proceedings on behalf of a client should not normally depend upon the extent of the investigation conducted. The Code of Professional Responsibility does not expressly impose any duty upon a lawyer to conduct an independent investigation of the merits of a client's claim. He is entitled to accept his client's version of the facts and to proceed on the assumption that they are true absent compelling evidence to the contrary. Whether a lawyer abused his duty to represent his client's interests zealously is not a matter of what a hypothetical reasonable practitioner would have done in the same circumstances, but of whether the lawyer's conduct was beyond the limits of reason or the bounds of the law although another lawyer might not have acted similarly.

13. One who takes an active part in the initiation, continuation, or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based and either correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or believes to this

effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information. Lack of probable cause may be found where the lawyer proceeded with knowledge that the claim had no factual or legal basis, but there is no obligation to investigate if the lawyer could reasonably believe the facts to be as the client alleged.

14. The rule that malice may be inferred from the facts that establish want of probable cause, although the jury is not required to draw that inference, was developed in cases where damages were sought from a layperson who initiated proceedings. The rule fails to make sufficient allowance for the lawyer's role as advocate and should not be applied in determining whether a lawyer acted for an improper purpose. A finding of an improper purpose on the part of the unsuccessful attorney must be supported by evidence independent of the evidence establishing that the action was brought without probable cause.

The decision of the Court of Appeals is affirmed as to the claims sounding in negligence and abuse of process and is reversed as to the claim for malicious prosecution of civil proceedings.

Justice Levin, joined by Justice Williams, also wrote separately to advocate a new remedy, a court rule, to provide an appropriate measure of deterrence against wrongful litigation and reasonable compensation for wronged litigants without imperiling the right of free access to the courts. There is already a court rule providing for an award of reasonable expenses, including attorney fees, incurred in proving or disproving unwarranted denials or allegations in pleadings. The Court should recognize the inadequacy of existing provisions for the taxation of costs and adopt a court rule authorizing the trial judge to order the payment of the prevailing party's actual expenses, including reasonable attorneys' fees and limited consequential damages, where the action was wrongfully initiated, defended, or continued. The factual issues would be resolved after a prompt post-termination hearing at which the parties could call witnesses and they and their attorneys could testify. The standard to be applied would be whether the losing party or his attorney had proceeded without probable cause and for an improper purpose. The award of fees and expenses should be limited to those incurred after the action should have been discontinued or liability admitted. Such a rule would permit a prompt remedy without the difficulties and delay inherent in a subsequent tort action.

Chief Justice Coleman, joined by Justice Fitzgerald, agreed

that the plaintiff had failed to state actionable claims under theories of negligence or abuse of process, but dissented as to the requirement of special injury in cases of malicious prosecution.

1. Special injury is said to be required in order to limit the circumstances in which an action for the malicious prosecution of civil proceedings can be maintained. The problem with that reasoning is that it relies on an incidental effect of the special-injury requirement. It is nowhere contended that the requirement of special injury serves to distinguish meritorious from frivolous litigation. Nor is there a contention that special injury is more egregious than other injury. The opinion is comprehensible only because of an unstated, although correct, premise: most litigation does not involve special injury. This use of the special-injury requirement has two results. First, in cases in which no special injury can be alleged, the injury which is not special caused by even the most frivolous litigation cannot be compensated. Second, if the Court's reasoning is correct, meritorious claimants may be deterred from raising their claims in cases where the potential defendants would be able to allege special injury in a subsequent malicious prosecution case. Meritorious and frivolous claims are protected alike when no special injury can be alleged, but neither is protected when an allegation of special injury might be made; the arguments that the Court advances in favor of the requirement have no connection with the content of the requirement. A more reasonable approach would be to look to other elements of the action for malicious prosecution, such as a lack of probable cause and an improper motive, to provide the necessary protection for bona fide litigants.

2. The issue here is not finding a cure for excessive litigation. It is whether the harm caused by wrongful litigation is compensable. For any given tort there probably are means other than a lawsuit for deterring its commission. However, the fact that unsuccessful suits for malicious prosecution may be brought should not be given added importance in deciding whether a tort cause of action should be expanded simply because the wrong to be compensated is itself a lawsuit.

3. Central to the case is the judicial process of weighing the harm which could be caused by groundless suits for malicious prosecution against the harm caused by all other groundless litigation. In upholding the special-injury requirement for malicious prosecution cases the Court gives little, if any, consideration to the harmful effects of other kinds of groundless litiga-

tion. The Court leaves lawyers, in most cases, free from the concern of defending one kind of case, at the expense of subjecting the rest of society to many kinds of groundless litigation without recompense. The one-sidedness of the treatment is especially apparent with respect to the argument that defending groundless actions for malicious prosecution might increase the cost of legal malpractice insurance. The effect that another type of groundless litigation may already be having on medical malpractice insurance is overlooked. Prediction of how suits for malicious prosecution might affect insurance is speculative at best; however, one would not expect that the adverse effects of the threat of groundless lawsuits would affect attorneys to a greater extent than any other defendants.

4. The elements of lack of probable cause and improper motive are narrow in scope and not easily shown. Frivolous claims of malicious prosecution would likely show their frivolous nature more clearly than other frivolous claims. Attorneys are in a better position than other persons to recognize groundless litigation and thereby to limit the extent to which the fear of frivolous actions for malicious prosecution affects their conduct.

5. The Court also suggests that some attorneys would specialize in actions for malicious prosecution and perhaps file them indiscriminately. If that were true, one would expect that they would be no less hesitant to file groundless lawsuits against members of other professions. A viable action for malicious prosecution is necessary to give substance to the attorney's duty not to bring frivolous litigation. The Court's concern should be with preserving free access to the courts for meritorious claims, rather than denying it for persons who have suffered harm, but not special injury, from wrongful litigation.

Justice Moody also agreed with the decision as to negligence and abuse of process, but dissented as to the requirement of special injury as an element of the action for malicious prosecution.

1. The Court has not distinctly recognized a cause of action for malicious prosecution without special injury, nor has it specifically adopted the requirement of special injury. The concept of special injury has been somewhat expanded without a specific adoption or rejection of it. The duty to interpret the common law in light of present circumstances and changed conditions rests with the Court. Even if the requirement of special injury may be considered a part of Michigan's jurisprudence, the Court may abrogate common-law rules.

2. In this case the Court is presented with the opportunity to

adopt or reject the requirement. The requirement of special injury limits the potential recovery for malicious prosecution of civil proceedings and thereby protects the right of free access to the courts. However, the limitation is too broad; suits arising out of meritorious as well as vexatious actions are disallowed.

3. The special-injury requirement is not logically related to the damages actually incurred by the defendant as a result of a frivolous suit. The injury to reputation or business flowing from any defamatory matter alleged and the expense of defending a lawsuit which was brought without probable cause and for an improper purpose do not depend on an interference with the defendant's person or property. The requirement of an arrest or seizure of property is in large part an anachronistic one. The Revised Judicature Act abolished the writ of *capias ad respondendum,* which permitted a civil action to be commenced by the arrest of the defendant. The law concerning the availability of attachment and garnishment has also changed. Thus, the likelihood of "special injury" occurring in a lawsuit has been greatly reduced.

4. If a person is maliciously injured in his credit and reputation, and his business is lessened or broken up, it can make no difference in his right to recover for the injury that his person or property has not been seized or disturbed. The strict requirement of lack of probable cause and malice, *i.e.,* improper purpose, are more appropriate guardians of the right to free access to the courts and of the honest use of the judicial process to redress the harm caused by the abuse of it than the artificial requirement of special injury.

5. The delicate relation among attorneys, clients, and the judicial system requires a careful definition of the elements of probable cause and improper purpose when attorneys are sued for malicious prosecution. A standard of reasonable belief in the existence of the facts of the claim and in its validity under the applicable law is applicable to the attorney for a plaintiff. Probable cause will be found for bringing or continuing the action unless the plaintiff's counsel proceeded with the knowledge that the client's claim had no factual or legal basis.

6. There should be no requirement that an attorney investigate a claim if he could reasonably believe the facts to be as alleged by the client. In complying with the duties to make legal counsel available and to represent a client zealously within the bounds of the law an attorney should be prepared to represent clients with doubtful, but tenable, claims. The threat of liability for wrongful use of civil proceedings must not force

an attorney to choose between advancing substantial costs to investigate a claim with some merit and refusing to take it.

7. The jury resolves any conflict in the underlying facts and then the judge determines whether the facts constitute probable cause. A jury may infer malice or improper purpose from an absence of probable cause when the defendant is a layperson. However, the lawyer's duty to press his client's claim requires an independent determination of improper purpose; the lawyer is not liable for malicious prosecution if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of the claim.

83 Mich App 429; 268 NW2d 673 (1978) affirmed in part.

OPINION OF THE COURT

1. ATTORNEY AND CLIENT — NEGLIGENCE — THIRD PARTIES.

An attorney owes no actionable duty of care to an adverse party in litigation.

2. NEGLIGENCE — DUTY — WORDS AND PHRASES — COMMON LAW — QUESTION OF LAW.

Whether the defendant in a negligence action owed an actionable duty to the plaintiff is a question of law which a court decides after assessing the competing considerations of policy for and against recognizing the asserted duty.

3. ATTORNEY AND CLIENT — DUTY.

An attorney owes a client a duty which is broader than the obligation of reasonable investigation before bringing a civil action on the client's behalf, and which concerns decisions made on behalf of, often in consultation with, the client regarding the manner of proceeding with the client's cause.

4. ATTORNEY AND CLIENT — NEGLIGENCE — THIRD PARTIES — CONFLICT OF INTEREST.

An attorney ought not to be held liable to the adverse party in a civil proceeding for negligence in beginning or continuing the lawsuit on behalf of a client because the creation of a duty in favor of an adversary would create a conflict of interest which would seriously hamper the attorney's effectiveness as counsel for his client.

5. ATTORNEY AND CLIENT — NEGLIGENCE — THIRD PARTIES.

The public policy of maintaining a vigorous adversary system outweighs the asserted advantages of finding a duty of care owing to an attorney's opponent in litigation.

6. ATTORNEY AND CLIENT — NEGLIGENCE — THIRD PARTIES.

Recognition of an action by an adverse party against an attorney for negligence in bringing a civil action on behalf of a client might unduly inhibit attorneys from bringing close cases or advancing innovative theories, or taking action against defendants who can be expected to retaliate, and would work against the public policy of encouraging free access to the courts.

7. ATTORNEY AND CLIENT — COMMON LAW.

The adversary system intends and expects lawyers to probe the outer limits of the bounds of the law, ever searching for a more efficacious remedy, or a more successful defense.

8. NEGLIGENCE — DUTY — THIRD PARTIES — RELIANCE.

Reliance is an appropriate fact to be considered in deciding whether a professional person owes a duty to a third party to avoid negligence in performing professional services.

9. ATTORNEY AND CLIENT — NEGLIGENCE — DUTY — THIRD PARTIES — RELIANCE.

There can be neither reliance by a party in litigation on the quality of services performed by an attorney who represents that party's adversary, nor benefit intended by the attorney or the adversary to that party, because the relation of the parties is adversarial; the absence of reliance distinguishes the case from those in which professional persons have been held liable for negligence in performing professional services which affect third parties.

10. PROCESS — ABUSE OF PROCESS — TORTS.

To recover for the tort of abuse of process the plaintiff must plead and prove, in addition to damages, that the defendant had an ulterior purpose and that there was an act in the use of process which is improper in the regular prosecution of the proceeding.

11. PROCESS — ABUSE OF PROCESS — PLEADING.

The action for abuse of process lies for the improper use of process, not for maliciously causing it to issue; a plaintiff physician did not properly plead an action for abuse of process against defendant attorneys who brought a malpractice action against him where the only act the plaintiff alleged that the attorneys committed was the issuance of a summons and complaint, which are properly used for the institution of a civil suit for medical malpractice.

12. MALICIOUS PROSECUTION — SPECIAL INJURY.

Special injury, an interference with the plaintiff's person or property, is an essential element of the tort action for malicious prosecution of civil proceedings.

13. MALICIOUS PROSECUTION — SPECIAL INJURY.

Special injury should be retained as an element of the tort of malicious prosecution of civil proceedings to limit the circumstances in which an action for the tort can be maintained; the limitation serves the dual purpose of allowing the honest plaintiff to press his case without threat of suit and of limiting vexatious lawsuits.

14. MALICIOUS PROSECUTION — ELEMENTS OF TORT.

The elements of a tort action for malicious prosecution of civil proceedings, in addition to special injury, are the termination of prior proceedings in favor of the present plaintiff, the absence of probable cause for bringing those proceedings, and malice, or a purpose other than that of securing the proper adjudication of the claim.

15. MALICIOUS PROSECUTION — PROBABLE CAUSE — EVIDENCE.

The absence of probable cause in bringing a civil action may not be established merely by showing that the action was successfully defended; to require an attorney to advance only those claims that will ultimately be successful would place an intolerable burden on the right of access to the courts.

16. MALICIOUS PROSECUTION — PROBABLE CAUSE.

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

17. ATTORNEY AND CLIENT — MALICIOUS PROSECUTION — PROBABLE CAUSE.

Lack of probable cause on the part of a lawyer in initiating, defending, or continuing proceedings on behalf of a client may be found where the lawyer proceeded with knowledge that the claim had no factual or legal basis, but there is no obligation to investigate if the lawyer could reasonably believe the facts to be as the client alleges.

18. ATTORNEY AND CLIENT — PROFESSIONAL MISCONDUCT — ZEALOUS REPRESENTATION.

Whether a lawyer abused his duty to represent his client's interests zealously is not a matter of what a hypothetical reasonable practitioner would have done in the same circumstances, but of whether the lawyer's conduct was beyond the limits of reason or the bounds of the law, although another reasonable lawyer might not have acted similarly.

19. ATTORNEY AND CLIENT — MALICIOUS PROSECUTION — MALICE — PROBABLE CAUSE.

The rule in actions for malicious prosecution of civil proceedings initiated by a layperson that malice may be inferred from the facts that establish want of probable cause, although the jury is not required to draw that inference, fails to make sufficient allowance for the lawyer's role as advocate and should not be applied in determining whether a lawyer acted for an improper purpose.

20. ATTORNEY AND CLIENT — MALICIOUS PROSECUTION — MALICE — PROBABLE CAUSE.

A finding, in an action for malicious prosecution of civil proceedings, of an improper purpose on the part of the unsuccessful attorney must be supported by evidence independent of the evidence establishing that the action was brought without probable cause.

CONCURRING OPINION BY LEVIN, J.

21. MALICIOUS PROSECUTION — COSTS — COURT RULES.

*A court rule should be adopted to allow the trial judge to order the payment of the prevailing party's actual expenses, including reasonable attorneys' fees and limited consequential damages, where an action was wrongfully initiated, defended, or continued; that remedy would provide an appropriate measure of deterrence against wrongful litigation and reasonable compensation for wronged litigants without imperiling the right of free access to the courts.*

OPINION DISSENTING IN PART BY COLEMAN, C.J.

See headnotes 1-11.

22. MALICIOUS PROSECUTION — SPECIAL INJURY.

*Proof of special injury should not be required in actions for the malicious prosecution of civil proceedings because the other elements of the action, such as a lack of probable cause and an*

*improper motive, provide the necessary protection for bona fide litigants.*

23. MALICIOUS PROSECUTION — ATTORNEY AND CLIENT — PROFESSIONAL MISCONDUCT.

*A viable action for malicious prosecution is necessary to give substance to the attorney's duty not to bring frivolous litigation (DR 7-102[A]).*

24. MALICIOUS PROSECUTION — PUBLIC POLICY.

*The Supreme Court should preserve free access to the courts for meritorious claims, rather than deny it for persons who have suffered harm, but not special injury, from wrongful litigation by continuing the requirement of special injury in an action for malicious prosecution.*

OPINION DISSENTING IN PART BY BLAIR MOODY, JR., J.

See headnotes 1-11, 16, 17.

25. COMMON LAW — SUPREME COURT — CONSTITUTIONAL LAW.

*The duty to interpret the common law in light of present circumstances rests with the Supreme Court (Const 1963, art 3, § 7).*

26. MALICIOUS PROSECUTION — SPECIAL INJURY.

*The requirement of special injury limits the potential recovery for malicious prosecution of civil proceedings and thereby protects the right of free access to the courts; however, the limitation is too broad because suits arising out of meritorious as well as vexatious actions are disallowed.*

27. MALICIOUS PROSECUTION — IMPROPER PURPOSE.

*The strict requirements of lack of probable cause and malice,* i.e., *improper purpose, are more appropriate guardians of free access to the courts and of promoting the honest use of the judicial process than the artificial requirement of special injury.*

28. ATTORNEY AND CLIENT — MALICIOUS PROSECUTION — ELEMENTS OF TORT.

*The delicate relation among attorneys, clients, and the judicial system requires a careful definition of the elements of probable cause and improper purpose when attorneys are sued for malicious prosecution of civil proceedings.*

29. ATTORNEY AND CLIENT — MALICIOUS PROSECUTION — PROBABLE CAUSE.

*An attorney, in complying with the duties to make legal counsel*

*available and to represent a client zealously within the bounds of the law, should be prepared to represent clients with doubtful, but tenable claims; the threat of liability for wrongful use of civil proceedings must not force an attorney to choose between advancing substantial costs to investigate a claim with some merit and refusing to take it.*

30. ATTORNEY AND CLIENT — MALICIOUS PROSECUTION — PROBABLE CAUSE.

*A lawyer is not liable for malicious prosecution of civil proceedings if he acts primarily for the purpose of obtaining a proper adjudication of the claim.*

31. MALICIOUS PROSECUTION — SPECIAL INJURY.

*The requirement of special injury should be eliminated from actions for malicious prosecution of civil proceedings; the requirements of lack of probable cause and improper purpose, and functions of the judge and jury, strike a proper balance between unfettered access to the courts for those with tenable claims and the need to redress the harm caused by an abuse of the judicial system.*

*Schureman, Frakes, Glass & Wulfmeier* (by *Charles F. Glass)* and *Nederlander, Dodge & McCauley, P.C.* (by *Patrick B. McCauley),* for plaintiff.

*Lopatin, Miller, Bindes, Freedman & Bluestone* (by *Sheldon L. Miller* and *Michael Gagleard)* for defendant Dozorc.

*Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.* (by *Charles T. McGorisk* and *Christine D. Oldani),* for defendant Golden.

Amici Curiae:

*Bodman, Longley & Dahling* (by *Joseph A. Sullivan* and *David W. Hipp)* for Detroit Surgical Society.

*John M. Burkoff* for Michigan Association of Neurological Surgeons, Michigan Orthopedic Society, Michigan Academy of Plastic Surgeons, Michi-

gan Society of Urologists, and Michigan Chapter, American College of Surgeons.

*Kerr, Russell & Weber* (by *A. Stewart Kerr, John L. Shoemaker* and *Curtis J. DeRoo)* for Michigan State Medical Society and Wayne County Medical Society.

*Ivan E. Barris* and *David F. DuMouchel* for State Bar of Michigan.

*Hillman, Baxter & Hammond* (by *Joel M. Boyden)* and *Bushnell, Gage & Reizen, in propriis personis.*

*Dykema, Gossett, Spencer, Goodnow & Trigg* (by *Daniel G. Wyllie* and *Bowden V. Brown)* for Herbert D. Schunk, M.D.

LEVIN, J. The plaintiff is a physician who, after successfully defending in a medical malpractice action, brought this action against the attorneys who had represented the plaintiffs in the former action. Dr. Friedman sought under a number of theories to recover damages for being compelled to defend against an allegedly groundless medical malpractice action. The trial court granted the defendants' motions for summary and accelerated judgment.

The Court of Appeals affirmed in part and reversed in part. We granted leave to appeal to consider what remedies may be available to a physician who brings such a "countersuit".

We hold that:

(1) The plaintiff has failed to state an actionable claim on a theory of negligence because an attorney owes no duty of care to an adverse party in litigation;

(2) The plaintiff has failed to state an actionable claim on a theory of abuse of process because there is no allegation that defendants committed an irregular act in the use of the process issued in the prior case;

(3) The plaintiff has failed to state an actionable claim on a theory of malicious prosecution because his complaint did not allege interference with his person or property sufficient to constitute special injury under Michigan law.

We affirm the decision of the Court of Appeals dismissing plaintiff's negligence and abuse of process claims, and reverse its decision to remand plaintiff's malicious prosecution claim to the trial court for further proceedings.

## I

Leona Serafin entered Outer Drive Hospital in May, 1970, for treatment of gynecological problems. A dilatation and curettage was performed by her physician, Dr. Harold Krevsky. While in the hospital, Mrs. Serafin was referred to the present plaintiff, Dr. Friedman, for urological consultation. Dr. Friedman recommended surgical removal of a kidney stone which was too large to pass, and the operation was performed on May 20, 1970. During the surgery, the patient began to ooze blood uncontrollably. Although other physicians were consulted, Mrs. Serafin's condition continued to worsen and she died five days after the surgery. An autopsy was performed the next day; the report identified the cause of death as thrombotic thrombocytopenic purpura, a rare and uniformly fatal blood disease, the cause and cure of which are unknown.

On January 11, 1972, attorneys Dozorc and

Golden, the defendants in this action, filed a malpractice action on behalf of Anthony Serafin, Jr., for himself and as administrator of the estate of Leona Serafin, against Peoples Community Hospital Authority, Outer Drive Hospital, Dr. Krevsky and Dr. Friedman, as well as another physician who was dismissed as a defendant before trial. In December, 1974, the case went to trial in Wayne Circuit Court. No expert testimony tending to show that any of the defendants had breached accepted professional standards in making the decision to perform the elective surgery or in the manner of its performance was presented as part of the plaintiff's case. The judge entered a directed verdict of no cause of action in favor of Dr. Friedman and the other defendants at the close of the plaintiff's proofs. The judge subsequently denied a motion for costs brought by codefendant Peoples Community Hospital Authority, pursuant to GCR 1963, 111.6. The Court of Appeals affirmed[1] and this Court denied leave to appeal.[2]

Dr. Friedman commenced the present action on March 17, 1976 in Oakland Circuit Court. The following excerpt from his complaint summarizes his theories of recovery and the injuries he allegedly sustained as a result of the initiation and prosecution of the malpractice action:

"13. That as a direct and proximate result of the negligence, malicious prosecution and abuse of process of these defendants, the plaintiff, Seymour Friedman, M.D., has endured grievous damages, including, but not limited to, the following: the cost of defending the aforesaid cause and the appeal, an increase in his annual malpractice insurance premiums for so long as

[1] *Serafin v Peoples Community Hospital Authority,* 67 Mich App 560; 242 NW2d 438 (1976).

[2] 397 Mich 880 (1976).

he practices medicine, the loss of two young associates from his office who could no longer afford to pay the increased malpractice insurance premiums thereby requiring him to work excessive hours without relief, damages to his reputation as a physician and surgeon, embarrassment and continued mental anguish."

The defendants moved for summary judgment under GCR 1963, 117.2, subds (1) and (3), and for accelerated judgment under GCR 1963, 116. The judge granted both motions in November, 1976, concluding that (1) plaintiff had failed to state a cause of action for negligence because there was "no relationship other than that of adversaries" between the defendants and plaintiff and hence there was "no duty owing"; and (2) the refusal of the trial judge in the prior action to find that the claims advanced by the defendants on behalf of their client were unreasonable and should render them responsible under GCR 1963, 111.6 for litigation expenses of their opponents established that the prior action was brought with probable cause and therefore precluded a subsequent action for malicious prosecution or abuse of process.

The Court of Appeals affirmed the dismissal insofar as it was based on failure to state a claim on the theories of negligence and abuse of process.[3] However, it reversed the dismissal of the cause of action sounding in malicious prosecution and remanded this cause to the trial court, declaring that an adverse ruling on a defendant's motion under GCR 111.6 did not bar a subsequent malicious prosecution action and that the facts surrounding the filing and continuation of the prior action were in dispute.

This Court granted leave to appeal on both the plaintiff's application from that portion of the

[3] *Friedman v Dozorc,* 83 Mich App 429; 268 NW2d 673 (1978).

Court of Appeals decision affirming the dismissal of the causes of action sounding in negligence and abuse of process and on the defendants' application to cross-appeal from that portion of the decision reversing the dismissal of the cause of action for malicious prosecution.[4]

## II

### A

Plaintiff and amici in support urge this Court to hold that an attorney owes a present or prospective adverse party a duty of care, breach of which will give rise to a cause of action for negligence. We agree with the circuit judge and the Court of Appeals that an attorney owes no actionable duty to an adverse party.

Plaintiff and amici argue that an attorney who initiates a civil action owes a duty to his client's adversary and all other foreseeable third parties who may be affected by such an action to conduct a reasonable investigation and re-examination of the facts and law so that the attorney will have an adequate basis for a good-faith belief that the client has a tenable claim.[5] Plaintiff contends that

[4] 405 Mich 823 (1979).

[5] The heading of the principal section of plaintiff's argument seeking recognition of a cause of action for negligence against an opposing attorney is more specific:

"An attorney who commences a civil action has the affirmative duty and obligation to foreseeable third parties who may be affected by that civil action to conduct a reasonable investigation prior to the commencement of the action and to constantly re-examine the civil action once filed during its continuation as is reasonably necessary, ordinary and appropriate under the circumstances of the particular case to enable him to come to a good faith belief that his client has or continues to have a tenable claim and that the factual matters contained in the complaint are true and such investigation and re-examination must be conducted with the exercise of reasonable and ordinary skill, care, diligence and knowledge ordinarily possessed by attorneys under similar circumstances."

this duty is created by the Code of Professional Responsibility and by the Michigan General Court Rules.[6]

Plaintiff further argues that an attorney's separate duty under the Code of Professional Responsibility to zealously represent a client is limited by the requirement that the attorney perform within the bounds of the law.[7] Acting within the bounds of the law is said to encompass refraining from asserting frivolous claims; this charge upon the profession imposes upon counsel a duty to the public, the courts and the adverse party to conduct a reasonable investigation. Plaintiff contends that since the duty to investigate already arises from

[6] Plaintiff's brief refers to Code of Professional Responsibility and Canons, Canon 1, DR 1-102(A), Canon 6, DR 6-101(A), Canon 7, DR 7-102(A), and various Ethical Considerations associated with Canon 7, especially EC 7-4 and EC 7-10, as well as to GCR 1963, 111.6 and 114.

[7] Code of Professional Responsibility and Canons, Canon 7 provides: "A lawyer should represent a client zealously within the bounds of the law".

DR 7-102 provides in pertinent part:

"(A) In his representation of a client, a lawyer shall not:

"(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

"(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

EC 7-4 provides:

"The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous."

EC 7-10 provides:

"The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."

the attorney-client relationship under the code and court rules, recognition of a cause of action for negligence will impose no new obligation on the attorney.

Defendants counter that an attorney cannot be liable to third parties for acts that result from client representation in the absence of fraud or collusion. An attorney's only actionable legal duty is owed to his or her client. An attorney cannot owe a duty to the client's legal opponent because of the very duty that is owed to the client. An attorney owing one duty to a client and another duty to the client's adversary, each of whom have adverse interests, would be faced with an irreconcilable conflict of interest.

B

In a negligence action the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty.[8]

Dean Prosser has said that " 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff" and concerns "the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other".[9] Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct.

Assuming that an attorney has an obligation to

[8] *Moning v Alfono,* 400 Mich 425, 436-438; 254 NW2d 759 (1977); *Smith v Allendale Mutual Ins Co,* 410 Mich 685, 713; 303 NW2d 702 (1981).

[9] Prosser, Torts (4th ed), § 53, p 324. Dean Prosser also cautions that " '[d]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection". *Id.,* pp 325-326.

his client to conduct a reasonable investigation prior to bringing an action, that obligation is not the functional equivalent of a duty of care owed to the client's adversary. We decline to so transform the attorney's obligation because we view such a duty as inconsistent with basic precepts of the adversary system.

The duties, professional and actionable, owed to the client by the attorney acting as advocate and adviser are broader than the obligation of reasonable investigation. Those duties concern decisions which the attorney makes on behalf of, and often in consultation with, the client, regarding the manner of proceeding with the client's cause. A decision to proceed with a future course of action that involves litigation will necessarily adversely affect a legal opponent. If an attorney were held to owe a duty of due care to both the client and the client's adversary, the obligation owing to the adversary would extend beyond undertaking an investigation and would permeate all facets of the litigation. The attorney's decision-making and future conduct on behalf of both parties would be shaped by the attorney's obligation to exercise due care as to both parties. Under such a rule an attorney is likely to be faced with a situation in which it would be in the client's best interest to proceed in one fashion and in the adversary's best interest to proceed contrariwise. However he chooses to proceed, the attorney could be accused of failing to exercise due care for the benefit of one of the parties.

In *Parnell v Smart,* 66 Cal App 3d 833, 837-838; 136 Cal Rptr 246, 248 (1977), a panel of the California Court of Appeals, in refusing to recognize an attorney's duty to his client's adversary, expressed this concern as follows:

"The distinguishing feature of this case is that the defendants occupy the position of counselor to the *adverse* party (Farmers) in an *adverse* proceeding instituted by the plaintiff. Defendants were directly responsible to their client, Farmers, and were under a duty to represent and protect their client's interest against the claim being made by plaintiff. In this role they were duty bound to challenge, minimize or, if possible, to defeat the claim being made. Under these circumstances, it is unreasonable to conceive that defendants owed some sort of legal duty to plaintiff." (Emphasis in original.)

In short, creation of a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest[10] which would seriously hamper an attorney's effectiveness as counsel for his client.[11] Not only would the adversary's

[10] Under a section entitled Conflicts in Litigation, the comments to the Discussion Draft of ABA Model Rules of Professional Conduct, 48 USLW, No. 32, Supplement, p 8 (February 19, 1980), most aptly identify the type of conflict of interest presented under the instant facts:

"Most if not all questions of conflict of interest are questions of degree. As noted above, minor and inevitable conflicts inherent in client-lawyer relationships necessarily must be tolerated. On the other hand, a conflict of interest may be so sharp as to preclude the lawyer from representing a particular client. For example, under no circumstances could a lawyer properly represent both the plaintiff and the defendant in contested litigation, or represent parties to a negotiation whose interests are fundamentally antagonistic to each other. When it is plain that prejudice to the client's interests is likely to result, the lawyer should not undertake the representation even with the consent of the client. A client's consent does not legitimate a lawyer's abuse of professional office."

[11] In *Berlin v Nathan,* 64 Ill App 3d 940, 952; 381 NE2d 1367, 1376 (1978), which arose from a physician's countersuit against the original plaintiffs and their attorneys, the court said:

"[W]e believe it would be contrary to public policy for us to hold that an attorney has a duty to an intended defendant not to file a weak or perhaps 'frivolous' lawsuit since we would be creating an insurmountable conflict of interest between the attorney and the client. The attorney owes a duty to his or her client to present the client's case vigorously in a manner as favorable to the client as the rules of law and professional ethics demand. *(Norton v Hines,* 49 Cal App 3d 917; 123 Cal Rptr 237 [1975])."

interests interfere with the client's interests, the attorney's justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship. As the California Supreme Court observed in *Goodman v Kennedy,* 18 Cal 3d 335, 344; 556 P2d 737, 743; 134 Cal Rptr 375 (1976):

> "The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal 'would prevent him from devoting his entire energies to his client's interests' *(Anderson v Eaton,* 211 Cal 113, 116; 293 P 788, 790 [1930]). The result would be both 'an undue burden on the profession' *(Lucas v Hamm,* 56 Cal 2d 583, 589 [15 Cal Rptr 821, 824; 364 P2d 685, 688 (1961)]) and a diminution in the quality of the legal services received by the client." (Footnote omitted.)

In *Tappen v Ager,* 599 F2d 376, 379 (CA 10, 1979), a physician's countersuit against an attorney, the United States Court of Appeals for the Tenth Circuit refused to find a duty owing to the attorney's opponent in litigation because such a duty would be inconsistent with the adversarial relationship of the parties:

> "[T]he negligent tort arises in a narrow context. It requires two people to be in a relationship whereby one person owed a duty of prudent conduct to the other. The adversary nature of the lawsuit is strongly at odds with this concept. The lawyer's duty of care is to his client and to the court."

We agree and conclude that the public policy of maintaining a vigorous adversary system outweighs the asserted advantages of finding a duty of due care to an attorney's legal opponent.

Recognition of an attorney's duty to an adverse party would, contrary to the assertions of plaintiff and amici, impose additional burdens on the attorney. The conflict of interest which would result cannot be resolved, as plaintiff contends, simply by allowing the attorney to resolve all doubts in favor of the client, for the existence or reasonableness of the doubts might themselves become jury questions which would defy principled resolution.

Plaintiff argues that concern for the chilling effect on free access to the courts which might result from declaring the existence of an attorney's duty in favor of an adverse party is misplaced. Instead, plaintiff urges that recognition of a cause of action in negligence would facilitate free access to the courts. Plaintiff asserts that the historical check on free access to the courts through independent assessment of the case by the attorney has broken down. Instead of acting as an effective screen against groundless suits, the attorney has become a mere conduit for such suits, particularly in medical malpractice actions where the attorney acquires a contingent fee interest in the outcome of the litigation. Recognition of a cause of action for negligence in such cases would, we are told, encourage attorneys to resume this screening function and thereby promote free access to the courts for those with well-founded claims.

Defendants counter that recognition of a duty owing from an attorney to his client's adversary would inhibit free access to the courts. An attorney faced with the risk of being held liable in negligence to the adverse party will decline close cases and will be unduly inhibited in the free use of the courts on behalf of his client.

We acknowledge that our ability to predict the

effect on court dockets of recognition of a cause of action for negligence is limited. There is, however, a public policy of encouraging free access to the courts. Because we are of the opinion that recognition of a cause of action for negligence in favor of a client's adversary might unduly inhibit attorneys from bringing close cases or advancing innovative theories, or taking action against defendants who can be expected to retaliate, we decline to recognize a duty of due care to the adverse party. We reiterate what this Court said in *State Bar Grievance Administrator v Corace,* 390 Mich 419, 434-435; 213 NW2d 124 (1973):

> "[O]ur adversary system 'intends, and expects, lawyers to probe the outer limits of the bounds of the law, ever searching for a more efficacious remedy, or a more successful defense'."

We agree with those courts in other jurisdictions which have relied on the policy of encouraging free access to the courts as a reason for declining to recognize a negligence cause of action in physician countersuits.[12] No appellate court has yet approved such a cause of action.

We briefly address, for the sake of completeness, the other arguments advanced by plaintiff and amici.

Plaintiff and amici contend that a greater degree of accountability should be imposed upon the legal profession to restore public confidence in the bar, and that privity of contract no longer shields a professional from liability to foreseeable third par-

[12] *Weaver v Superior Court of Orange County,* 95 Cal App 3d 166; 156 Cal Rptr 745 (1979); *Berlin v Nathan,* 64 Ill App 3d 940; 381 NE2d 1367 (1978); *Lyddon v Shaw,* 56 Ill App 3d 815; 372 NE2d 685 (1978); *Brody v Ruby,* 267 NW2d 902 (Iowa, 1978); *Spencer v Burglass,* 337 So 2d 596 (La App, 1976); *Hill v Willmott,* 561 SW2d 331 (Ky App, 1978).

ties.[13] Our decision today is not, however, based on the doctrine of privity of contract but on public policy considerations respecting the attorney's role in the adversary system and the importance of preserving free access to the courts.

Plaintiff and amici also contend that attorneys ought to be subject to liability for negligence to all foreseeable third parties, because the scope of duty is determined by foreseeability of harm, which is clear in the case of an intended adversary, and not by such factors as reliance or intended benefit.

We are of the opinion, however, that reliance is an appropriate factor to be considered in deciding whether a duty is owed to another by a professional.[14] The absence of reliance distinguishes a third party's relationship with a member of the legal profession who represents that party's adversary from a third party's relationship with a member of another profession whose negligent conduct may affect him.[15]

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[13] In *Williams v Polgar,* 391 Mich 6; 215 NW2d 149 (1974), this Court held that an abstracter of title is subject to liability in negligence to foreseeable third parties who rely on the abstract.

[14] In finding that a title abstracter may owe a duty to a third party to avoid negligent misrepresentation in an abstract, this Court recognized a duty to persons who had foreseeably *relied* on the abstract:

"This cause of action arising from breach of the abstracter's contractual duty runs to those persons an abstracter could reasonably foresee as relying on the accuracy of the abstract put into motion. The particular expert-client relationship accruing to a professional contract to certify the condition of the record of title reposes a peculiar trust in an abstracter which runs not only to the original contracting party." *Williams v Polgar, supra,* 22-23.

[15] See *Bickel v Mackie,* 447 F Supp 1376, 1381 (ND Iowa, 1978), *aff'd* 590 F2d 341 (CA 8, 1978), where the Court declined to find that an attorney owed a duty of due care to a physician who successfully defended a malpractice suit, and said:

"However, in the present case there is no question of reliance of third parties who are adversaries in judicial proceedings. The attorney owes his primary and paramount duty to his client. The very nature of the adversary process precludes reliance by opposing parties. While it is true that the attorney owes a general duty to the judicial system, it is not the type of duty which translates into

An occasional decision has found an attorney liable to third parties absent reliance. The California Supreme Court held an attorney liable to the intended beneficiary under a will for negligently drafting the will.[16]

Defendants contend that an attorney's liability for negligence to third parties should be limited to negligent will drafting and negligent title examination. We intimate no view regarding an attorney's liability for negligence to third parties who are not adversaries in litigation. Those factual situations are not before us. It is sufficient to note that in the present case there can be neither reliance by the plaintiff nor benefit intended by the defendants or their client because the relationship of the parties is adversarial.[17]

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liability for negligence to an opposing party where there is no foreseeable reliance by that party on the attorney's conduct."

[16] *Lucas v Hamm,* 56 Cal 2d 583; 364 P2d 685; 15 Cal Rptr 821 (1961).

The California courts have reasoned that where an attorney's relationship with his client was intended to benefit a third party, the third party could recover directly from the attorney for breach of duty where the harm from the breach was also certain and foreseeable. *Heyer v Flaig,* 70 Cal 2d 223; 449 P2d 161; 74 Cal Rptr 225 (1969).

Although the California courts have been liberal in extending an attorney's liability to third parties, the California Supreme Court more recently refused to extend an attorney's duty of care in giving legal advice to a client to third parties with whom the client deals at arm's length in the absence of a showing that the advice was foreseeably transmitted to or relied upon by or intended to benefit the third parties. *Goodman v Kennedy, supra.*

In *Norton v Hines,* 49 Cal App 3d 917; 123 Cal Rptr 237 (1975), and *Weaver v Superior Court of Orange County,* 95 Cal App 3d 166; 156 Cal Rptr 745 (1979), a panel of the California Court of Appeals declined to find that an attorney owed a duty to his or her client's adversary in litigation.

[17] The Appellate Court of Illinois observed:

"When a tort action is brought [the attorney] has but one intended beneficiary, his client; the adverse party is certainly not an intended beneficiary of the adverse counsel's client. Thus, even in states extending the attorney's responsibility and liability to intended beneficiaries of the client's conduct, such as intended legatees under a will, no liability to the adverse party sued by the client has been found

In sum, the demands of the adversary system distinguish the legal profession from other professions whose members have been held liable to third parties for negligence, and the present case from those in which lawyers have been held liable to third parties.

## III

To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding. *Spear v Pendill,* 164 Mich 620, 623; 130 NW 343 (1911).[18]

Plaintiff contends he has pleaded that defendants' ulterior purpose in filing the former malpractice action was to coerce payments of large sums of money from plaintiff for defendants' financial gain by means of their contingent fee arrangement with the former plaintiff. In addition, plaintiff alleges that irregular use of process was shown by defendants' filing of the complaint without adequate investigation.

Defendants counter that plaintiff's pleadings are

absent malicious prosecution." *Berlin v Nathan,* 64 Ill App 3d 940, 952-953; 381 NE2d 1367, 1376 (1978).

[18] The Restatement Torts, 2d, explains the tort of abuse of process as follows:

"The gravamen of the misconduct for which the liability stated in this section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this section." 3 Restatement Torts, 2d, § 682, comment *a,* p 474.

deficient in failing to allege an act by the defendants beyond mere initiation of a lawsuit and an ulterior purpose other than settlement of a lawsuit.

We need not decide whether plaintiff's pleadings sufficiently allege that the defendants had an ulterior purpose in causing process to issue, since it is clear that the plaintiff has failed to allege that defendants committed some irregular act in the use of process. The only act in the use of process that plaintiff alleges is the issuance of a summons and complaint in the former malpractice action. However, a summons and complaint are properly employed when used to institute a civil action, and thus plaintiff has failed to satisfy the second element required in *Spear, supra,* 623, where the Court observed " '[t]his action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue' ".

We note that other courts that have addressed the question whether abuse of process is a possible theory of recovery in the context of a medical malpractice countersuit have found that mere commencement of an action for malpractice is not an improper use of process. *Martin v Trevino,* 578 SW2d 763 (Tex Civ App, 1978); *Hoppenstein v Zemek,* 62 AD2d 979; 403 NYS2d 542 (1978); *Lyddon v Shaw,* 56 Ill App 3d 815; 372 NE2d 685 (1978).

## IV

Plaintiff relies upon the same allegations respecting defendants' conduct and their failure to meet professional standards which assertedly constitute negligence in contending that he has pled a cause of action for malicious prosecution. He ar-

gues that the question of probable cause in a malicious prosecution action against the attorney for an opposing party turns on whether the attorney fulfilled his duty to reasonably investigate the facts and law before initiating and continuing a lawsuit. If the attorney's investigation discloses that the claim is not tenable, then it is his obligation to discontinue the action.

Defendants respond that Michigan is among those jurisdictions that have not abandoned the special injury requirement in actions for the malicious prosecution of civil proceedings. They urge, in addition, that this Court adopt a rule that a successful motion pursuant to GCR 1963, 111.6 in the former lawsuit is a necessary condition precedent to institution of a subsequent malicious prosecution action by the former defendant.

We agree with defendants that under Michigan law special injury remains an essential element of the tort cause of action for malicious prosecution of civil proceedings. Although the circuit judge did not rest decision on the plaintiff's failure to plead special injury, summary judgment under GCR 1963, 117.2(1) for failure to state a claim could be appropriately entered on that basis; the factual disputes asserted by plaintiff are immaterial.[19]

A

The recognition of an action for malicious prosecution developed as an adjunct to the English practice of awarding costs to the prevailing party[20]

[19] Plaintiff contends that it was error for the trial court to grant defendants' motions for summary and accelerated judgment since the facts relevant to whether defendants had probable cause to initiate and continue the former malpractice action—the extent to which the defendants conducted a reasonable review of medical records and pathology and autopsy reports, and the extent to which they attempted to obtain the opinions of expert witnesses—were in dispute.

[20] The early common law required any complainant who lost his suit to pay his opponent *wer,* a monetary penalty which varied with

in certain aggravated cases where the costs remedy was thought to be inadequate and the defendant had suffered damages beyond the expense and travail normally incident to defending a lawsuit. In 1698 three categories of damage which would support an action for malicious prosecution were identified: injury to one's fame (as by a scandalous allegation), injury to one's person or liberty, and injury to one's property.[21] To this day the English courts do not recognize actions for malicious prosecution of either criminal or civil

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the complainant's status. After the Norman conquest, *wer* gave way to amercement, a more flexible sanction paid to the court. Although every unsuccessful initiator of legal proceedings was subject to amercement, the amount, at least in theory, varied according to the wrongfulness of the complainant's conduct. Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis,* 88 Yale L J 1218, 1221-1223 (1979).

Amercement lost its effectiveness over time as the amounts assessed were subjected to limits and diminished by inflation. *Id.,* 1226, fn 63. Parliament eventually sought to revive a system of internal sanctions through a number of statutes which allowed prevailing defendants—and plaintiffs (see Goodhart, *Costs,* 38 Yale L J 849, 852-853 [1929])—to recover all or part of their costs of litigation. *Id.,* p 853, and Note, *supra,* p 1226, fn 64, both citing 23 Hen 8, c 15, § 1 (1531) (allowing costs at the discretion of the court to a prevailing defendant in actions of trespass, case, debt or covenant, detinue, account, and contract, or on any statute); 8 Eliz 1, c 2 (1565) (allowing costs and damages to the defendant where the plaintiff had caused arrest or attachment by invoking summary process and had delayed or discontinued prosecution of the claim on the merits); and 4 Jac 1, c 3 (1607) (allowing the defendant to recover costs whenever the plaintiff might have recovered them had he prevailed).

The Statute of Marlbridge (also Marleberge, Marlborough), 52 Hen 3, c 6 (1267), has been described as a watershed which signaled the replacement of a previously recognized right to bring a subsequent action for false suit with a sweeping system for allowing prevailing defendants in civil cases to recover costs, including attorney fees, in the original action. See, *e.g.,* 52 Am Jur 2d, Malicious Prosecution, § 9, pp 191-192. But other sources state that the asserted pre-statute right of action is "mythical", Note, *supra,* p 1225, fn 59, and that the statute "was an isolated instance" of the unsuccessful plaintiff being subject to liability to the defendant as well as amercement. Goodhart, *supra,* p 853.

[21] *Savile v Roberts,* 1 Ld Raym 374, 378; 91 Eng Rep 1147, 1149-1150 (1698).

proceedings unless one of these types of injury, as narrowly defined by the cases, is present.[22]

A substantial number of American jurisdictions today follow some form of "English rule" to the effect that "in the absence of an arrest, seizure, or special damage, the successful civil defendant has no remedy, despite the fact that his antagonist proceeded against him maliciously and without probable cause".[23] A larger number of jurisdictions, some say a majority, follow an "American rule" permitting actions for malicious prosecution of civil proceedings without requiring the plaintiff to show special injury.[24]

B

The plaintiff's complaint does not allege special injury. We are satisfied that Michigan has not significantly departed from the English rule and we decline to do so today.

This Court heretofore has neither recognized the unrestricted availability of a tort cause of action, analogous to malicious prosecution, for the wrongful initiation or continuation of civil proceedings, nor abrogated the traditional requirement that a

[22] For discussion of what will constitute the requisite injury, see *Quartz Hill Consolidated Gold Mining Co v Eyre,* LR 11 QBD 674, 689-693; 52 LJQB(NS) 488 (1883) (opinion of Bowen, L.J.); and *Wiffen v Bailey & Romford Urban Dist Council,* [1915] 1 KB 600.

[23] 52 Am Jur 2d, *supra,* § 10, p 192. The Reporter's Note at 5 Restatement Torts, 2d, Appendix, § 674, p 438, identifies 16 states which require some form of special injury in order to support an action for wrongful civil proceedings. *O'Toole v Franklin,* 279 Or 513, 518, fn 3; 569 P2d 561 (1977), lists the same 16 states and adds Kentucky.

[24] 52 Am Jur 2d, *supra,* § 10, p 193; Prosser, Torts (4th ed), § 120, p 853. The Reporter's Note, *supra,* lists 30 states which purportedly follow this majority rule. *O'Toole v Franklin, supra,* pp 518-519, fn 4, identifies 23 states.

Since the Reporter's Note and *O'Toole* differ over the categorization of Kentucky (see fn 23, *supra),* and both include Michigan (see part IVB of this opinion) as a "majority rule" state, the classification of the states does not appear to be entirely reliable.

plaintiff alleging wrongful institution of civil proceedings have suffered special injury in the nature of an interference with person or property. Examination of the Court's decisions reveals, rather, that despite occasional dictum the existence of an action for malicious prosecution of civil proceedings has been recognized only in circumstances where, consistent with the English rule, an interference with the plaintiff's person or property occurred.

*Brand v Hinchman,* 68 Mich 590; 36 NW 664 (1888), is the first decision of this Court concerning an action for malicious prosecution of a civil, rather than criminal, proceeding. Hinchman had obtained a writ of attachment against Brand and his business partner McCullough based upon an affidavit alleging that Brand and McCullough were indebted to Hinchman and were about to assign, dispose of, or conceal their property with intent to defraud their creditors. Two deputies took the writ to Brand's store and displayed it to him. Brand asked and was granted time to see Hinchman or Hinchman's attorneys. The officers remained at the store for at least half an hour until a clerk employed by Hinchman's attorneys arrived to tell them the claim was settled. The officers departed without having formally served the writ or levied upon property of the business.

When Brand and McCullough subsequently obtained a judgment against Hinchman for maliciously obtaining the writ of attachment, Hinchman contended that the action for malicious prosecution would not lie because there had been no arrest of the plaintiffs' persons or seizure of their property. The Court responded:

"While in this case there was no service of the writ, there was at least a technical taking and possession of the property. The officer went in the store to make the

levy, and did not go out of it until ordered to by the agent of Hinchman & Sons. He testifies that he should have prevented any one from removing any goods from the building, and he certainly had possession enough to have done so."[25]

The Court's finding that there had been a technical taking and possession of the plaintiffs' property was sufficient to answer Hinchman's argument and decide the case. Justice MORSE, the author of the opinion, went on, however, to say:

"But, whether he had such possession or not, *I am* fully satisfied, from a consultation of the authorities, that the action is maintainable without any arrest or seizure of property."[26] (Emphasis supplied.)

Reviewing a number of sources, he acknowledged that the English authorities and the majority of treatise writers substantiated the rule on which Hinchman relied but identified a growing trend among the American cases toward allowing actions for malicious prosecution of a civil action absent an arrest or seizure of property, "especially the swearing out of a false attachment without probable cause".[27] Justice MORSE concluded:

"The common law declares that for every injury there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business lessened or broken up, it can make no difference, in his right to recover for such injury, that his person or property has not been manually seized or disturbed. *But this is my individual opinion, the other members of the Court not deeming it*

[25] *Brand v Hinchman,* 68 Mich 590, 596; 36 NW 664 (1888).

[26] *Id.*

[27] *Id.,* p 597.

*necessary in this case to express any opinion upon this matter.*"[28] (Emphasis supplied.)

*Brand* stands only for the proposition that the facts of that case demonstrated a technical or constructive seizure of property sufficient to support an action for maliciously obtaining an attachment; if a majority of the Court had been prepared to say that a seizure of property was not essential to the cause of action, it would have been unnecessary for the Court to address that point.

Nor is *Antcliff v June,* 81 Mich 477; 45 NW 1019 (1890), authority for recognizing an action for malicious prosecution of a civil proceeding absent special injury to the defendant in the prior action.[29] Justice MORSE, who also wrote this opinion, recalled and reiterated the views he had expressed

[28] *Id.,* pp 597-598.

[29] June, a laborer, consulted Crowell, an attorney, regarding a dubious claim of $50 that June purported to have against Antcliff, a prosperous farmer in a neighboring county. Crowell secured a summons against Antcliff from a justice of the peace and arranged to have it served by a deputy sheriff of the county where Antcliff resided, although the service was invalid because the summons was directed to officers of the county in which the justice sat. On the day set for return of the summons Antcliff, who in the meantime had received an anonymous letter advising him not to appear, was absent. The justice heard testimony from June, under questioning by Crowell, to the effect that Antcliff owed June $300 for goods and services; judgment was entered against Antcliff in that amount. Crowell subsequently obtained a writ of execution based upon the judgment and, accompanied by the sheriff of the county where Antcliff resided, rode out to Antcliff's farm to confront him with the execution. Antcliff denied any debt to June but, under threat by Crowell to drive off his stock and levy on his farm, paid $240 cash to settle the matter, most of which Crowell apparently pocketed.

Antcliff brought suit against June and Crowell upon a two-count declaration (see fn 31, *infra)* alleging that they had acted falsely, maliciously and without probable cause in obtaining the judgment, execution and payment. The circuit judge entered a directed verdict for the defendants at the close of Antcliff's proofs.

Antcliff appealed and the defendants responded that the declaration did not establish malicious prosecution because it showed that the court lacked jurisdiction and did not indicate that a prior proceeding had terminated in the plaintiff's favor.

in *Brand*[30] but again revealed his discussion to be dictum by concluding:

"But *it is not necessary to determine whether the first count was a good one, in an action for malicious prosecution.* It sets out fully a conspiracy between the defendants, June and Crowell, to defraud the plaintiff, and that he was defrauded out of the money paid upon this void judgment. It therefore clearly sets out an actionable wrong,—one that can be recovered for in an action upon the case,—and it is immaterial what it is called."[31] (Emphasis supplied.)

Thus, *Antcliff* stands not for the proposition that an action for malicious prosecution of civil proceedings will lie absent injury to the plaintiff's person or property but for the conclusion that the declaration stated an action on the case for fraud.

In the foregoing cases and others subsequently

[30] "I am satisfied, however, that if the wrong and injury is done by a malicious suit it is immaterial, upon principle, whether the court had jurisdiction or not to entertain such suit. For every malicious wrong there is certainly in this day and age a remedy; and, under our liberal system of pleading in this state, a plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named or called.

"The first count of the declaration plainly shows a malicious and actionable wrong, and every averment was supported by cogent proof. It may be that the prosecution of the suit to judgment in the justice's court by itself alone did not touch the person or property of the plaintiff, but the writer of this opinion, in *Brand v Hinchman,* held that it was not necessary, in an action for the malicious prosecution of a civil suit, that the person should be molested or property seized, if it appeared that the suit was malicious, and without probable cause, and the party had been injured or damaged thereby. See 68 Mich 596-598, and cases there cited. I am still of the opinion there expressed, and have been fortified in my position by the facts of this case, and the decisions of other courts, not cited in *Brand v Hinchman* [citations omitted]." *Antcliff v June,* 81 Mich 477, 490; 45 NW 1019 (1890).

[31] *Id.,* p 492. The Court also found that the second count of the declaration stated a claim for abuse of process, and the case has been cited for that proposition. *Marlatte v Weickgenant,* 147 Mich 266, 275; 110 NW 1061 (1907); *Spear v Pendill,* 164 Mich 620, 624; 130 NW 343 (1911). See, also, *Powers v Houghton,* fn 32, *infra.*

decided by this Court,[32] the plaintiff suffered some

[32] In *Pawlowski v Jenks,* 115 Mich 275; 73 NW 238 (1897), the plaintiff brought an action alleging the malicious prosecution of an action in chancery to restrain him from operating a business selling intoxicating liquors. This Court held that the advice of counsel to a client who has fully disclosed the facts, to the effect that the client has a meritorious case, establishes as a matter of law the client's probable cause for bringing the action. Since no question concerning the sufficiency of the complaint was discussed and the defendant had obtained a permanent injunction in the prior action, the case is at most evidence that some members of the bar regarded an injunction which interfered with the plaintiff's business as a special injury which would support a subsequent action for malicious prosecution of civil proceedings.

In *Powers v Houghton,* 159 Mich 372; 123 NW 1108 (1909), the defendants had sued out a writ of replevin against Powers, pursuant to which an officer had seized 16 lambs. Powers had sold the lambs to another three days before the writ was issued and was in the act of delivering them to the buyer when they were seized. After obtaining a favorable verdict in the replevin action, Powers brought an action for malicious prosecution and recovered a judgment from which defendants appealed. This Court held that a defendant in a replevin suit who at the time of seizure had no property interest in the goods taken could not maintain an action for malicious prosecution against the initiator of the replevin action. The Court's discussion demonstrates that it regarded actions for malicious prosecution of civil proceedings as maintainable only in special circumstances and did not read *Brand* and *Antcliff* as establishing a broader rule:

"We have, then, in the case at bar, this situation: The plaintiff seeks to recover damages for the malicious prosecution of a civil action, by which he was deprived of neither his liberty, reputation, nor property, but simply of the possession of property belonging to another. Pollock, in his work on Torts (8th ed), at page 316, states the rule as follows:

" 'Generally speaking, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even if malice be proved. For, in contemplation of law, the defendant, who is unreasonably sued, is sufficiently indemnified by a judgment in his favor, which gives him his costs against the plaintiff.'

"See, also, *Quartz Hill [Consolidated] Gold Mining Co v Eyre,* LR 11 QBD 674; 52 LJQB(NS) 488 [1883], where it said:

" '[I]n the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.'

"This is the English rule, which has been somewhat modified in America. In 1 Cooley on Torts (3d ed), at page 345, the rule is stated to be that:

" 'In some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule.'

special injury equivalent to a seizure of property as a result of the defendant's institution of civil

"Among those malicious civil suits giving a right of action, he enumerates arrest, attachment, garnishment, insanity cases, injunctions, receivers, and other suits that interfere with person or property. Under the last class of cases, he says (page 348):

" 'So a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with, by the appointment of a receiver, the granting of an injunction, or by writ of replevin.'

"As supporting the text touching writs of replevin, he cites *Brounstein v Sahlein,* 65 Hun [72 NY Sup] 365; 20 NYS 213 [1892]; *McPherson v Runyon,* 41 Minn 524; 43 NW 392; 16 Am St Rep 727 [1889]. Both of these cases have been examined. In the first, not only was the plaintiff's property interfered with, but his business was largely injured. In the second, property of the plaintiff had been taken on the writ.

"In our own state, the case of *Brand v Hinchman,* 68 Mich 590; 36 NW 664; 13 Am St Rep 362 [1888], is to some extent applicable. There, an attachment was sworn out by defendant, Hinchman, and placed in the sheriff's hands for service. A deputy visited Brand's store, but made no actual levy, the subject-matter of the suit being adjusted. This court found, however, that there was at least a technical taking and possession of Brand's property, and the proofs showed that damage resulted to his business as a result of the swearing out of the writ (without probable cause).

"The case of *Antcliff v June,* 81 Mich 477; 45 NW 1019; 10 LRA 621; 21 Am St Rep 533 [1890], is authority for the proposition that a gross and fraudulent abuse of the process of the court, resulting in damage, gives a right of action to the person sustaining the damage.

"But we have been unable to find a single adjudicated case (and counsel for plaintiff has called our attention to none), where it is held that the defendant in a replevin suit, having no property in the goods taken, may maintain an action for malicious prosecution against the unsuccessful plaintiff in the original action. The authorities are not harmonious upon the question, where the property of the defendant in the original action is taken, and upon that question we express no opinion." *Powers v Houghton,* 159 Mich 372, 373-374; 123 NW 1108 (1909).

In *Krzyszke v Kamin,* 163 Mich 290; 128 NW 190 (1910), the Court held, after surveying *Powers v Houghton, supra,* and a variety of texts and cases from other jurisdictions, that an action for malicious prosecution would lie where the defendant had obtained an injunction to restrain the plaintiff from disposing of his personal property on the strength of patently insufficient averments in a judgment creditor's bill, and where the plaintiff was unable to hold an advertised auction as scheduled because of the injunction—arguably the equivalent of a temporary seizure of his property.

*Tomkovich v Mistevich,* 222 Mich 425; 192 NW 639 (1923), *Scovera v Armbruster,* 257 Mich 340; 241 NW 231 (1932), and *Fisk v Powell,* 349 Mich 604; 84 NW2d 736 (1957), all concerned actions for maliciously obtaining an attachment.

proceedings. No decision of this Court holds that an action for malicious prosecution of civil proceedings can be maintained absent special injury, whatever the precise boundaries of that concept.

Nor had the Court of Appeals, prior to its decision in this case, declared other than in dictum that an action for the malicious prosecution of a civil action could be maintained without regard to whether the plaintiff had incurred special injury.[33]

C

Since this Court has not heretofore declared that an action for malicious prosecution of civil pro-

[33] In *Leeseberg v Builders Plumbing Supply Co,* 6 Mich App 321; 149 NW2d 263 (1967), the defendant had obtained a writ of attachment which led to the plaintiff's warehouse being locked for two weeks.

In *Rowbotham v Detroit Automobile Inter-Ins Exchange,* 69 Mich App 142, 147; 244 NW2d 389 (1976), defendant insurer, having obtained a judgment against plaintiff to recoup an erroneously paid claim for damages arising out of an automobile accident, asked the court clerk to file a certificate of unsatisfied judgment with the Secretary of State, pursuant to a statute which the court later held inapplicable to the judgment in question. The Secretary of State suspended plaintiff's operator's license. Although the Court of Appeals said that "Michigan courts have clearly expanded [the tort of malicious prosecution] to include malicious civil proceedings", its holding is more limited: "We believe that a proceeding maliciously instituted to deprive a person of his operator's license can qualify as a proceeding warranting a tort suit, for the proceeding may adversely affect a legally protected interest. *Cf. Carver v Lykes,* 262 NC 345; 137 SE2d 139 (1964) (real estate broker's license)."

In *Carver,* p 352, the Supreme Court of North Carolina embraced the view that, "under certain circumstances, an action for malicious prosecution may be predicated upon the prosecution, institution, or instigation of an administrative proceeding where such proceeding is adjudicatory in nature and may adversely affect a legally protected interest". North Carolina follows the "English rule" and extends the tort of malicious prosecution only "to include the malicious institution of civil proceedings which involve an arrest of the person or seizure of property or which result in some special damage". *Id.,* p 352. "A driver's license, once issued, is a significant interest subject to constitutional due process protections", *Shavers v Attorney General,* 402 Mich 554, 599; 267 NW2d 72 (1978), citing *Bell v Burson,* 402 US 535, 539; 91 S Ct 1586; 29 L Ed 2d 90 (1971), and deprivation thereof may therefore be regarded as equivalent to a seizure of property, *i.e.,* special injury.

ceedings may be maintained in the absence of special injury, it remains to be decided whether we should so hold today. We are persuaded that the special injury requirement should be retained to limit the circumstances in which an action for the malicious prosecution of civil proceedings can be maintained.

Most commentators appear to favor abrogation of the special injury requirement to make the action more available and less difficult to maintain.[34] Their counsel should, however, be evaluated skeptically. The lawyer's remedy for a grievance is a lawsuit, and a law student or tort professor may be particularly predisposed by experience and training to see the preferred remedy for a wrongful tort action as another tort action. In seeking a remedy for the excessive litigiousness of our society, we would do well to cast off the limitations of a perspective which ascribes curative power only to lawsuits.

We turn to a consideration of Dean Prosser's criticisms of the three reasons commonly advanced by courts for adhering to the English rule. First, to the assertion that the costs awarded to the prevailing party are intended as the exclusive remedy for the damages incurred by virtue of the wrongful litigation, Prosser responds that "in the United States, where the costs are set by statute at trivial amounts, and no attorney's fees are allowed, there can be no pretense at compensation even for the expenses of the litigation itself".[35] This argument

[34] Prosser, *supra,* § 120, p 851; Note, *Promoting Recovery by Claimants in Iowa Malicious Prosecution Actions,* 64 Iowa L Rev 408 (1979); Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?,* 26 Case Western Reserve L Rev 653, 657-662 (1976); Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions,* 45 Fordham L Rev 1003, 1090 (1977).

[35] Prosser, *supra,* § 120, p 851.

is compelling, but it does not necessarily justify an award of compensation absent the hardship of special injury or dictate that an award of compensation be assessed in a separate lawsuit. Second, to the arguments that an unrestricted tort of wrongful civil proceedings will deter honest litigants and that an innocent party must bear the costs of litigation as the price of a system which permits free access to the courts, Prosser answers that "there is no policy in favor of vexatious suits known to be groundless, which are a real and often a serious injury".[36] But a tort action is not the only means of deterring groundless litigation, and other devices may be less intimidating to good-faith litigants. Finally, in response to the claim that recognition of the tort action will produce interminable litigation, Prosser argues that the heavy burden of proof which the plaintiff bears in such actions will safeguard bona fide litigants and prevent an endless chain of countersuits. But if few plaintiffs will recover in the subsequent action, one may wonder whether there is any point in recognizing the expanded cause of action. If the subsequent action does not succeed, both parties are left to bear the expenses of two futile lawsuits, and court time has been wasted as well.

Although this case arises upon the plaintiff doctor's assertions that the defendant attorneys wrongfully prosecuted a medical malpractice action against him, if we were to eliminate the special injury requirement that expansion of the tort of malicious prosecution would not be limited to countersuits against attorneys by aggrieved physicians. An action for malicious prosecution of civil proceedings could be brought by *any* former defendant—person, firm or corporation, private or pub-

[36] *Id.*

lic—in whose favor a prior civil suit terminated, against the former plaintiff or the plaintiff's attorney or both. In expanding the availability of such an action the Court would not merely provide a remedy for those required to defend groundless medical malpractice actions, but would arm all prevailing defendants with an instrument of retaliation, whether the prior action sounded in tort, contract or an altogether different area of law.

This is strong medicine—too strong for the affliction it is intended to cure. To be sure, successful defense of the former action is no assurance of recovery in a subsequent tort action, but the unrestricted availability of such an action introduces a new strategic weapon into the arsenal of defense litigators, particularly those whose clients can afford to devote extensive resources to prophylactic intimidation.

At present, a plaintiff and his attorney who know that they have less than an airtight case must, in deciding whether to continue the case or in evaluating a settlement offer, consider whether if they proceed to trial they will invest more and recover less or nothing. If the instant plaintiff's approach is adopted, all plaintiffs and their attorneys henceforth must also weigh the likelihood that if they persevere in the action and receive an unfavorable decision, they will not only take nothing but also be forced to defend an action for malicious prosecution of civil proceedings. Even if the plaintiff and his attorney had abundant cause for bringing and continuing the action and acted without malice, the expense and annoyance foreseeably involved in even a successful defense of the countersuit may induce them to abandon a problematic claim or to settle the case for less than they would otherwise accept. Some will say

amen, but this would push the pendulum too far in favor of the defense, more than is necessary to rectify the evil to which this effort is directed.

Because many actions for malicious prosecution of civil proceedings will present questions of fact concerning what measures the former plaintiff and his attorney took, and with what state of mind, the prospect of having the countersuit submitted to a jury capable of returning a large verdict including damages for business loss, injury to reputation and emotional distress will loom large indeed, especially since many parties or attorneys do not have or may be unable to obtain insurance against such liability.

The cost of legal malpractice insurance is bound to increase, assuming coverage against such liability is available. (The currently advertised State Bar group program seems to include such coverage.) Litigators may be excluded from group programs and find that they cannot obtain coverage at reasonable rates. A legal malpractice crisis may arise as serious as the medical malpractice crisis.

Permitting a tort action for wrongful civil proceedings to be maintained absent special injury to the plaintiff could easily generate a surprising number of such actions. Not only doctors, but most defendants, react to a lawsuit with hurt feelings and outrage. They may impute malicious motives to the plaintiff and the opposing attorney and be eager to exact retribution if they prevail. There is no shortage of lawyers who are eager to develop new specialties and would be willing to accept such actions on a contingent fee basis. Some product manufacturers and insurance companies may routinely file countersuits with a view to inhibiting plaintiffs or their attorneys from commencing actions against them or their insureds. The indis-

criminate filing of countersuits may lead to actions for wrongfully proceeding with a wrongful civil proceedings action. Embittered litigants whose differences are more emotional than legal will have added opportunities to continue their strife.

The cure for an excess of litigation is not more litigation. Meritorious as well as frivolous claims are likely to be deterred. There are sure to be those who would use the courts and such an expanded tort remedy as a retaliatory or punitive device without regard to the likelihood of recovery or who would seek a means of recovering the actual costs of defending the first action without regard to whether it was truly vexatious.

Other courts have, in the last few years, refused to abandon the special injury requirement. In a 1977 decision arising out of an action brought by physicians who had been sued for medical malpractice by a plaintiff they had not treated, the Oregon Supreme Court rejected an invitation to change the law of that jurisdiction.[37] The court suggested that the proposed change was more appropriate for legislative consideration, especially since two recent legislative examinations of the medical malpractice "problem" had followed decisions reaffirming the special injury requirement without resulting in any change in the elements of an action for malicious prosecution of civil proceedings.

In this connection, it is noteworthy that the instant action is a test case brought at about the same time as the Legislature and this Court were called upon to adopt a number of measures to alleviate the medical malpractice crisis. The Legislature could create a special cause of action in favor of physicians without the potential impact

[37] *O'Toole v Franklin, supra,* pp 522-524.

on the entire litigation system of a general cause of action for wrongful civil proceedings. No court, although some have been asked to do so, has been persuaded that a principled distinction could be drawn by a court of law on the basis that injury to the reputation of a doctor is a special injury warranting exceptional solicitude not accorded other aggrieved litigants.

In 1978 the District of Columbia Court of Appeals rejected a similar effort by a physician.[38] In 1979, the Washington Supreme Court adhered to the special injury requirement, concluding that the limitation "still serves the dual purpose of allowing the honest plaintiff to press his case without threat of suit and of limiting vexatious lawsuits".[39] Recent Illinois[40] and Rhode Island[41] decisions are in agreement. The list of states ad-

[38] The court said:

"The purpose of the special injury rule, however, is to strike a balance between allowing free access to the courts for the vindication of rights without fear of a resulting suit, and the undue exercise of such right. *Davis v Boyle Bros, Inc,* 73 A2d 517, 521 (DC Mun App, 1950). Appellant's argument, if accepted, would upset that delicate balance. The nature of his profession, given its profound impact on the lives of those with whom he deals, cannot be allowed to insulate him from potential liability. In order to maintain a free access to the courts by persons with grievances who might otherwise be restrained from seeking redress because of their fear of liability should they fail, the special injury rule has consistently been upheld.

" 'The limitation is sound. When disputes reach the litigious stage, usually some malice is present on both sides. Friendly tort suits are not common. Nor is existence or want of probable cause always easy to determine until the event of the litigation is known. Some margin of safety in asserting rights, though they turn out to be groundless and their assertion accompanied by some degree of ill-will, must be maintained. Otherwise litigation would lead, not to an end of disputing, but to its beginning, and rights violated would go unredressed for fear of the danger of asserting them.' *Melvin v Pence,* 76 US App DC 154, 157; 130 F2d 423, 426 (1942)." *Ammerman v Newman,* 384 A2d 637, 641 (DC App, 1978).

[39] *Gem Trading Co, Inc v Cudahy Corp,* 92 Wash 2d 956, 965; 603 P2d 828 (1979).

[40] *Berlin v Nathan,* 64 Ill App 3d 940; 381 NE2d 1367 (1978).

[41] *Jacques v McLaughlin,* — RI —; 401 A2d 430 (1979).

hering to the special injury rule includes a number of other major jurisdictions.[42]

V

Apart from special injury, elements of a tort action for malicious prosecution of civil proceedings are (1) prior proceedings terminated in favor of the present plaintiff, (2) absence of probable cause for those proceedings, and (3) "malice", more informatively described by the Restatement as "a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based".[43]

The following discussion addresses the chief concern of this case: the conditions under which the attorney for an unsuccessful plaintiff may be held liable.

A

The absence of probable cause in bringing a civil action may not be established merely by showing that the action was successfully defended.[44] To require an attorney to advance only those claims that will ultimately be successful would place an intolerable burden on the right of access to the courts.

The Court of Appeals adopted, and plaintiff endorses, the standard for determining whether an

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[42] The sources cited in fn 23, *supra,* agree that New York, Pennsylvania, New Jersey, Maryland, Ohio, Wisconsin and Texas also follow the English rule.

[43] See, generally, Prosser, *supra,* § 120, pp 850-856, and 3 Restatement Torts, 2d, §§ 674-681B, pp 452-473. Propriety of purpose is discussed in § 676.

[44] See Prosser, *supra,* § 120, p 855. *Cf. Drobczyk v Great Lakes Steel Corp,* 367 Mich 318, 322; 116 NW2d 736 (1962).

attorney had probable cause to initiate and continue a lawsuit articulated in *Tool Research & Engineering Corp v Henigson,* 46 Cal App 3d 675, 683-684; 120 Cal Rptr 291 (1975):

"The attorney is not an insurer to his client's adversary that his client will win in litigation. Rather, he has a duty 'to represent his client zealously * * * [seeking] any lawful objective through legally permissible means * * * [and presenting] for adjudication any lawful claim, issue, or defense.' (ABA, Code of Professional Responsibility, EC 7-1, DR 7-101[A][1] * * *.) So long as the attorney does not abuse that duty by prosecuting a claim which a reasonable lawyer would not regard as tenable or by unreasonably neglecting to investigate the facts and law in making his determination to proceed, his client's adversary has no right to assert malicious prosecution against the attorney if the lawyer's efforts prove unsuccessful.

* * *

"The attorney's obligation is to represent his client honorably and ethically, and he may, without being guilty of malicious prosecution, vigorously pursue litigation in which he is unsure of whether his client or the client's adversary is truthful, so long as that issue is genuinely in doubt."

The *Henigson* court also said: "An attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried."

In our view, this standard, while well-intentioned, is inconsistent with the role of the attorney in an adversary system.

Our legal system favors the representation of

litigants by counsel.[45] Yet the foregoing standard appears skewed in favor of non-representation; the lawyer risks being penalized for undertaking to present the client's claim to a court unless satisfied, after a potentially substantial investment in investigation and research, that the claim is tenable.

A lawyer may be confronted with the choice between allowing the statute of limitation to run upon a claim with which the client has only recently come forward, or promptly filing a lawsuit based on the information in hand. Such dilemmas are particularly likely to arise in connection with medical malpractice claims because a statute provides a six-month limitation period for bringing an action based on a belatedly discovered claim[46] as an alternative to the normal two-year limitation period for malpractice actions.[47] Time will not always permit "a reasonable investigation and industrious search of legal authority" before the lawyer must file a complaint to preserve the client's claim—and thus, perhaps, avoid an action by the client for legal malpractice.

In medical malpractice actions the facts relevant to an informed assessment of the defendant's liability may not emerge until well into the discovery process. Sometimes the relevant facts are not readily ascertainable. In the instant case, for example,

[45] *Cf.* Canon 2:

"A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

EC 2-26 states:

"A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment."

[46] MCL 600.5838(2); MSA 27A.5838(2).

[47] MCL 600.5805(4); MSA 27A.5805(4); *cf. Dyke v Richard,* 390 Mich 739; 213 NW2d 185 (1973).

defendants maintain that their efforts to acquire Mrs. Serafin's medical records were rebuffed until they commenced suit and thereupon became able to invoke established discovery procedures and the implicit power of the court to compel disclosure; it may be the practice of some doctors or hospitals to refuse to release medical records until a lawsuit has been commenced.[48]

Moreover, the *Henigson* standard suggests rather ominously that every time a lawyer representing, say, a medical malpractice plaintiff encounters a fact adverse to the client's position or an expert opinion that there was no malpractice, he must immediately question whether to persevere in the action.[49] An attorney's evaluation of the client's case should not be inhibited by the knowledge that perseverance may place the attorney personally at risk; the next fact or the next medical opinion may be the one that makes the case,[50]

[48] In 1975 a task force composed of representatives from the State Bar of Michigan and a number of medical organizations, meeting to discuss solutions to the problem of escalating medical malpractice insurance premiums and the increasing volume of medical malpractice litigation, issued a list of recommendations which included the enactment of legislation "to allow the issuance of a special 'record subpoena' for the obtaining of medical records without the necessity of a lawsuit being commenced", so long as the patient consented to release of the records. *Recommendations of the Joint Medical/Legal Task Force on Medical Malpractice,* 54 Mich St B J 81, 82 (1975).

[49] Compare the heading of the principal portion of plaintiff's brief arguing for recognition of a cause of action against a plaintiff's lawyer *for negligence,* set out in fn 5, *supra.*

[50] *Szlinis v Moulded Fiber Glass Companies, Inc,* 80 Mich App 55; 263 NW2d 282 (1977), *lv gtd* 402 Mich 925 (1978), *app dismissed by stipulation* 407 Mich 893 (1979), although not a medical malpractice case, illustrates how late-arising developments may provide a plaintiff's lawyer with clear evidence of liability where before there was only suspicion. Four people perished in a boating accident in June, 1969. According to plaintiff-appellant's brief in this Court, pp 4-5, the first floating tests and inspections failed to reveal any defects in the hull. Subsequent tests conducted in August and September, 1970 revealed certain abnormalities which of themselves were not striking. It was only in January, 1971, that further tests by naval architects revealed that a combination of defects rendered it virtually impossible

and such developments may occur even on the eve of trial.

Indeed, a jury-submissible claim of medical malpractice may sometimes be presented even without specific testimony that the defendant physician violated the applicable standard of care.[51] Thus, a lawyer may proceed in the good-faith belief that his proofs will establish a prima facie case of medical malpractice without expert testimony, only to find that the court disagrees. Such conduct is not the equivalent of proceeding without probable cause.

Indeed, whether an attorney acted without probable cause in initiating, defending or continuing proceedings on behalf of a client should not normally depend upon the extent of the investigation conducted. The Code of Professional Responsibility does not expressly impose any duty upon a lawyer to conduct an independent investigation of the merits of a client's claim. DR 7-102(A), upon which plaintiffs in the instant action rely, states only that a lawyer shall not:

"(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client *when he knows or when it is obvious that such action*

to right the boat if it capsized—not an uncommon occurrence in sailing.

In *Szlinis* the complaint was not filed until after the tests were completed. But suppose the complaint had been filed shortly after the accident and subsequent preliminary testing for defects had been unproductive. Had the plaintiff's attorney then evaluated the case in the shadow of a potential tort action or motion to recover litigation expenses by a boat manufacturer claiming injury to business reputation and loss of sales, might he not have decided to discontinue the action rather than conduct additional tests?

[51] See *Orozco v Henry Ford Hospital,* 408 Mich 248; 290 NW2d 363 (1980).

We do not suggest that the prior action in the instant matter was a case where expert testimony was not necessary.

*would serve merely to harass or maliciously injure another.*

"(2) *Knowingly* advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law." (Emphasis supplied.)

DR 7-102(A) and the other professional standards to which plaintiff refers[52] consistently incorporate a requirement of *scienter* as to groundlessness or vexatiousness, not a requirement that the lawyer take affirmative measures to verify the factual basis of his client's position. A lawyer is entitled to accept his client's version of the facts and to proceed on the assumption that they are true absent compelling evidence to the contrary.[53] The only general limitation on the lawyer's acceptance of employment is found in DR 2-109(A),[54] the

[52] As already noted, the negligence section of plaintiff's brief refers to Code of Professional Responsibility and Canons, Canon 1, DR 1-102(A), Canon 6, DR 6-101(A), Canon 7, DR 7-102(A), and various Ethical Considerations associated with Canon 7, especially EC 7-4 and EC 7-10. All eight divisions of DR 7-102(A) make reference to the lawyer's knowledge in defining prohibited conduct.

[53] *Cf. Murdock v Gerth,* 65 Cal App 2d 170, 179; 150 P2d 489, 493 (1944):

"It would be inimical to the administration of justice if an attorney were to be held liable to a malicious prosecution action where, after an honest, industrious search of the authorities, upon facts stated to him by his client, he advises the latter that he has a good cause of action, although the courts upon a trial of such action decide that the attorney's judgment was erroneous. If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court. And if it subsequently is determined that the position honestly taken by the attorney was erroneous he should be relieved from responsibility."

[54] "A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such a person wishes to:

"(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

"(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument

language of which parallels DR 7-102(A). And, although DR 6-101(A)(2) states that a lawyer shall not "[h]andle a legal matter without preparation adequate in the circumstances", that preparation need not entail verification of the facts related by the client.

Framed as it is in terms of "reasonableness", the *Henigson* standard is difficult to reconcile with the lawyer's obligation to represent his client's interests zealously.[55] "Zealous representation" contemplates that the lawyer will go to the limits for his client, representing him loyally, tenaciously and single-mindedly. The question of whether a lawyer "abused that duty" is not a matter of what a hypothetical reasonable practitioner would have done in the same circumstances, but of whether the lawyer's conduct was beyond the limits of reason or the bounds of the law[56] although another "reasonable" lawyer, or many such lawyers, might not have acted similarly.

The Restatement's definition of probable cause provides ample guidance whether damages are sought from a lawyer, his client or both:

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for an extension, modification, or reversal of existing law." DR 2-109(A), Acceptance of Employment.

[55] "A lawyer should represent a client zealously within the bounds of the law." Canon 7.

[56] See EC 7-3:

"Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law."

"One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

"(a) correctly or reasonably believes that under those facts the claim *may* be valid under the applicable law, or

"(b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information."[57] (Emphasis supplied.)

As applied to a plaintiff's lawyer, this standard would allow lack of probable cause to be found where the lawyer proceeded with knowledge that the claim had no factual or legal basis, but would impose no obligation to investigate if the lawyer could reasonably believe the facts to be as the client alleged.

B

This Court has said, in opinions addressed to the tort of malicious prosecution, that malice may be inferred from the facts that establish want of probable cause, although the jury is not required to draw that inference.[58] This rule, developed in cases where damages were sought from a lay-person who initiated proceedings,[59] fails to make sufficient allowance for the lawyer's role as advocate and should not be applied in determining whether a lawyer acted for an improper purpose.

A client's total lack of belief that the action he initiates or continues can succeed is persuasive evidence of intent to harass or injure the defen-

[57] 3 Restatement Torts, 2d, § 675, pp 457-458.

[58] *Hamilton v Smith,* 39 Mich 222 (1878); *Drobczyk v Great Lakes Steel Corp, supra; Renda v International Union, UAW,* 366 Mich 58, 100-101; 114 NW2d 343 (1962).

[59] *Hamilton v Smith, supra; Carson v Edgeworth,* 43 Mich 241; 5 NW 282 (1880); *LeClear v Perkins,* 103 Mich 131; 61 NW 357 (1894).

dant by bringing the action. But a lawyer who is unaware of such a client's improper purpose may, despite a personal lack of belief in any possible success of the action, see the client and the claim through to an appropriate conclusion without risking liability. 3 Restatement Torts, 2d, § 674, comment *d,* states:

"An attorney who initiates a civil proceeding on behalf of his client or one who takes any steps in the proceeding is not liable if he has probable cause for his action (see § 675); *and even if he has no probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim.* (See § 676). An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances." (Emphasis supplied.)

While a client's decision to proceed with litigation although he knows that the facts are not as alleged, or that a proper application to the facts of existing law (or any modification thereof which can be advanced in good faith) will not support the claim, is indicative of the client's ulterior, malicious motive, that inference cannot so easily be drawn from conduct of a lawyer who owes his client a duty of representation and is unaware of the client's improper purpose. The lawyer who "acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim", albeit with knowledge that the claim is not tenable, should not be subject to liability on the thesis that an inference of an improper purpose may be

drawn from the lawyer's continuing to advance a claim which he knew to be untenable.[60]

The Restatement defines the mental element of the tort of wrongful civil proceedings as "a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based". A finding of an improper purpose on the part of the unsuccessful attorney must be supported by evidence independent of the evidence establishing that the action was brought without probable cause.[61]

We affirm that portion of the Court of Appeals decision which upheld summary judgment in favor of defendants on plaintiff's claims sounding in negligence and abuse of process. With respect to plaintiff's claim for malicious prosecution, we reverse the decision of the Court of Appeals and affirm the trial court's grant of summary judgment; we do so on the ground that an action for malicious prosecution of a civil action may not be brought absent special injury and the plaintiff failed to plead special injury.

KAVANAGH, WILLIAMS, and RYAN, JJ., concurred with LEVIN, J.

LEVIN, J. *(concurring).* Much of the discussion of the problem of unjustified litigation suffers from

[60] In most, if not all, attorney-client relationships, decision-making authority ultimately rests with the client. A client may, in apparent good faith, insist upon pressing the claim although the attorney has explained that it has no chance of succeeding. An attorney's ability to withdraw from representation is limited if the client objects.

[61] A contingent fee arrangement or the expectation of the attorney that he will ultimately receive a fee for his services is not evidence of an improper purpose. In contrast, a purpose to secure an improper adjudication of the client's claim, as by coercing a settlement unrelated to the merits from an opponent who wishes to avoid the harassment, expense or delay of letting the lawsuit run its course, is an improper purpose. See 3 Restatement Torts, 2d, § 674, comment *d*, p 453.

an undue focus upon the need to compensate the injury suffered by the defendant subjected to a groundless and malicious action. Groundless civil litigation is, however, more than an affliction visited upon a few scattered individuals; it besets the judicial system as a whole. It is, therefore, appropriate to think of it as a systemic problem and to fashion a remedy which preserves and strengthens the integrity of the civil litigation system rather than randomly providing a fortuitous amount of compensation in a handful of isolated cases.

In England, the losing party in a civil action is ordinarily required to reimburse the prevailing party for that portion of the latter's litigation costs which is determined by the judge or an officer of the court to have been "necessary".[1] The recovery thus obtained is usually incomplete, but greater costs can be awarded if the litigation was vexatious or groundless.[2]

The English system has been criticized because the risk of responsibility for a portion of the opponent's actual costs may deter debatable, good-faith claims.[3]

Commentators have also been skeptical of the potential of court-administered sanctions within the original lawsuit as a remedy for groundless litigation because in this country the costs awarded to the prevailing party in a civil action are typically fixed by statute at amounts which pale beside the actual costs incurred in litigation, and American courts have generally been inclined to leave revision of costs schemes to the legislatures.[4]

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[1] Goodhart, *Costs,* 38 Yale L J 849, 854-862 (1929).

[2] *Id.,* 861-862.

[3] *Ackerman v Kaufman,* 41 Ariz 110, 114; 15 P2d 966 (1932). But see Goodhart, *supra,* pp 874-876.

[4] Note, *Groundless Litigation and the Malicious Prosecution Debate:*

I am of the opinion, however, that this Court can appropriately devise an approach to wrongful litigation which is capable of providing both an appropriate measure of deterrence and reasonable compensation for wronged litigants without imperiling the right of free access to the courts. The remedy, quite simply, is to recognize the inadequacy of existing provisions for the taxation of costs and to adopt a new and distinct court rule authorizing the judge to whom a civil action is assigned to order payment of the prevailing party's actual expenses, including reasonable attorneys' fees and limited consequential damages, where the action was wrongfully initiated, defended or continued.[5] Depending upon the circumstances, payment might be required of the attorney, the client or both. The factual questions implicit in such an evaluation of the losing side's conduct would be resolved by the judge after a prompt post-termination hearing at which the parties could call witnesses and they and their attorneys could testify.

The foundation for developing such a comprehensive structure for controlling vexatious litigation is already in place. GCR 1963, 111.6, provides:

*A Historical Analysis*, 88 Yale L J 1218, 1232-1233 (1979). See, also, McCormick, Damages, ch 8, pp 234-259.

[5] Adoption of such a rule appears to be an appropriate exercise of this Court's plenary power over practice and procedure in Michigan courts. See *Perin v Peuler (On Rehearing)*, 373 Mich 531, 540-541; 130 NW2d 4 (1964).

Section 2401 of the Revised Judicature Act provides:

"Except as otherwise provided by statute, the supreme court shall by rule regulate the taxation of costs." MCL 600.2401; MSA 27A.2401.

But GCR 1963, 16, states:

"Rules of practice set forth in any statute, not in conflict with any of these rules, shall be deemed to be in effect until superseded by rules adopted by the Supreme Court."

Any conflict between a statute and implementation by court rule of the proposal set forth in this opinion can thus be resolved in favor of the rule. Such conflict is unlikely in any event because the instant proposal does not concern costs, but expenses above and beyond costs.

"Unwarranted Allegations and Denials. If it appears at the trial that any fact alleged or denied by a pleading ought not to have been so alleged or denied and such fact if alleged is not proved or if denied is proved or admitted, the court may, if the allegation or denial is unreasonable, require the party making such allegation or denial to pay to the adverse party the reasonable expenses incurred in proving or preparing to prove or disprove such fact as the case may be, including reasonable attorney fees."

The principles of GCR 1963, 111.6, can readily be extended to wrongful litigation and defense as well as wrongful pleading and can be made applicable regardless of the stage at which the prior litigation terminates; the award of fees and expenses should be limited to those incurred after the point at which the action should have been discontinued or liability admitted.

The sum recoverable should include all fees and administrative charges incurred because of the litigation as well as reasonable attorney's fees. The judge could award a prevailing defendant in a professional malpractice case an additional sum for loss of income-producing time and injury to professional reputation or business resulting from the wrongful action if the amount is capable of being calculated with reasonable certainty.[6]

[6] The proposed procedure would not appear to violate a constitutional right of jury trial. US Const, Am VII, preserving the right of jury trial in common-law suits where the amount in controversy exceeds twenty dollars, does not apply to the states through the Fourteenth Amendment. *Melancon v McKeithen,* 345 F Supp 1025 (ED La, 1972), *aff'd per curiam sub nom Mayes v Ellis,* 409 US 943; 93 S Ct 289; 34 L Ed 2d 214 (1972).

Const 1963, art 1, § 14, preserves the right of jury trial only in causes of action which were part of the common law prior to its adoption. See *Conservation Dep't v Brown,* 335 Mich 343, 346; 55 NW2d 859 (1952).

The procedure suggested here would not involve a cause of action in the usual sense of that term, and certainly not one predating the Michigan Constitution. See, generally, *Curtis v Loether,* 415 US 189,

The rule could provide that the standard to be applied by the judge in determining whether such an award should be made is whether the losing party or his attorney had proceeded without probable cause and for an improper purpose.[7] So defining the inquiry, in terms of the traditional elements of a cause of action for malicious prosecution of civil proceedings, allows the judge to consult existing precedent for guidance.

Having such a determination made by the judge to whom the original proceeding was assigned would have a number of advantages over assessment of these questions by judge and jury in a separate tort action:

First, a strategy for evaluating the propriety of litigation which is administered exclusively by

194-195; 94 S Ct 1005; 39 L Ed 2d 260 (1974); *Atlas Roofing Co v Occupational Safety & Health Review Comm,* 430 US 442; 97 S Ct 1261; 51 L Ed 2d 464 (1977).

[7] The rule could incorporate the basic concepts of an action for wrongful civil proceedings—absence of probable cause and malice (improper purpose)—as expressed in the Restatement Torts, 2d, §§ 674, 675, 676, 681 and 681A, but differ in the following respects:

(i) an award could be made to a plaintiff as well as to a defendant who prevails in the underlying cause where the requisite elements (absence of probable cause and malice in maintaining or defending the cause and damages) are established;

(ii) an award could be restricted to damages for specific pecuniary loss, including actual attorney fees and other expense reasonably incurred in maintaining or defending the proceedings and any harm to professional or business reputation; recovery for defamation not affecting professional or business reputation or for emotional distress need not be provided for;

(iii) the judge who presided in the underlying cause claimed to have been wrongfully brought or defended could decide the matter without a jury following a hearing which would be required to be concluded within a specified time which parallels the time for a motion for a new trial or judgment notwithstanding the verdict; a motion seeking such an award could be required to be filed by the prevailing party within a limited time after entry of judgment in the underlying cause; hearing on probable cause, malice and damages could be required to be concluded promptly after filing of the motion; findings of fact and conclusions of law could be required to be filed by the judge soon thereafter; any appeal could be consolidated with an appeal on the merits of the underlying cause.

judges is more susceptible of consistent application and careful supervision than a strategy which relies on a group of laymen chosen at random, often for one day and one trial. Confiding the question solely to the judge avoids the bifurcation of function associated with jury trial on the critical issue of probable cause in an action for malicious prosecution of civil proceedings.[8] Limiting recovery to actual pecuniary loss, thereby eliminating recovery for emotional distress, and relying on a judge to assess damages, combined with the greater control that appellate courts exercise over a judge's findings as compared to a jury's verdict, should tend to avoid awards which might intimidate good-faith litigants.

Second, the judge would usually be familiar with the history of the case; the necessary evidence could be adduced and the relevant findings made in far more efficient fashion than if a new action and a separate trial before a different judge were required.

Third, parties who might be reluctant to initiate further litigation although they felt themselves wronged would be more likely to avail themselves of internal sanctions than of the opportunity to start a separate action which would take its place on the crowded docket and which the defendants would be likely to resist with all available means.

Groundless litigation diverts judicial resources which could otherwise be devoted to more deserving cases and represents a challenge to this Court's "general superintending control over all

[8] 3 Restatement Torts, 2d, § 681B, pp 472-473, provides that the court determines whether "the defendant had probable cause for his action" but the jury determines "the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them".

courts"[9] comprising Michigan's "one court of justice".[10] By adopting a court rule this Court would address the problem directly and in a manner compatible with its responsibility to exercise close control and supervision.

This is unmistakably a test case, brought primarily to secure a change in the law. If a court rule responsive to the problem of wrongful litigation is ultimately adopted, the plaintiff and others who have rallied to his cause may win the war even if they have lost this battle.

In pursuing this case, the plaintiff and his supporters have taken a leading role in directing our attention to a widely held concern that today the courts are burdened and innocent parties harassed by an epidemic of frivolous lawsuits. The measure proposed here will put the validity of that perception to the test. All those who feel that they have been made the victims of wrongful litigation would be able to seek a prompt remedy without facing the difficulties and delay inherent in a subsequent tort action.

The effectiveness of such a rule would depend upon the vigilance of the judges who would apply it. The opinion of the Court in the instant case describes certain instances in which sanctions should not be imposed against an attorney. Nothing in the opinion of the Court should, however, be understood as indicating that the Court is unwilling to commit itself to the imposition of sanctions against an attorney where it is appropriate.

WILLIAMS, J., concurred with LEVIN, J.

COLEMAN, C.J. *(concurring in part, dissenting in*

[9] Const 1963, art 6, § 4.

[10] Const 1963, art 6, § 1.

*part).* I concur with parts II and III of the majority opinion which hold that the plaintiff has failed to state actionable claims under theories of negligence or abuse of process. I dissent from the portion of the majority opinion that requires proof of special injury[1] in malicious prosecution cases. I concur with Justice MOODY'S result and add the following to explain my disagreement with the analysis employed by the majority in requiring special injury in malicious prosecution cases.

## I

The majority concludes that proof of special injury is necessary in order "to limit the circumstances in which an action for the malicious prosecution of civil proceedings can be maintained". The stated reason for this limitation is not to deter litigants who have meritorious claims from seeking a proper adjudication. The problem with this reasoning arises from the fact that it relies on an incidental effect of the special injury requirement.

Although the majority's stated concern is to protect meritorious claims, it is nowhere con-

[1] Special injury generally includes interference with a person or property, such as through arrest or attachment, or an injury that would not ordinarily result in all similar suits. *Jacques v McLaughlin,* — RI —; 401 A2d 430 (1979); *Schwartz v Schwartz,* 366 Ill 247; 8 NE2d 668 (1937); *Gem Trading Co, Inc v Cudahy Corp,* 92 Wash 2d 956; 603 P2d 828 (1979).

In this case, the plaintiff alleged the following damages:

"[T]he cost of defending the aforesaid cause and the appeal, an increase in his annual malpractice insurance premiums for so long as he practices medicine, the loss of two young associates from his office who could no longer afford to pay the increased malpractice insurance premiums thereby requiring him to work excessive hours without relief, damages to his reputation as a physician and surgeon, embarrassment and continued mental anguish."

The majority concludes that none of these damages constitute "special injury".

tended in the opinion that the special injury requirement serves to distinguish meritorious from frivolous litigation. Nor is there a contention that special injury cases represent injury that is more egregious than in other cases. The majority's position is comprehensible only because of an unstated, although correct, premise: *most litigation does not involve special injury.*

Two noteworthy results follow from using the special injury requirement in such a way. First, in cases in which no special injury can be alleged, the non-special injury caused by the most frivolous malpractice litigation cannot be compensated. Second, assuming, as the majority does that the special injury requirement is important to protect meritorious claimants, such claimants may be deterred from raising meritorious claims in cases where the potential defendants would be able to allege special injury in a subsequent malicious prosecution case. Thus, by invoking the special injury requirement on behalf of meritorious litigants, the meritorious and frivolous claims alike are protected when no special injury can be alleged. Neither is protected when a special injury allegation might be made.

Thus, the arguments that the majority advances in favor of the special injury requirement, in reality, have no basis within the content of the special injury requirement. The same arguments could be advanced as forcefully in favor of abolishing the malicious prosecution action altogether, or even in favor of something so absurd as requiring that all malicious prosecution plaintiffs be from Kansas.

A far more reasonable approach would be to look to other elements of the malicious prosecution cause of action—such as *no probable cause* and an

*improper motive*—to provide the necessary protection for bona fide litigants.

However, reliance on an incidental effect of the special injury requirement is not my only objection to the majority position. My colleagues cloud the issue by such statements as, "The cure for an excess of litigation is not more litigation". The issue here is not finding a cure for excessive litigation. *The issue is whether the harm rendered by wrongful litigation is compensable.*

The majority, in responding to Dean Prosser's criticism of the special injury requirement, wonders whether there are not other means of deterring groundless litigation and whether "if few plaintiffs will recover in the subsequent action, * * * there is any point in recognizing the expanded cause of action". Further, the majority asserts, "[i]f the subsequent action does not succeed, both parties are left to bear the expenses of two futile lawsuits, and court time has been wasted as well".

Although this reasoning bears a certain initial attractiveness, it does not withstand closer examination. First, for any given tort there probably are means other than a lawsuit for deterring its commission. Second, even if we are able to predict the number of future malicious prosecution plaintiffs who would be successful—which we are not able to do—I do not agree that such a prediction would be pertinent. The argument that because few would be compensated, none should be, is novel. Third, any time that a cause of action is expanded, there is the possibility that future suits seeking to come within its scope will fail. In determining whether a tort cause of action should be expanded, we do not normally find significant the fact that unsuccessful suits may be brought. I do not agree that this

factor should be given added importance simply because the wrong to be compensated is itself a lawsuit.

## II

Central to this case is the judicial process of weighing two different potential harms caused by two different types of groundless litigation, only one of which has been given much consideration by the majority. On the one hand, there is the potential harm which could be caused by groundless malicious prosecution suits. On the other hand, there is the harm caused by all other types of groundless litigation. In upholding the special injury requirement, the majority has engaged in much speculation as to what the effects of groundless malicious prosecution suits might be. Little, if any, consideration is given to the harmful effects of other groundless litigation. The retention of the special injury requirement leaves lawyers, in most cases, free from the concern of defending one type of potentially groundless litigation, but at the expense of subjecting the rest of society to the threat of suffering many kinds of groundless litigation without recompense.

The one-sided treatment is especially apparent with respect to the argument regarding the possible increase of legal malpractice insurance premiums. The other side of the coin is that physician plaintiffs and amici obviously conclude, whether correctly or incorrectly, that their defense of groundless litigation has contributed to the high cost of medical malpractice insurance policies with resultant higher costs to patients. Redress for frivolous litigation, they believe, might provide some relief. The majority, when suggesting that the defense of groundless malicious prosecution

cases might have some effect on legal malpractice insurance, seems unaware or unconcerned that a different type of groundless litigation may already be having an effect on medical malpractice insurance.

Prediction of how malicious prosecution suits might affect one type of insurance or another is speculative at best. However, one would not expect that the adverse effects of groundless litigation would affect attorneys, or the bringing of lawsuits, to a greater extent than the threat of groundless lawsuits presently affects the rest of our society.

On balance, the effect which malicious prosecution cases without the special injury requirement would have on access to the courts would be less than the effect which other types of groundless litigation has on society. Importantly, the elements of such a malicious prosecution case (lack of probable cause and improper motive) are narrow in scope and not easily met. This narrowness would likely mean that frivolous malicious prosecution cases would more clearly show their frivolous nature than groundless litigation of other varieties. Also, unlike in other cases, attorneys are the ones who must consider what threat, if any, a groundless malicious prosecution suit presents. Certainly, attorneys are in a better position than other members of society to recognize groundless litigation for what it is. Thus, they are in a better position to limit the extent to which the fear of a frivolous malicious prosecution action will affect their conduct.

Also significant in determining the effects of malicious prosecution cases is the fact that in many, if not most, instances the defendant will be an attorney. The majority suggests that many attorneys would likely develop a specialty in this

type of case and perhaps file them as a matter of course. If the attorneys of this state are such that they will indiscriminately file groundless suits against other attorneys—and we have no reason whatsoever to believe this is true—one would expect that they would be no less hesitant to file groundless lawsuits against members of other professions. Thus, if the majority's speculation as to this propensity of attorneys is warranted, it seems to argue even more persuasively that the general public needs some sort of effective remedy.

If we are to give substance to DR 7-102(A), subds (1) and (2), which establishes an attorney's duty to the public not to bring frivolous litigation, a viable malicious prosecution action is necessary.

## III

In conclusion, this Court's concern should be for preserving free access to the courts *for meritorious claims.* The majority, by protecting meritorious and frivolous claims alike, has denied free access to the courts for all those who have suffered harm but no "special injury" from wrongful litigation.

I would affirm the Court of Appeals.

FITZGERALD, J., concurred with COLEMAN, C.J.

BLAIR MOODY, JR., J. *(dissenting in part).* I agree with the analysis employed and the result reached by the opinion of the Court, except for part IV which deals with a cause of action for malicious prosecution of civil proceedings.

The opinion of the majority holds that a claim for malicious prosecution may not be asserted in the absence of the element of special injury and that the plaintiff failed to plead this element of the tort. Because approval of an action for mali-

cious prosecution of civil proceedings, without requiring the element of special injury, would be appropriate and provide fair and sufficient redress to the issue presented in this case, I dissent.

A

In determining the proper elements of an action for malicious prosecution of civil proceedings, our Court today is not bound by explicit decisions that require assertion of the element of special injury. The scholarly opinion of my colleague most appropriately recounts the history of the "English rule" and the split in American jurisdictions between adoption of that rule and the "American rule" relating to a cause of action for malicious prosecution.

In Michigan, our decisions reveal that this Court has not distinctly recognized a cause of action for malicious prosecution without special injury. Likewise, the cases cited in my colleague's opinion do not indicate a specific adoption by this Court of the "English rule" with its special injury requirement or a specific rejection of the "American rule", which allows recovery without a showing of special injury.

In this regard, in avoidance of an explicit determination, our Court in *Brand v Hinchman,* 68 Mich 590; 36 NW 664 (1888), previously expanded the concept of special injury by approving a cause of action involving a *technical* taking and possession of a plantiff's property. Justice MORSE, the author of *Brand,* expressed his individual opinion that recovery should not be limited to a showing of special injury. The other Justices, however, deemed such a holding not necessary to decision.

In *Powers v Houghton,* 159 Mich 372; 123 NW

1108 (1909), this Court recognized that the "English rule" had been modified and the definition of special injury was broadened in American jurisdictions. In *Powers,* the plaintiff sought "to recover damages for the malicious prosecution of a civil action, by which he was deprived of neither his liberty, reputation, nor property, but simply of the possession of property belonging to another". 159 Mich 373. The Court reversed a judgment in favor of the plaintiff on the narrow ground that it was "unable to find a single adjudicated case * * * where it is held that the defendant in a replevin suit, having no property in the goods taken, may maintain an action for malicious prosecution against the unsuccessful plaintiff in the original action". 159 Mich 374. Whether Michigan followed the special injury requirement or the broader view espoused by Justice MORSE remained undecided. Cases following *Brand* and *Powers* all involved situations that fit into a somewhat expanded concept of special injury.[1] Thus, it appears we are left

[1] *E.g., Krzyszke v Kamin,* 163 Mich 290; 128 NW 190 (1910) (injunction), *Rowbotham v Detroit Automobile Inter-Ins Exchange,* 69 Mich App 142; 244 NW2d 389 (1976) (deprivation of automobile operator's license).

The Michigan cases discussed in the majority opinion involve some special injury equivalent to a seizure of or interference with property. Other jurisdictions add to the arrest or seizure of property elements of the definition of special injury some other special injury "not necessarily resulting in any and all suits prosecuted to recover for like causes of action". *Schwartz v Schwartz,* 366 Ill 247, 250; 8 NE2d 668 (1937). See also *Ring v Ring,* 102 RI 112; 228 A2d 582 (1967); *Buck v Gale,* 271 Or 90; 530 P2d 1248 (1975); *Brody v Ruby,* 267 NW2d 902 (Iowa, 1978).

Plaintiff Friedman's complaint states:

"That as a direct and proximate result of the negligence, malicious prosecution and abuse of process of these defendants, the plaintiff, Seymour Friedman, M.D., has endured grievous damages, including, but not limited to, the following: the cost of defending the aforesaid cause and the appeal, an increase in his annual malpractice insurance premiums for so long as he practices medicine, the loss of two young associates from his office who could no longer afford to pay the increased malpractice insurance premiums thereby requiring him to

today without a specific adoption or rejection of the special injury requirement.

The duty to interpret the common law in light of present circumstances and changed conditions rests with this Court. Even if the special injury condition may be considered to be a part of our jurisprudence, this Court may abrogate common-law rules.[2] Today, this Court is presented with the opportunity to adopt or reject the special injury requirement in Michigan law.

B

Admittedly, the special injury condition of the "English rule" limits the recovery potential for malicious prosecution of civil proceedings and thereby protects the right of free access to the courts. However, the limitation is too broad. Suits arising out of meritorious as well as vexatious actions are disallowed. The special injury requirement is not logically related to the actual damages incurred by the defendant as a result of a frivolous suit. The injury to reputation or business flowing from any defamatory matter alleged as the basis of the proceedings,[3] and the expense of defending a

work excessive hours without relief, damages to his reputation as a physician and surgeon, embarrassment and continued mental anguish."

The majority holds that the complaint does not allege special injury. *Cf. Mills County State Bank v Roure,* 291 NW2d 1 (Iowa, 1980) (loss of medical practice or business income sufficiently alleges special injury).

[2] "[T]he general rule is that the common law prevails except as abrogated by the Constitution, the Legislature or this Court. Const 1963, art 3, § 7." *People v Aaron,* 409 Mich 672, 722; 299 NW2d 304 (1980).

Even if the "English rule" has been the common law in Michigan, it should be abrogated. Legal scholars and historians are left to decide whether the pure "English rule", a modified "English rule", or some other rule, if any, stated the common law in this jurisdiction.

[3] 3 Restatement Torts, 2d, § 681(b), p 469.

lawsuit which was brought without probable cause and for an improper purpose do not depend upon a technical interference with person or property. The storekeeper whose property is attached for a few moments certainly suffers no greater injury or harm than the individual whose reputation is tarnished or who suffers a loss of business as a result of a truly vexatious lawsuit.

Furthermore, the requirement of an arrest or seizure of property is in large part an anachronistic one. At an earlier time many actions could be commenced by a writ of *capias ad respondendum.* That writ permitted a civil action to be started by the arrest of the defendant. See Black's Law Dictionary (4th ed), p 262. In Michigan certain contract actions and apparently all tort actions could, upon a proper declaration and affidavit, be started by a writ of *capias ad respondendum. Kirker v Larson,* 254 Mich 648; 236 NW 896 (1931). RJA § 1815 abolished this writ and provides that "no civil actions shall be started by arrest". Civil arrest is now a limited concept and rarely applicable. See 35 MCLA, RJA Practice Commentary, pp 238-240, Committee Comment, pp 240-242.

The law concerning attachment and garnishment has also changed. See *Fuentes v Shevin,* 407 US 67; 92 S Ct 1983; 32 L Ed 2d 556 (1972). The Legislature has abolished, in most situations, attachment and garnishment as prejudgment security devices. 1974 PA 371.

Thus, the likelihood of special injury, as defined by the majority, occurring in a lawsuit brought today is greatly reduced. The element of special injury is now likely to occur in only a limited class and number of cases.

The views of Justice MORSE written almost a century ago are pertinent today:

"The common law declares that for every injury there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business lessened or broken up, it can make no difference, in his right to recover for such injury, that his person or property has not been manually seized or disturbed." *Brand, supra,* 597-598.

C

The strict requirements of lack of probable cause and malice, *i.e.,* improper purpose, are more appropriate guardians of free access to the courts and of promoting the honest use of the judicial process than the artificial requirement of special injury. The elements of the tort of malicious prosecution of civil proceedings include:

1. A civil proceeding instituted, continued or procured by one person against another.

2. Termination of the proceeding in favor of the person against whom it is brought, except for an ex parte proceeding.

3. Absence of probable cause for bringing or continuing the proceeding.

4. Malice or a primary purpose other than that of securing the proper adjudication of the claim on which the proceeding is based.

5. Proof of injury resulting in damages.[4]

Many American jurisdictions,[5] commentators,[6]

[4] See Prosser, Torts (4th ed), § 120, pp 850-856; 3 Restatement Torts, 2d, §§ 674, 681, pp 452, 469. The Restatement term for this tort is wrongful use of civil proceedings.

The instant case does not present the issue of "wrongful defense" of civil proceedings. The determination of that issue should be made in the proper case or within the rule-making process of this Court. However, a counter-plaintiff should be subject to the same standards as a plaintiff.

[5] See, *e.g.,* 52 Am Jur 2d, Malicious Prosecution, § 10, p 193. See also fn 24 of the majority opinion.

[6] *E.g.,* Prosser, Torts (4th ed), § 120, p 851; Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medi-*

the American Law Institute[7] and amicus State Bar of Michigan recognize that the elements of lack of probable cause and malice provide the necessary protection to attorneys and litigants seeking access to the judicial system, while, at the same time, they allow proper redress for vexatious litigation.

The instant case involves a suit against the opposing attorneys in an earlier malpractice action. Attorneys are the agents who provide the necessary expertise for clients who wish to litigate their rightful claims. Lawyers have an obligation to aid laypersons in obtaining access to the courts. The delicate relationship among attorneys, clients, and our judicial system requires careful definition of the elements of absence of probable cause and improper purpose when attorneys are sued for malicious prosecution.

The American Law Institute supplies an appropriate basic standard to determine probable cause:

"One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he

*cal Malpractice Actions,* 45 Fordham L Rev 1003, 1090 (1977); Jennings, Comment, *Promoting Recovery by Claimants in Iowa Malicious Prosecution Actions,* 64 Iowa L Rev 408, 418 (1979). See Kisner, Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?,* 26 Case Western Reserve L Rev 653, 662 (1976).

[7] 3 Restatement Torts, 2d, § 674, comment *e,* pp 454-455:

"[I]n order to recover under the rule stated in this Section, the plaintiff must prove something more than the mere fact that the civil proceedings have been initiated without probable cause and for an improper purpose and have terminated in his favor. He must show either material harm or the violation of a legal right that is in itself sufficient to support an action for damages. Among the latter are the imprisonment of the person against whom the proceedings are brought, the deprivation of his possession of land, chattels or intangible things, or the harm to his reputation, assumed to result from the defamatory nature of the facts alleged as the basis of the proceedings against him. Among the material harms are the harm resulting from the interference with the use, enjoyment or vendibility of his land, chattels or intangible things, and the expenditures reasonably necessary to defend himself against the proceedings."

reasonably believes in the existence of the facts upon which the claim is based, and either

"(a) correctly or reasonably believes that under those facts the claim *may* be valid under the applicable law, or

"(b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information." (Emphasis added.) 3 Restatement Torts, 2d, § 675, pp 457-458.

This standard of reasonable belief is applicable to the attorney for a plaintiff. Probable cause will be found for bringing or continuing the original action unless counsel proceeded with the knowledge that the client's claim had no factual or legal basis. There should be no requirement that an attorney investigate a claim if the lawyer could reasonably believe the facts to be as alleged by the client. The decision to forego adopting a general obligation for reasonable investigation is guided by a lawyer's duty to the profession and his or her client. "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Code of Professional Responsibility and Canons, Canon 2. In complying with this canon an attorney should be prepared to represent clients with doubtful, but tenable, claims. "A lawyer should represent a client zealously within the bounds of the law." Canon 7.

Futhermore, an attorney must not be required to expend substantial funds to investigate every case upon the threat of being held liable in a subsequent suit for wrongful use of civil proceedings. This threat of liability must not force an attorney to choose between advancing substantial costs for a client with a tenable and meritorious, but less than solid, claim and refusing to take a

case with some merit, but with potentially high costs.[8]

To enhance free access to our courts for litigants and attorneys to bring tenable claims which, for example, may seek to expand the common law, it is necessary in actions for malicious prosecution of civil proceedings, as in actions for malicious (criminal) prosecution, to carefully delineate the functions of judge and jury, particularly in determining probable cause.

"The respective functions of court and jury in actions for malicious prosecution differ in one important particular from their respective functions in other actions of tort in which, as in actions for negligence, the liability of the defendant depends upon the unreasonable character of his conduct. In passing upon this question someone must determine what the defendant did or failed to do and the circumstances under which his act or omission occurred; and someone, either court or jury, must determine whether, in the light of these circumstances, his conduct measured up to the standard of a reasonable man. In actions for negligence and other tort actions in which the liability of a defendant depends upon the unreasonable character of his conduct, both of these matters are determined by the jury * * *.

"In actions for malicious prosecution, however, upon the [issue] of * * * probable cause, the jury has only the function of finding the circumstances under which the defendant acted. The court determines whether, under those circumstances, * * * the defendant had or had not probable cause. If there is no conflict in the testimony as to what the circumstances were, the court has no need for a finding of the jury. The jury is not called upon to act unless there is a conflict in the

[8] Code of Professional Responsibility and Canons, DR 5-103(B) permits an attorney to advance the costs of litigation if the client remains ultimately liable for the costs. In a medical malpractice case the expense of investigation and obtaining expert evaluations is often a substantial burden. Whether these costs are expended should be determined by the requirements of developing the case, not by the threat of a later lawsuit.

testimony that presents an issue of fact for its determination.

* * *

"The better * * * method [in determining the issue of probable cause] is to require the jury to find a special verdict setting forth the circumstances under which they find that the proceedings were initiated. Upon these findings the court then determines whether the defendant had probable cause."[9]

Thus, the jury resolves any conflict in the underlying facts on the issue of probable cause. Once the conflict is resolved, the judge determines whether the facts as found by the jury constitute probable cause. If the facts underlying an attorney's reasonable belief are not in dispute, the judge decides the issue of probable cause.

The element of improper purpose must also be appropriately defined. When a party is sued for malicious prosecution, a jury may infer malice from an absence of probable cause. See, *e.g., Renda v International Union, UAW,* 366 Mich 58, 99-100; 114 NW2d 343 (1962). To permit a jury to infer malice or improper purpose may be appropriate when the defendant is a layperson. However, as explained in 3 Restatement Torts, 2d, § 674, comment *d,* p 453, it is necessary to make an independent determination of improper purpose when the defendant is the attorney who initiated the original action:

"An attorney who initiates a civil proceeding on behalf of his client or one who takes any steps in the proceeding is not liable if he has probable cause for his action (see § 675); *and even if he has no probable cause*

[9] 3 Restatement Torts, 2d, § 673, comment *e,* pp 449-450. See also § 681B, pp 472-473. Michigan cases have required careful instruction to the jury concerning probable cause. *E.g., Wilson v Bowen,* 64 Mich 133; 31 NW 81 (1887).

*and is convinced that his client's claim in unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim.* (See § 676.) An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances." (Emphasis added.)

The lawyer's duty to press his client's claim requires this independent evaluation of improper purpose.[10]

For these reasons, the requirement of special injury should be eliminated. The requirements of lack of probable cause and improper purpose coupled with the respective functions of judge and jury strike a proper balance between unfettered access to the courts for those with tenable claims and the need to redress the harm caused by an abuse of our judicial system.

D

As an alternative to a malicious prosecution claim, an ancillary proceeding to occur immediately after judgment in the original action is suggested in a concurring opinion. Such a proposal would offer the advantages of control, availability and efficiency.

However, it may also be anticipated that this procedure could create the potential of adding an ancillary issue to every lawsuit, increase docket congestion, precipitate a conflict of interest between attorney and client, and grant too much power to the trial judge, thereby placing a pre-

[10] A contingent-fee arrangement is not an improper purpose. 3 Restatement Torts, 2d, § 674, comment *d,* p 453.

mium on "judge shopping". The ease of accessibility of such a procedure may increase the likelihood of the prevailing party filing an ancillary proceeding. It could encourage, without reflection or thought, retaliatory claims. Also, since this alternative suggestion would apply to defendant and plaintiff alike, it raises an issue concerning the concept of what is an appropriate defense.

These comments are made only for the purpose of raising initial questions regarding the suggested alternative. This case, nevertheless, raises an issue of significance that should be determined on its own merits.

This case, therefore, should be remanded to the trial court. The trial court erroneously ruled that the denial of the motion for costs pursuant to GCR 1963, 111.6 in the prior malpractice action determined the question of probable cause. The trial court did not rule upon the question of the factual dispute.

Accordingly, I would affirm the judgment of the Court of Appeals and remand this cause for further proceedings not inconsistent with this opinion.

PEOPLE v CHRISTENSON

Docket Nos. 63672-63674. Argued October 7, 1980 (Calendar No. 5).—Decided November 23, 1981.

Bernhardt D. Christenson was convicted by a jury in Washtenaw Circuit Court, William F. Ager, Jr., J., of three counts of larceny by conversion. The defendant's business, Washtenaw Active Homes, Inc., purchased modular homes from the manufacturer, Active Homes of Marlette, and sold them to purchasers who qualified for financing by the Farmers Home Administration (FHA). The three complainants made sales agreements and construction contracts with the defendant's company and "progress payments" were to be made to the defendant as he required them from the money loaned to the complainants by the FHA, if the purchasers were satisfied that the work had been done. A representative of the FHA was required to cosign the checks for the progress payments. After certain progress payments had been made, the defendant ceased work on the houses because of financial difficulties, and later was adjudicated bankrupt. The defendant was accused of using the progress payments in issue to pay debts other than those incurred in performing the work for which the payments had been made. The trial court denied the defendant's motion for a directed verdict of acquittal, in which the defendant contended that he was not guilty of larceny by conversion as a matter of law because there was no evidence that the complainants had not received the work for the progress payments they made. The Court of Appeals, Danhof, C.J., and V. J. Brennan and

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 5] 18 Am Jur 2d, Conversion § 26.
50 Am Jur 2d, Larceny § 39.
Nature of property or rights other than tangible chattels which may be subject of conversion. 44 ALR2d 927.

[2, 4, 5] 18 Am Jur 2d, Conversion §§ 6, 53.
50 Am Jur 2d, Larceny § 39.

[3, 4, 5] 18 Am Jur 2d, Conversion § 53.
50 Am Jur 2d, Larceny § 23.

[4, 5] 18 Am Jur 2d, Conversion § 25 *et seq.*

[6] 18 Am Jur 2d, Conversion § 10.

Carroll, JJ., affirmed in an unpublished per curiam opinion (Docket Nos. 78-1283—78-1285). Defendant appeals.

In an opinion by Justice Fitzgerald, joined by Chief Justice Coleman and Justices Kavanagh, Williams, Levin, and Ryan, the Supreme Court *held:*

The element of conversion was not established in this case because title to the funds as well as possession passed to the defendant.

1. The purpose of the statute prohibiting larceny by conversion is to cover one of the offenses against property not covered by common-law larceny, in which a person with lawful intent obtains possession of another person's property but subsequently converts the property to his own use. Larceny by conversion is a crime against possession and not against title; a person cannot convert his own funds. Thus, if an owner intends to part with title as well as possession, there can be no crime of larceny.

2. In this case, there is no testimony that there was not sufficient work in place to justify the amount of the progress payments. There is no testimony that the defendant represented that the checks would go directly to Active Homes of Marlette rather than to Washtenaw Active Homes, and he is not charged with conversion of funds belonging to Active Homes of Marlette. Although the representative of the FHA may have been acting under the misconception that Washtenaw Active Homes was an agent of Active Homes of Marlette, it is clear from the representative's testimony that the misconception was never conveyed to him by the defendant. In any event, there is no testimony that the complainants misunderstood the relation of the defendant's company to Active Homes of Marlette. They knew that payments were being made to Washtenaw Active Homes and there is no evidence that the complainants intended to retain any title to the progress payments. Thus, title as well as possession of the progress payments passed to the defendant and, accordingly, there can be no crime of larceny by conversion on these facts.

3. Even if the defendant was not the intended owner of the progress payments but merely a trustee of the funds, the element of conversion has not been established. The prosecutor contends that conversion is established by the fact that the complainants gave the money to the defendant for a specific purpose, to pay for the homes or for site preparation, but that the defendant did not use it for that purpose. However, there was no agreement that the defendant would apply the *specific* funds he received from the complainants for particular work to

pay the laborers and materialmen responsible for that work. There was no requirement that the defendant establish a separate trust account for each complainant in which he would deposit that particular complainant's funds. It is beyond dispute that the defendant had the contractual obligation to pay the debts of the work in place for which he received progress payments from the complainants. However, there was nothing to preclude the defendant from paying for those debts with funds other than the money he received from the complainants. Although the facts of this case may support civil actions against the defendant by complainants and Active Homes of Marlette, they do not support a conviction of larceny by conversion.

Justice Moody concurred in the result because there can be no conversion of money unless there is an obligation on the part of the defendant to deliver the same money he received from the complainants for the intended purpose. The assertion by the people that the gravamen of the offense was that the defendant appropriated funds to his own purpose overlooks the requirement that there be an obligation to keep intact or deliver the specific funds. No such obligation was shown in this case.

Reversed.

OPINION OF THE COURT

1. LARCENY — CONVERSION — STATUTES — COMMON LAW.

The purpose of the statute prohibiting larceny by conversion is to cover one of the offenses against property not covered by common-law larceny, in which a person with lawful intent obtains possession of another person's property but subsequently converts the property to his own use (MCL 750.362; MSA 28.594).

2. LARCENY — CONVERSION — POSSESSION.

Larceny by conversion, like common-law larceny, is a crime against possession and not against title (MCL 750.362; MSA 28.594).

3. LARCENY — CONVERSION — POSSESSION.

A person cannot convert his own funds; thus, if an owner intends to part with title as well as possession to the defendant, there can be no crime of larceny by conversion (MCL 750.362; MSA 28.594).

4. LARCENY — CONVERSION — POSSESSION.

Title and possession of progress payments made by the purchaser

of a modular house passed to a defendant residential builder under a sales agreement and construction contract for the house and, accordingly, there could be no larceny by conversion arising out of the defendant's use of the money to pay debts other than those incurred in doing the work for which payments were made where there is no testimony that there was not sufficient work done to justify the amount of the progress payments under the contract or that the defendant misrepresented to the agency which financed the building and controlled the progress payments that the payments were to be made to the manufacturer or that he was the agent of the manufacturer, the defendant is not charged with conversion of funds belonging to the manufacturer, and there was no testimony that the purchaser misunderstood the defendant's relation to the manufacturer or that the purchaser intended to retain any title to the payments (MCL 750.362; MSA 28.594).

5. LARCENY — CONVERSION — CONTRACTS.

The element of conversion is not established, in a trial for larceny by conversion, by the facts that the complaining purchaser of a modular house gave money as partial payments to a defendant residential builder for a specific purpose, to pay for the house or for preparation of the site, but that the defendant did not use it for that purpose, in the absence of an agreement that the defendant would apply the specific funds he received from the purchaser as progress payments for particular work to pay the laborers and materialmen responsible for that work or of a requirement that the defendant would establish a separate trust account for each purchaser's particular funds (MCL 750.362; MSA 28.594).

CONCURRING OPINION BY BLAIR MOODY, JR., J.

6. LARCENY — CONVERSION — MONEY.

*There can be no conversion of money unless there is an obligation on the part of the defendant to keep intact or deliver the specific funds he received from the complainants for the intended purpose (MCL 750.362; MSA 28.594).*

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people.

*O'Hagan & Conlin, P.C.,* for defendant.

FITZGERALD, J. Defendant was convicted of three counts of larceny by conversion, MCL 750.362; MSA 28.594, as a result of his use of progress payments made by complainants for modular homes erected by defendant's company.

Defendant owned and operated Washtenaw Active Homes, Inc., which sold and erected modular or prefabricated homes. Washtenaw Active Homes purchased the modular homes from the manufacturer, Active Homes of Marlette, and then sold the homes to purchasers who qualified for financing by the Farmers Home Administration.

Each of the three complainants entered into sales agreements and construction contracts with defendant's company after qualifying for FHA financing. Under the FHA program, a bank account containing the loan money was set up by the FHA and the complainants were given a checkbook. Each check required the signatures of the complainants and of Mr. Kominek of the FHA.

Under the terms of the construction contract, partial payments not to exceed 60% of the value of the work in place were to be made to defendant as he required them. Defendant would submit a statement to the purchaser listing the amount owed for materials and labor. The purchaser, if satisfied that the work was done, would make out a check for up to 60% of the bill and forward it to Kominek. Kominek would then inspect the property to insure that the work listed on the bill was done, at his option, request a waiver of lien, and cosign the check.

During the course of constructing complainants' houses and after certain progress payments had been made, defendant ceased work on the houses because he was experiencing financial difficulties.

He subsequently filed for bankruptcy and was adjudicated bankrupt. Because certain progress payments of complainants had not been specifically forwarded to Active Homes of Marlette, but rather had been used to pay other debts, the defendant was charged with larceny by conversion of these progress payments.[1]

The sole issue on appeal is whether the trial court properly denied defendant's motion for directed verdict in which defendant contended that he was not guilty of larceny by conversion as a matter of law.

Larceny by conversion is "one of the crimes provided by statute law to occupy the no-man's land surrounding the offenses against property at common law". *People v Doe, alias Meyer,* 264 Mich 475; 250 NW 270 (1933).[2] The purpose of the larceny by conversion statute is to cover one of the situations left unaccounted for by common-law larceny, that is, where a person obtains possession of another's property with lawful intent, but subsequently converts the other's property to his own use.[3]

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[1] One progress payment from each complainant was alleged to have been converted, amounting to $5,100, $5,500 and $10,000.

[2] For an interesting history of the development of larceny in the common law see Perkins, Criminal Law (2d ed), pp 231-233; LaFave & Scott, Criminal Law, pp 618-622, 673-678.

[3] A felonious taking or "trespass" is essential to establish the crime of larceny at common law. *People v Taugher,* 102 Mich 598; 61 NW 66 (1894). Consequently, larceny was not the proper charge at common law if a person lawfully acquired possession of property belonging to another and subsequently converted it to his own use. However, courts held that if the defendant had a felonious intent at the time of acquiring possession of property and subsequently converted the property, the initial fraud would supply the element of trespass. *People v Shaw,* 57 Mich 403; 24 NW 121 (1885); Anno: *Distinction between larceny and embezzlement,* 146 ALR 532. Under our present larceny by conversion statute, MCL 750.362; MSA 28.594, the character of the delivery of property, whether induced by legal or wrongful means, is not an element. *People v Doe, alias Meyer,* 264 Mich 475; 250 NW 270 (1933).

As with common-law larceny, larceny by conversion is a crime against possession and not against title; one cannot convert his own funds. *People v Martin,* 116 Mich 446; 74 NW 653 (1898); *People v Long,* 409 Mich 346; 294 NW2d 197 (1980). Thus, if an owner intends to part with title as well as possession, there can be no crime of larceny.[4]

In the instant case, it must first be determined whether title as well as possession of the progress payments passed to defendant. Under the terms of the construction contract, defendant was entitled to progress payments for up to 60% of the value of work in place. The borrower was charged under the contract with the responsibility of making on-site development inspections as the work progressed. Another clause of the contract provided that acceptance of completed work and payment by the owner to the contractor did not relieve the contractor of his obligation to the owner to discharge any and all liens for the benefit of subcontractors, materialmen or any other laborers.

At trial, complainants did not testify that the items listed on defendant's statements, approved by them and approved by Kominek, were not properly payable as work in place. There is no testimony that there was not sufficient work in place, as listed on defendant's statements, to justify the amount of the progress payments.

Although the FHA provided Active Homes of Marlette with a letter of commitment requiring it to remit sums directly to Active Homes of Marlette, the payments were made to defendant. There

[4] If the owner is induced to part with both possession and right to ownership by fraudulent representations of one who receives the property with felonious intent, the proper charge is false pretenses. *People v Long,* 409 Mich 346; 294 NW2d 197 (1980); *People v Martin,* 116 Mich 446; 74 NW 653 (1898). See, also, Clark & Marshall, Crimes (7th ed), p 857; Perkins, *supra,* pp 247, 296.

is no testimony that defendant represented that the checks would go directly to Active Homes of Marlette rather than Washtenaw Active Homes. Moreover, defendant is not charged with conversion of funds belonging to Active Homes of Marlette. See *People v Bayer,* 352 Mich 564; 90 NW2d 656 (1958).

Of the three progress payment checks involved here, and the waivers of lien accompanying them, two were made out to Washtenaw Active Homes and only one was made out to "Active Homes". Although Kominek may have been acting under the misconception that Washtenaw Active Homes was an agent of Active Homes of Marlette, it is clear from Kominek's testimony that this misconception was never conveyed to Kominek by defendant. In any event, there is no testimony that the complainants misunderstood the status of defendant's company vis-à-vis Active Homes of Marlette. They knew that payments were being made to Washtenaw Active Homes and there is no evidence that complainants intended to retain any title to the progress payments.

Thus, we conclude that title and possession of the progress payments passed to defendant and, accordingly, there can be no crime of larceny by conversion on these facts.

Even if we were to accept the argument that defendant was not the intended owner of the progress payments and that he was merely a trustee of the funds,[5] we do not find that the element of conversion has been established. The prosecutor contends that conversion is established by the fact that the complainants gave the money to defendant for a specific purpose, *i.e.,* to pay for

[5] The prosecutor neither charged nor argued the applicability of the building contract fund act, MCL 570.171 *et seq.;* MSA 26.331 *et seq.,* in this case.

the home or for site preparation, but defendant did not use it for that purpose.[6]

In *People v Bayer, supra,* in reversing defendant's conviction of larceny by conversion, this Court stated:

"More applicable to our present case is the holding of this Court in a civil action alleging tortious conversion of funds:

" 'It should be noted that defendant was not required to deliver to plaintiff the specific or identical moneys which he collected for merchandise sold or on accounts receivable, but was only required to pay plaintiff the invoiced price for merchandise delivered to him. Therefore, as plaintiff was not entitled to the specific or identical moneys collected by defendant from his customers, he was not entitled to a judgment in tort for conversion. * * *

" ' "There can be * * * no conversion of money, unless there was an obligation on the part of defendant to deliver specific money to plaintiff." 65 CJ, Trover and Conversion, § 24, p 23.' *Garras v Bekiares,* 315 Mich 141, 147, 148 [23 NW2d 239 (1946)]." 352 Mich 595. See, also, *People v Chapman,* 305 Mich 516; 9 NW2d 697 (1943).

It is clear in this case that defendant used partial payments for work in place to pay debts that were not the specific debts incurred in construction of the work in place. He subsequently was unable to pay the latter debts because of his impending bankruptcy. However, there was no agreement that defendant apply the *specific* funds he received from complainants for particular work

[6] The prosecutor also contends that this fact demonstrates that complainants did not intend to part with title. We do not agree for the reasons which follow in the text. Assuming, *arguendo,* that such evidence does support the prosecutor's theory of reservation of title by complainants, we still find that the element of conversion has not been established for the reasons which follow in the text.

to pay the laborers and materialmen responsible for that work. There was no requirement that defendant establish a separate trust account for each complainant in which he would deposit that *particular* complainant's funds.

It is beyond dispute that defendant had the contractual obligation to pay the debts of the work in place for which he received progress payments from the complainants. However, there was nothing to preclude defendant from paying for those debts with funds other than the identical moneys he received from complainants. The fact that defendant's bankruptcy intervened to preclude such payment does not render defendant guilty of larceny by conversion.

Although the facts of this case may support civil actions against defendant by complainants and Active Homes of Marlette, they do not support a conviction of larceny by conversion.

Reversed.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, and RYAN, JJ., concurred with FITZGERALD, J.

BLAIR MOODY, JR., J. I concur with the result reached by the opinion of the Court for the reason that there can be no conversion of money unless there is an obligation on the part of the defendant to deliver the identical money received for the intended purposes.

The essence of the dispute in the instant case was captured by Justice VOELKER dissenting in *People v Bayer,* 352 Mich 564, 574; 90 NW2d 656 (1958), where he stated:

"That the testimony in this case may have richly

shown that this defendant possessed 'a heart full of larceny', as the saying goes, or that he may possibly have been guilty of some other offense, is no reason to sustain his conviction for this offense unless it is warranted by the record. On the other hand, that he may in the same transaction have possibly been guilty of one or more different criminal offenses as well as the one for which he was convicted is no reason to let him go."

Defendant was convicted of three counts of larceny by conversion, MCL 750.362; MSA 28.594. It is claimed by the people that the heart of this case revolves about the issue of whether the defendant diverted money from the purpose for which it was delivered to him. The gravamen of the offense, as urged by the people, was the fact that Christenson appropriated funds to his own purposes to pay other obligations instead of applying them to certain avowed purposes.

This assertion overlooks the requirement that an action for conversion of money is not maintainable unless there is an obligation on the part of the defendant to return or apply the specific money entrusted to his care. *Garras v Bekiares,* 315 Mich 141; 23 NW2d 239 (1946); *Globe & Rutgers Ins Co of New York v Fisher,* 234 Mich 258; 207 NW 884 (1926); *Alfred Shrimpton & Sons v Culver,* 109 Mich 577; 67 NW 907 (1896).

This basic proposition was applied in the context of a criminal action for larceny by conversion in *People v Bayer.* The majority opinion in *Bayer,* as aptly quoted by this Court today, specifically prescribes that a prosecution for larceny by conversion of money will lie only where there is an obligation to keep intact or deliver the specific money in question and where such money can be identified. No such obligation was shown in this case. Reversed.

PEOPLE v STURDIVANT

PEOPLE v ROBINSON

Docket Nos. 65414, 65853. Decided November 23, 1981. On application by the defendant in *Sturdivant* and by the people in *Robinson* for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals in *Sturdivant* and remanded the case for correction of the defendant's sentence, and affirmed the judgment of the Court of Appeals in *Robinson*.

Richard L. Sturdivant was convicted on his plea of guilty in Crawford Circuit Court, David W. Fershee, J., of larceny in a building, and was sentenced to 48 months of probation, with the first 6 months to be served in jail. After his release from jail, the defendant was found guilty by E. Patrick Murray, J., of violating the probation, and sentenced to 32 to 48 months in prison, with credit for the time served between his arrest for the probation violation and the date of sentencing. The defendant appealed, claiming that he was also entitled to credit for the time he served as a condition of probation. The Court of Appeals, D. C. Riley, P.J., and R. B. Burns, J. (N. J. Kaufman, J., dissenting), affirmed (Docket No. 78-3968). Defendant makes a delayed application for leave to appeal.

Stanley L. Robinson, Jr., was convicted on his plea of guilty in Otsego Circuit Court, William A. Porter, J., of breaking and entering with intent to commit larceny, and was sentenced to 48 months of probation, with the first 6 months to be served in jail. The defendant was convicted, on his plea of guilty, of violating the probation and sentenced to 3-1/2 to 10 years in prison with no credit for the 6 months served in jail as a condition of probation. The Court of Appeals, Cynar, P.J., and M. J. Kelly and Gillespie, JJ., remanded for resentencing giving the credit (Docket No. 46333). The people apply for leave to appeal. *Held:*

The principles of double jeopardy require giving the defendants credit for time spent in jail as a condition of probation. The basic constitutional guarantee against double punishment

is violated when punishment already exacted for an offense is not fully credited in imposing sentence upon retrial and a new conviction of the same offense, after reversal on appeal. There is no reason for refusing to apply the principle where the initial period of incarceration was a condition of probation rather than a sentence voided by reversal. To hold otherwise would lead to the anomalous result of a defendant suffering longer incarceration as a result of having been placed on probation than if initially sentenced to the maximum prison term possible for the offense.

The judgment of the Court of Appeals in *Sturdivant* is reversed and the case is remanded to the circuit court for correction of the defendant's sentence to reflect the proper credit for time served. The judgment of the Court of Appeals in *Robinson* is affirmed.

97 Mich App 711; 296 NW2d 157 (1980) reversed.

99 Mich App 623; 299 NW2d 13 (1980) affirmed.

*Frank J. Kelley,* Attorney General, and *Robert A. Derengoski,* Solicitor General, for the people.

*Alton Davis,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General, Prosecuting Attorneys Appellate Service, for the people in *Sturdivant.*

*John Dennany,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General, Prosecuting Attorneys Appellate Service, for the people in *Robinson.*

State Appellate Defender (by *Chari Grove,* for defendant Sturdivant, and *Terence R. Flanagan,* for defendant Robinson).

PER CURIAM. In each of these cases, the defendant was placed on probation, with a condition that he spend the first six months in jail, as

authorized by MCL 771.3; MSA 28.1133.[1] After each defendant was released he violated probation and was sentenced to prison. The question presented by these two applications for leave to appeal is whether a defendant is entitled to credit against the sentence imposed after a finding of probation violation for time spent in custody as a condition of probation. The Court of Appeals panels reached conflicting results. We conclude that credit is required for time served as a condition of probation.

## I

### A

Richard Leroy Sturdivant pled guilty of larceny in a building on October 3, 1977. On December 9, 1977 he was sentenced to four years' probation, with a condition that he spend the first six months in the county jail.[2] After serving at least part of this time, he was released but soon thereafter was arrested and charged with violation of probation. After a hearing, he was found to have violated probation and was sentenced to 32 to 48 months in prison, with credit for the time served between his

[1] At the time the defendants were sentenced the statute read:

"As a condition of probation, the court may require the probationer to be imprisoned in the county jail or the house of correction for not more than 6 months, at such time or intervals, which may be consecutive or non-consecutive, within the probation period as the court in its discretion may determine, * * * but the period of confinement shall not exceed the maximum period of imprisonment provided for the offense charged if such maximum period is less than 6 months."

The statute has been amended and now permits up to 12 months' incarceration as a condition of probation. 1980 PA 514.

[2] The defendant was given credit against this six-month incarceration for the one month that he had been in custody before his conviction on the original charge of larceny in a building.

arrest on the probation violation and the date of sentence.

The defendant appealed, claiming that he should have been given credit against his 32-to-48-month sentence for the time he served as a condition of probation. The Court of Appeals affirmed. 97 Mich App 711; 296 NW2d 157 (1980). The majority relied on its interpretation of the Legislature's intent in adopting the probation revocation statute,[3] and on a series of earlier decisions by Court of Appeals panels in similar cases.[4] Judge KAUFMAN dissented, arguing that the statute allowing credit for time served before sentencing was applicable to the case.[5]

The defendant has filed a delayed application for leave to appeal to this Court.

B

Stanley Lee Robinson, Jr., pled guilty of breaking and entering with intent to commit larceny. On April 15, 1978, he was sentenced to four years' probation with the initial six months to be served

[3] MCL 771.4; MSA 28.1134:

"It is the intent of the legislature that the granting of probation to one convicted shall be a matter of grace conferring no vested right to its continuance, if, during the period of probation it shall appear to the satisfaction of the sentencing court that the probationer is likely again to engage in an offensive or criminal course of conduct, or that the public good requires revocation or termination of probation previously granted. All probation orders, therefore, shall be revocable or terminable * * *. In case such probation order is terminated or revoked the court may proceed to sentence such probationer in the same manner and to the same penalty as it might have done if such probation order had never been made."

[4] *E.g., People v Lacy,* 54 Mich App 471; 221 NW2d 199 (1974); *People v Jaynes,* 23 Mich App 360; 178 NW2d 558 (1970).

[5] MCL 769.11b; MSA 28.1083(2):

"Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing."

in jail. On April 12, 1979, he was arraigned for probation violation. He pled guilty of a violation of probation and was sentenced to 3-1/2 to 10 years in prison on the underlying breaking and entering conviction. He received credit for 13 days' incarceration between his arrest for probation violation and sentencing, but no credit for the time served as a condition of probation.

The Court of Appeals remanded for resentencing giving credit. 99 Mich App 623; 299 NW2d 13 (1980). As had Judge KAUFMAN, dissenting in *Sturdivant,* the Court found the circumstances of the case to be within the jail credit statute.

The prosecutor has applied for leave to appeal to this Court.

II

As the decisions of the Court of Appeals in these cases demonstrate, the interpretation of MCL 771.3; MSA 28.1133 and MCL 771.4; MSA 28.1134 is not free from doubt. However, we do not base our decision on the interpretation of the statutory language. Rather, we conclude that giving credit is required by the double jeopardy principles enunciated by the United States Supreme Court in *North Carolina v Pearce,* 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969). In that case, a defendant had served time in prison pursuant to a conviction that had been reversed. On retrial he was again convicted and not given credit for time served when the new sentence was imposed. The Court applied the constitutional guarantees against double punishment and concluded:

"We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully 'credited' in imposing sen-

tence upon a new conviction for the same offense. The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction. Suppose, for example, in a jurisdiction where the maximum allowable sentence for larceny is 10 years' imprisonment, a man succeeds in getting his larceny conviction set aside after serving three years in prison. If, upon reconviction, he is given a 10-year sentence, then, quite clearly, he will have received multiple punishments for the same offense. For he will have been compelled to serve separate prison terms of three years and 10 years, although the maximum single punishment for the offense is 10 years' imprisonment. Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.

"We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed." 395 US 718-719. (Footnotes omitted.)

We can discern no basis for refusing to apply this principle to the situation before us, in which the initial period of incarceration was a condition of probation rather than a sentence voided by reversal. To hold otherwise could lead to the anomalous result of a defendant suffering longer incarceration as a result of having been placed on probation than if initially sentenced to the maximum prison term possible for the offense.

Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals in *Sturdivant* and remand to the circuit court for correction of

the defendant's sentence to reflect the proper credit for time served. The judgment of the Court of Appeals in *Robinson* is affirmed.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

UNITED STATES FIDELITY & GUARANTY COMPANY v BLACK

Docket No. 63656. Argued October 7, 1980 (Calendar No. 4).—Decided November 23, 1981.

United States Fidelity & Guaranty Company brought an action against Chase Black, Phillip C. Haughey, and AHB Associates, Inc., under an indemnity agreement, for reimbursement of claims which the plaintiff paid on the labor and materials bond for a housing project the defendants owned in Battle Creek. The defendants made the indemnity agreement to help the general contractor, Kwaske Brothers Construction Company, obtain the bonds required for financing of the project by the Michigan State Housing Development Authority. They raise the affirmative defense of fraud, claiming that they were advised that among the plaintiff's special conditions for underwriting the bond were that the defendants sign an indemnity agreement; that Jackson City Bank subordinate to the plaintiff a secured interest in certain assets of the Kwaske brothers; and that indemnity agreements be obtained from the Kwaske brothers and certain others. The loan to finance the housing project was made on December 28, 1971, and the defendants signed the indemnity agreement on June 20, 1972. They testified that in deciding to sign the agreement they relied on representations by the insurance agents who obtained the bond from the plaintiff that the other underwriting conditions had been met. Later they discovered that the Jackson City Bank had not subordinated its secured rights in the collateral and that not

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 37 Am Jur 2d, Fraud and Deceit §§ 187, 188.

[2] 17 Am Jur 2d, Contracts §§ 151, 152.
37 Am Jur 2d, Fraud and Deceit § 74.

[3] 37 Am Jur 2d, Fraud and Deceit §§ 185, 188, 189.

[4] 37 Am Jur 2d, Fraud and Deceit §§ 220 *et seq.*, 340.

[5, 7, 12] 17 Am Jur 2d, Contracts § 152.
37 Am Jur 2d, Fraud and Deceit §§ 178, 461, 477.

[6, 7] 37 Am Jur 2d, Fraud and Deceit § 227.

[8-10] 37 Am Jur 2d, Fraud and Deceit § 146 *et seq.*

[11] 37 Am Jur 2d, Fraud and Deceit § 323 *et seq.*

[12] 37 Am Jur 2d, Fraud and Deceit §§ 222, 340.

all of the other indemnity agreements had been made. The Calhoun Circuit Court, Stanley Everett, J., granted judgment for the plaintiff, deciding that the affirmative defense of fraud was not established because there was no proof that the plaintiff intended to induce the defendants to act on any misrepresentations, and that the plaintiff had no affirmative duty to advise the defendants that not all of the conditions had been met. The Court of Appeals, D. C. Riley, P.J., and V. J. Brennan and Crockett, JJ., affirmed in an unpublished per curiam opinion (Docket No. 78-1161). The defendants appeal.

In an opinion by Justice Williams, joined by Justices Levin, Fitzgerald, and Moody, the Supreme Court *held:*

When the defense is "innocent misrepresentation", it is not necessary for the defendants to prove that the plaintiff or its agents had a fraudulent intent or intended that the misrepresentations would be acted on by the defendants in signing the indemnity agreement because the parties were in privity of contract and the benefit of the misrepresentation inured to the plaintiff.

1. The general common-law rule that to constitute actionable fraud a material misrepresentation must be made with the intention that it be acted upon has been modified in Michigan by the "innocent misrepresentation" rule, which is still the law. The terms "actionable fraud" or "actionable fraudulent misrepresentation" encompass more than the traditional common-law definition of fraud in that they apply in some cases where the misrepresenter had no *scienter.* If there was in fact a misrepresentation and its deceptive influence was effective, the consequences to the victim being as serious as though it had proceeded from a vicious purpose, the victim has an action for the damages caused by it, where the misrepresentation is made in connection with making a contract between the parties and the loss of the party deceived inures to the benefit of the other. There is no distinction in the requirements for an action to recover damages for innocent misrepresentation and for innocent misrepresentation as an affirmative defense to an action to enforce a contract because in both instances the object is to make the injured party whole.

2. The rule of innocent misrepresentation differs from the traditional rule of fraud by eliminating the element of *scienter* and the requirement of proof of the intention that the misrepresentation be acted upon. However, the misrepresentation which is innocent must be made in connection with the formation of a contract, and the injury suffered by the victim must inure to the benefit of the misrepresenter. It is unnecessary to

prove a fraudulent intent of the misrepresenter where the representation is made in a transaction between the misrepresenter and the victim, because the misrepresenter should realize that the misrepresentation would be relied upon by the victim. Whenever parties engage in contractual negotiations they are attempting to persuade each other to accept proposed terms, and they form a mutually agreeable contract based upon the representations made in the course of bargaining. Thus, in cases where there is privity of contract, all representations may be presumed to be made for the purpose of inducing the other party to enter the contract.

3. In this case the plaintiff, through its agents, appears to have represented to the defendants that other parties had signed the indemnity agreement and that the Jackson City Bank had subordinated its secured interest in the assets of the Kwaske brothers. The defendants obviously wished to spread their potential liability over as many parties as possible and to subordinate their liability to as many indemnitors as possible; they indicated the importance of their concern by inquiring, on several occasions, whether all of the requirements for the bonds had been met. The plaintiff wanted the indemnity agreement signed, and the plaintiff's agent misrepresented a material fact in the course of trying to get the defendants to sign the agreement. Whether the misrepresentation was intentional or unintentional it is evident that the agent made the misrepresentation with the hope that the defendants would act upon it by signing the indemnity agreement. Independent proof of the plaintiff's intent is unnecessary because a material statement made in the course of contractual negotiations is presumptively made with the intention that it should be relied upon by the other party.

4. The test for reliance on the misrepresentation is whether it exerted a material influence on the mind of the complaining party in deciding to sign the agreement, although it might be only one of several motives, acting together, which produced the result. The misrepresentation need not be the sole influence upon the complaining party. The trial court found that the defendants, in deciding to sign the indemnity agreement, relied in part on the representation that other persons would be liable in the event that indemnification was required. The fact that the defendants did not sign the indemnity agreement until after the plaintiff abandoned its demand that the defendants' wives also sign in no way requires the conclusion of the trial court that the defendants did not rely on the misrepresentation that the other underwriting requirements were satisfied. The

trial court found that the defendants relied in part on the plaintiff's misrepresentation, which is sufficient to establish an affirmative defense of fraud. The facts that the defendants may have had other motives to sign the indemnity agreement and continued to bargain on other issues before signing the indemnity agreement do not change the conclusion that they relied on the misrepresentations.

5. Fraud may be committed by the suppression of facts and of the truth, as well as by open false assertions, where there is a legal or equitable duty of disclosure. The trial court concluded that the plaintiff had no duty to disclose to the defendants that the underwriting requirements for the bonds had been modified because the plaintiff did not know, nor reasonably should have known, of the defendants' reliance on the underwriting requirements. However, two employees of an insurance agency who dealt with the defendants were agents of the plaintiff in this matter. The insurance agents knew or reasonably should have known that the defendants were relying on the completion of all the underwriting requirements for the bond, and that knowledge is imputed to the plaintiff.

6. The general rule is that a party to a business transaction is under an obligation to exercise reasonable care to disclose to the other party, before the transaction is consummated, any subsequently acquired information which he recognizes as rendering untrue, or misleading, previous representations which, when made, were believed to be true. When the insurance agents discovered that their representations concerning the underwriting requirements for the bond were inaccurate they had a duty to advise the defendants because they knew that the defendants were concerned whether all the other parties had signed the indemnity agreement. Whether there was a satisfaction of the duty to inform the defendants must be considered by the trial court on remand.

7. The trial court's confusing and contradictory findings of fact as to what statements constituting a misrepresentation were made and at which time they were made requires clarification upon remand. If any of the statements exerted a material influence on the defendants' final decision to sign the indemnity agreement and if they were false, the defendants have established the affirmative defense.

8. The defendants seek to have the entire indemnity agreement set aside; however, if the trial court finds that the defense of misrepresentation has been established, it must decide which remedy would be the most equitable under the circumstances of the case. The court is not confined to the remedies sought by

the parties, full enforcement or total abrogation of the indemnity agreement. It may consider other remedies such as reformation of the contract, restitution, or partial enforcement of the contract.

Reversed and remanded to the trial court for further proceedings.

Justice Kavanagh, joined by Justice Ryan, agreed that the matter must be remanded for clarification. However, he wrote separately because the claim of misrepresentation here is asserted as a defense to the enforcement of a contract, and discussions of innocent misrepresentation, fraudulent misrepresentation, and silent fraud, while appropriate to a suit for damages, may confound the confusion in this case. The defendants claim that they were induced to enter into the contract by the misrepresentations of the plaintiff's agents. If the trial court finds that the plaintiff's agents made a representation of a material fact, that the representation was false, and that the defendants relied on the representation as all or part of the inducement to enter into the contract, the trial court should grant relief to the defendants; otherwise it should enforce the contract.

*Candler v Heigho,* 208 Mich 115; 175 NW 141 (1919), overruled in part.

OPINION OF THE COURT

1. FRAUD — MISREPRESENTATION — INTENT — COMMON LAW — WORDS AND PHRASES.

The general common-law rule that to constitute actionable fraud a material misrepresentation must be made with the intention that it be acted upon has been modified in Michigan by the "innocent misrepresentation" rule; the terms "actionable fraud" or "actionable fraudulent misrepresentation" encompass more than the traditional common-law definition of fraud in that they apply in some cases where the misrepresenter has no *scienter.*

2. FRAUD — MISREPRESENTATION — INTENT.

Where there was in fact a misrepresentation, even though made innocently, and its deceptive influence was effective, the consequences to the victim being as serious as though it had proceeded from a vicious purpose, the victim has an action for the damages caused by it where the misrepresentation is made in connection with making a contract between the parties and the loss of the party deceived inures to the benefit of the other.

3. FRAUD — MISREPRESENTATION — INTENT.

Any representations made by one party to another in a transaction between them which are false in fact and actually deceive the other party, and are relied on by him to his damage, are actionable, where the loss of the party deceived inures to the benefit of the other; it is unnecessary for the plaintiff to prove a fraudulent purpose or intent on the part of the defendant.

4. FRAUD — CONTRACTS — MISREPRESENTATION — INDUCEMENT — INTENT.

There is no distinction in the requirements for an action to recover damages for innocent misrepresentation and for innocent misrepresentation as an affirmative defense to an action to enforce a contract in Michigan because in both instances the object is to make the injured party whole.

5. CONTRACTS — MISREPRESENTATION — INDUCEMENT — INTENT.

It may justifiably be presumed in a contractual bargaining situation that all material representations by a party are made with the intention to induce the other party to enter into the contract; thus, in cases involving privity of contract independent proof of intent to induce reliance on a misrepresentation is unnecessary to maintain an action in deceit or to establish the defense of fraud in the inducement of a contract.

6. CONTRACTS — FRAUD — INDUCEMENT — RELIANCE.

The test in a case of fraud in the inducement for determining the existence of reliance on a misrepresentation is whether it exerted a material influence on the mind of the complaining party, although it might be only one of several motives, acting together, which produced the result of formation of a contract.

7. CONTRACTS — FRAUD — INDUCEMENT — RELIANCE.

A trial court erroneously concluded that the defendants in an action for reimbursement under an indemnity agreement had not established the affirmative defense of fraud in the inducement where the court found that the defendants in signing the indemnity agreement relied in part on misrepresentations by the plaintiff's agents that other parties would be liable before the defendants would be liable in the event that indemnification was required; the facts that the defendants may have had other motives to sign the indemnity agreement and they continued to bargain on other issues before signing the indemnity agreement do not change the conclusion that they relied on the misrepresentations.

8. FRAUD — SILENCE — DUTY TO DISCLOSE.

Fraud may be consummated by suppression of facts and of the truth where there is a legal or equitable duty of disclosure; one who remains silent when fair dealing requires him to speak may be guilty of fraudulent concealment.

9. FRAUD — SILENCE — DUTY TO DISCLOSE — KNOWLEDGE — AGENCY.

A trial court erroneously concluded that a plaintiff underwriter had no duty to defendants who were negotiating an indemnity agreement required by the underwriter for performance bonds to disclose that the underwriting requirements for the bonds had been modified where the trial court specifically found that two employees of an insurance agency were agents of the plaintiff underwriter; the defendants had discussed with the agents their concern about potential liability under the indemnity agreement and were openly trying to limit that liability; and the agents knew, or should have known, that the defendants were relying on their representations that all the underwriting requirements had been met.

10. FRAUD — SILENCE — DUTY TO DISCLOSE.

A party to a business transaction generally is under an obligation to exercise reasonable care to disclose to the other party, before the transaction is consummated, any subsequently acquired information which he recognizes as rendering untrue, or misleading, previous representations which, when made, were true or believed to be true.

11. REMEDIES — CONTRACTS — FRAUD IN THE INDUCEMENT — EQUITY.

Where the equitable defense of fraud in the inducement of a contract has been established the trial court must decide which remedy would be the most equitable under the circumstances; the court may consider abrogation, reformation, partial enforcement of the contract, or restitution as achieving the most just result.

SEPARATE OPINION BY KAVANAGH, J.

12. CONTRACTS — MISREPRESENTATION — INDUCEMENT — RELIANCE.

*A claim of misrepresentation by the plaintiff's agents as a defense to the enforcement of a contract has been established if the trial court finds that the plaintiff's agents made a representation of a material fact, that the representation was false, and that the defendants relied on the representation as all or part of the inducement to enter into the contract.*

*Foster, Swift, Collins & Coey, P.C.* (by *Philip T. Carter),* for plaintiff.

*Vandervoort, Cooke, McFee, Christ, Carpenter & Fisher (Dykema, Gossett, Spencer, Goodnow & Trigg,* by *Michael J. McGuigan* and *Carolyn D. Bell,* of counsel) for defendants.

WILLIAMS, J. *(for reversal).* This case, involving suit on an indemnity contract and a defense of innocent misrepresentation, is confusing for four reasons. First, the Court of Appeals in its decision confused the elements in the traditional fraudulent misrepresentation rule and the elements in the Michigan innocent misrepresentation rule. Both the Court of Appeals and the trial court erred in trying to decide an innocent misrepresentation case on the basis of the failure to prove an element required in the traditional fraudulent misrepresentation rule but not required under the innocent misrepresentation rule. Second, the trial court, although purporting to recognize the legal rule that it was sufficient that the "misrepresentation exerted a material influence", inconsistently and erroneously acted as though the influence had to be total and exclusive. Third, the trial court erroneously failed to permit the defendants to attempt to prove the affirmative defense of silent fraud, saying the plaintiff had no duty of disclosure. However, the record indicates that there was indeed evidence which could substantiate such a duty. And fourth, in determining whether a misrepresentation had actually been made the trial court made contradictory statements so that it is impossible to conclude for certain whether or not a misrepresentation was made that the victims, in this case the defendants, relied on.

Because of the errors above mentioned, the

Court of Appeals affirmance of the trial court is reversed. However, because it is unclear whether the trial court did or did not find that plaintiff in fact made a misrepresentation on which defendants relied and because the trial court erroneously dismissed the possibility of silent fraud, the matter is remanded to the trial court for further consideration. The nature of the equitable remedy is discussed.

## I. FACTS

Appellants Chase Black, Phillip Haughey and AHB Associates, Inc. (AHB), are defendants in an action for reimbursement by plaintiff-appellee United States Fidelity & Guaranty Company (USF &G) pursuant to an indemnity agreement dated December 28, 1971, but actually signed by the defendants on June 20, 1972. AHB is the developer of the Glenwood Trace Housing Project in Battle Creek and the general partner of the Glenwood Trace Limited Dividend Housing Association which owned the project. Black and Haughey, as stockholders and officers of AHB, desired to obtain financing for a low- and medium-income housing project from the Michigan State Housing Development Authority (MSHDA). To do so, however, required that the general contractor furnish labor and materials payment and performance bonds.[1] After accepting bids from prospective contractors in late 1971, defendants hired the Kwaske Brothers Construction Company on the condition that it could satisfy the MSHDA's bond requirement.

[1] The surety of a labor and materials payment bond agrees to pay parties furnishing labor and materials to the project if the contractor is unable. A performance bond assures the lender and owner of the project that the construction will be completed by the surety if the contractor fails to complete it.

Kwaske Brothers went to Mourer-Foster, Inc., a Lansing insurance agent, for assistance in finding an underwriter willing to furnish the necessary bonds. After negotiations with Capitol Indemnity Company were abandoned due to exorbitant rates and stiff underwriting requirements,[2] a Mourer-Foster employee, Albert Neubacher, contacted his former employer, USF&G. At first the underwriter refused to issue the bonds to Kwaske Brothers, but reconsidered provided certain conditions were performed.

On December 18, 1971, another Mourer-Foster employee, Myron Montie, met with Gerald Kwaske and defendant Black at defendant's offices and presented the following four bonding requirements of USF&G:

"1. The four Kwaske brothers, as officers of the general contractor, and their wives were to sign an indemnity agreement in favor of USF&G for amounts paid by USF&G under the bonds;

"2. Kwaske Brothers' bank, Jackson City Bank of Jackson, Michigan, was to subordinate its rights to certain assets of Kwaske Brothers and the Kwaskes individually to USF&G;

"3. Three major subcontractors and one material supplier (heating, plumbing, electrical and lumber) were to become liable on the bond by signing a surety or indemnity agreement; and

"4. AHB Associates, Phillip Haughey, Chase Black and their wives were to sign an indemnity agreement."

Black objected to Montie about the extensive lia-

[2] Kwaske Brothers was rather "lightly capitalized" and had had some trouble with the construction of student housing in Mt. Pleasant for Central Michigan University resulting in a $70,000 loss. Apparently neither Aetna Life Insurance & Casualty Company, who wrote the Mt. Pleasant construction bond, nor Capitol Indemnity wished to take the risk of bonding Kwaske Brothers unless certain, unnamed, requirements were met and the normal bond rates were increased.

bility defendants were asked to assume. He repeated these objections to Neubacher, the head of Mourer-Foster's Bond Department, but the requirements were reaffirmed. After evaluating the bond conditions against their potential liability, Black and Haughey agreed to sign the indemnity agreement provided their wives were omitted from the bond and USF&G agreed to include a priority of collection so that if indemnification were required, defendants would be the last indemnitors pursued.

The loan closing meeting was held at the MSHDA office in Lansing on December 28, 1971. Neubacher signed the labor and materials payment and performance bonds for USF&G in accordance with a written power of attorney. Black testified that he specifically asked Neubacher whether all of the other conditions imposed by USF&G had been satisfied and was told that USF &G "had obtained all of the conditions".[3] In the following months Neubacher made several requests for defendants to execute the indemnity agreement. One such attempt occurred on March 28, 1972, when Neubacher personally delivered a copy of the indemnity agreement to Black. Attached to the agreement was a photocopy of a letter to Neubacher from USF&G Bond Superintendent J. Edwin Pohl dated February 4th, stating:

"As you know, we are *still awaiting* certain papers to complete our file on this bond. We *are to receive* a Master Surety Agreement and resolution and certification signed by Kwaske Brothers Construction Company, Mr. and Mrs. Eugene Kwaske, Mr. and Mrs. Gerald Kwaske, Anthony Kwaske and Ernest Kwaske. We *are*

[3] Neubacher testified: "I don't know what my discussions were exactly on the day of the closing with all that's involved at a closing, but I'm sure I had some discussion of some sort with Mr. Black".

*also to receive* a specific indemnity agreement and resolution and certification signed by Chase Black, Phillip C. Haughey and AHB Associates, Inc. A letter from the City Bank of Jackson is *also to be received,* subordinating their interest to ours in connection with the blanket financing statement now in effect on Kwaske Brothers." (Emphasis added.)

Black admitted having read the letter at the time. When asked during cross-examination, "is it not true, from reading this, you were aware that the conditions that you were relying on had not at this time been satisfied?", Black responded:

"On the contrary, because I asked Mr. Neubacher what the situation was. That does not say that on March 28th that those were not available. It says on February 4th, they were not available. Mr. Neubacher responded that *those things had been taken care of* and this, our signature, our indemnity was the only thing yet remaining * * *." (Emphasis added.)

After the March 28th meeting with Neubacher, defendant Black sent a photocopy of the February 4th USF&G letter with the proposed indemnity agreement to his attorney with the following handwritten note at the bottom of the letter:

"3/28/72

"Bob—Al Neubacher came in this PM—wanting to talk about the attached 'Specific Indemnity Agreement.' I told him the wives *would not* be expected to sign, and that we wanted assurance that we were limiting ourselves after Kwaske Bros. Constr. Co., Inc., and after the three brothers personally.[4] He said thats *[sic]* what

[4] The USF&G bond requirements called for the *four* Kwaske brothers and their three wives to indemnify plaintiff. Only two brothers and their wives actually signed the indemnity agreement. Thus it is unclear what Black meant to say when he wrote "after the *three* brothers personally".

all these papers mean. Do you agree. Please call me after reading them over.

"Chase".

(Emphasis in original.)

In the extreme bottom right hand corner of the exhibit, below the handwritten note, is a date stamp indicating that defendants' counsel received the letter on March 29, 1972.

Defendants Black and Haughey testified that they "put total reliance" on representations that there would be other indemnitors and that the Jackson Bank would subordinate its security interest in Kwaske Brothers' assets. They insisted that Neubacher told them that they were the last to comply with the bond requirements both before and after the delivery of the February 4th letter.[5] Neubacher denied ever making such representations.

USF&G agreed to remove appellants' wives' names from the indemnity agreement but refused to set up any type of priority among the indemnitors. Defendants finally signed the agreement on June 20, 1972 and mailed it to Mourer-Foster. It was not until March, 1973, that defendants discovered that the Jackson City Bank had not subordinated its rights to various assets of the Kwaske Brothers, and not until 1975 that defendants learned that only two of the four Kwaske brothers and their wives and only one of the subcontractors had signed the master indemnity contract.

Kwaske Brothers defaulted under its labor and materials bond when it failed to pay all of the

[5] Haughey testified: "[Neubacher] said that we had had a gentleman's agreement that we were going to sign the specific indemnity agreement and all of the other conditions of the bond had been met. We were the only people who had not fulfilled our gentleman's agreement."

material suppliers and subcontractors. USF&G intervened in accordance with the labor and materials bond and settled the claims. USF&G subsequently brought suit against those sureties who had signed the indemnity agreement in order to recover its expenses of $78,971.27 plus interest. The plaintiff obtained a default judgment against defendants Kwaske Brothers Construction Company, Kathleen and Mary Helen Kwaske, and subcontractor Schmidt Electric Company; however, Gerald A. Kwaske and Ernest Kwaske received discharges in bankruptcy, leaving defendants Black, Haughey and AHB to face the remaining liability. Anthony Kwaske, Eugene Kwaske and his wife, the Jackson City Bank, and the major subcontractors and material suppliers who had worked on the project were not included in the suit since they had not signed the specific indemnity agreement, or, in the case of the bank, subordinated its security interest in the assets of Kwaske Brothers.

After a three-day bench trial in late July 1977 and submission of post-trial briefs by all the parties, the trial judge in a sometimes confusing and contradictory finding stated *inter alia:*

Mourer-Foster and its employees Montie and Neubacher were agents of USF&G;

Defendants "relied, in part, upon the fact that there were others who would be liable in the event that indemnification was required";

However, "defendants did not rely on the December, 1971 statement, for they did not sign the indemnity agreement until several months later and then only after the agreement was modified to eliminate the requirement that their wives sign it";

Nevertheless the "preliminary statements were

made to the defendants and these were certainly a factor in their decision to sign the indemnity agreement";

Neubacher answered yes when asked on December 28, 1971 if all the bond requirements of December 18th had been met;

Defendants failed to establish that Neubacher repeated the assurances on March 28, 1972, that the other conditions of the bond requirements had been met;

"[T]here is a total absence of proof that the plaintiff or its agents *made any representations with the intention that these be acted upon* by the defendants" (emphasis added).

The trial court, relying on *Candler v Heigho,* 208 Mich 115; 175 NW 141 (1919), and its progeny, held that the affirmative defense of actionable fraud was not established due to the failure of proofs that USF&G intended to induce defendants to act upon any misrepresentation which may have been made. Similarly the trial court dismissed the argument that the doctrine of silent fraud applied, holding the plaintiff had no duty to speak since it "neither knew nor had any reason to believe that defendants' actions were governed at all by its own requirements". The Court of Appeals affirmed in a 1-1/2-page unpublished per curiam opinion. Leave to appeal was granted by this Court on April 17, 1980. 408 Mich 898 (1980).

## II. COURT OF APPEALS CONFUSION OF THE TRADITIONAL AND THE "INNOCENT" MISREPRESENTATION RULES

The pertinent part of the Court of Appeals opinion reads as follows:

"On appeal, defendants argue that the general rule that a material misrepresentation be made with the intention that it be acted upon has been modified by Michigan's "innocent misrepresentation" rule of fraud. We disagree. *Hi-Way Motor Co v International Harvester Co,* 398 Mich 330, 336; 247 NW2d 813 (1976), sets forth the elements of actionable fraud by quoting from *Candler v Heigho,* 208 Mich 115, 121; 175 NW 141 (1919), as follows:

" 'The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery.'

"Michigan's 'innocent misrepresentation' rule of fraud modifies element (3) of the aforementioned general rule, but has no effect upon element (4). *Phillips v General Adjustment Bureau,* 12 Mich App 16, 20; 162 NW2d 301 (1968), clearly states that it is the intent to deceive that is modified by the 'innocent misrepresentation' rule of fraud. Element (4) of the aforementioned general rule is required to be proven under Michigan's 'innocent misrepresentation' rule of fraud. *Phillips, supra.'*[6]

[6] The Court of Appeals reliance on *Phillips* is not well taken. Although *Phillips* quoted 23 Am Jur, Fraud and Deceit, § 120, p 908, reincorporated in 37 Am Jur 2d, Fraud and Deceit, § 195, p 257, for a summary of the innocent misrepresentation doctrine, the Court limited its analysis to the last section, holding: "Michigan requires a benefit to inure to the person making an innocent misrepresentation in order to render him liable to a party relying on it to his detriment". *Phillips, supra,* 20. Therefore, *Phillips* is not authority for the rule of *Candler* "(4) that he made it [the misrepresentation] with the intention that it should be acted upon by [the victim]". Quite the opposite, as *Phillips* cites American Jurisprudence to the contrary.

We note also that in Michigan the terms "actionable fraud" or "actionable fraudulent misrepresentation" are more encompassing than the traditional common-law definition of fraud in that they may apply to situations where the misrepresenter had no *scienter.*

The doctrine of "innocent misrepresentation" established by Justice COOLEY 115 years ago in *Converse v Blumrich,* 14 Mich 109, 123; 90 Am Dec 230 (1866), was restated in *Holcomb v Noble,* 69 Mich 396, 399; 37 NW 497 (1888) (MORSE, J., concurring), where Justice MORSE, although being "strongly impressed" with the majority rule "supported by abundant authority outside of our own State", found

"that the doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, *though made innocently,* and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity." (Emphasis added.)

Accord, *Kroninger v Anast,* 367 Mich 478, 482; 116 NW2d 863 (1962); *Boss v Tomaras,* 241 Mich 540, 543; 217 NW 783 (1928); *Aldrich v Scribner,* 154 Mich 23, 25; 117 NW 581 (1908); *Busch v Wilcox,* 82 Mich 315, 336; 46 NW 940 (1890).[7] The innocent misrepresentation doctrine still obtains in Michi-

[7] Although there were a few isolated instances of other state and federal cases intimating that *scienter* is not required, see, *e.g., Smith v Richards,* 38 US (13 Pet) 26 (1839); *Smith v Babcock,* 2 Wood & M 246 (CCD Mass, 1846); *Tuthill v Babcock,* 2 Wood & M 298 (CCD Mass, 1846); *Lockridge v Foster,* 5 Ill 569 (1843); see, generally, Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment,* 60 Va L Rev 1109, 1172-1174 (1974), the doctrine of innocent misrepresentation remained pretty much "peculiar to our jurisprudence" for many years. *Aldrich v Scribner,* 154 Mich 23, 32; 117 NW 581 (1908). Over the past several decades, however, other states have abandoned the requirement of *scienter* in actions in fraud arising out of contractual misrepresentation. See, *e.g., Gulf Electric Co v Fried,* 218 Ala 684; 119 So 685 (1928); *Westerman v Corder,* 86 Kan 239; 119 P 868 (1912); *Maser v Lind,* 181 Neb 365; 148 NW2d 831 (1967); *McDaniel v Hodges,* 176 Va 519; 11 SE2d 623 (1940). As of this writing, however, the Michigan doctrine continues to be the minority position. See, generally, 37 Am Jur 2d, Fraud and Deceit, § 195, p 258.

gan today. We have found no case overturning or disapproving of *Converse* and its progeny.[8]

The rule of "innocent misrepresentation" is well expressed in a passage from *Phillips, supra,* p 20, quoting 23 Am Jur, Fraud and Deceit, § 120, p 908, reincorporated in 37 Am Jur 2d, Fraud and Deceit, § 195, p 257:

"The minority rule is followed in at least one state in a slightly more specific formulation; it is held that where an action is brought to recover for false and fraudulent misrepresentations made by one party to another [1] in a transaction between them, [2] any representations which are false in fact [3] and actually deceive the other, and [4] are relied on by him to his damage, are actionable, irrespective of whether the person making them acted in good faith in making them, [5] where the loss of the party deceived inures to the benefit of the other."

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[8] Although if read literally *Candler v Heigho,* 208 Mich 115, 121; 175 NW 141 (1919), may appear to have adopted the majority rule by quoting 20 Cyclopaedia of Law and Procedure 13 with approval, closer examination shows this to be plainly not the case since *Candler* turned on plaintiff's failure to rely on the misrepresentation. As Justice SOURIS, writing for a unanimous Court, later noted when reviewing the innocent misrepresentation doctrine in light of *Candler* and its progeny:

"Unfortunately, without acknowledging the limited applicability in Michigan of the general rule stated in 20 Cyc * * * our opinions * * * made reference generally to its requirement of proof of knowledge. * * * But none of these cases required the Court to consider proof of *scienter,* or lack thereof. The decisions turned upon absence of proof of misrepresentation. We have found no case in Michigan contrary to the rule of *Converse v Blumrich,* when determination of the issue of *scienter* was necessary to the decision." *Irwin v Carlton,* 369 Mich 92, 97; 119 NW2d 617 (1963).

This remains true today even in light of *Hi-Way Motor Co v International Harvester Co,* 398 Mich 330, 336; 247 NW2d 813 (1976), where this Court once again cited 20 Cyc without acknowledging its limited applicability in Michigan. *Hi-Way Motor* turned on the absence of a misrepresentation and plaintiffs' failure to rely on the representations made. *Id.,* 336-337. So that there will not be any confusion as to this state's position concerning the doctrine of innocent misrepresentation we specifically overrule *Candler* insofar as it purports to hold that all six common-law requirements of fraud must be proven in an innocent misrepresentation case. As *Converse* and *Irwin* indicate, Michigan has never so required.

In comparing the traditional common-law rule as stated in the Court of Appeals opinion with the innocent misrepresentation rule set forth in American Jurisprudence, several significant differences appear.

1. The innocent misrepresentation rule occurs [1] in a transaction between the contracting parties, whereas no such requirement appears in the traditional rule.[9] The instant case of course involves a contract of indemnity.

2. The requirement of *scienter, i.e.,* knowledge of the falsity of the misrepresentation, is present in the traditional rule (3) but not present in the innocent misrepresentation rule [3] and [4]. The Court of Appeals correctly recognized this.

3. The traditional misrepresentation rule requires (4) that the misrepresentation be made with the intention that it should be acted upon by the victim. The innocent misrepresentation rule has no such requirement. The quotation from American Jurisprudence states [4] "irrespective of whether the person making them acted in good faith in making them". As to this point, of course, the Court of Appeals applied the traditional instead of the "innocent" misrepresentation rule. We shall discuss this further almost immediately.

[9] Writing for the majority of this Court Justice CARPENTER said:

"Nearly every suit to recover damages for fraud arises from a contract. The plaintiff sues to recover damages because he has been fraudulently induced to make that contract. The defendant may be, and generally is, the other party to that contract. Sometimes, however, the defendant is a third person, either the agent of the other party, or perhaps some one having no legal relation whatever to either party. For the purpose of determining whether the principle of the *Holcomb* and *Busch* cases is applicable, I draw a distinction between the suits brought against a party to the contract and the suits brought against those who are not parties to the contract. If it is brought against a party to the contract, that principle is applicable. If it is not brought against a party to the contract, that principle is not applicable." *Aldrich, supra,* 30.

4. Under the traditional misrepresentation rule it is sufficient that the victim (6) suffer an injury. Under the innocent misrepresentation rule, the victim [5] must not only suffer an injury but also the injury must inure to the benefit of the other.[10]

Briefly then, while the traditional and innocent misrepresentation actions are substantially similar, they are also significantly different. On the one hand, the innocent misrepresentation rule differs in eliminating *scienter* and proof of the intention that the misrepresentation be acted upon. However, on the other hand, the innocent misrepresentation rule adds the requirements that the misrepresentation be made in connection with making a contract and the injury suffered by the victim must inure to the benefit of the misrepresenter. Actually what this means is this: while it is unnecessary to show that the innocent misrepresenter knew his representation was false, it is necessary to show that not only does the victim suffer injury, but also the injury must inure to the misrepresenter's benefit. It also means, and this is the major legal issue in this case, that it is unnecessary to prove separately that the representer intended that the victim rely on the misrepresentation, because the representation must be made "in a transaction between them", where the misre-

[10] We note that many states adopting the strict common-law definition of fraud distinguish between an action brought in tort for fraudulent misrepresentation and an affirmative defense of misrepresentation in a contract enforcement suit. While the tort action, typically seeking damages, must prove all of the requirements in the quotation cited in *Candler,* such as *scienter* and intent to induce reliance, the affirmative defense of misrepresentation has a lesser standard. See 12 Williston, Contracts (3d ed), § 1487, pp 322-328. In Michigan, however, we have done away with the distinction in requirements when the parties to the suit are in privity of contract. Whether the doctrine of innocent misrepresentation is used to recover damages or as an affirmative defense rescinding or reforming the contract the requirements are the same, since in both instances the object is to make the injured party whole.

presenter should realize that the misrepresentation would be relied upon. This was implicitly recognized in *Boss v Tomaras,* 241 Mich 540, 543; 217 NW 783 (1928), where this Court held:

> "*It was unnecessary for plaintiffs to prove a fraudulent purpose or intent upon the part of defendants, or those representing them.* If defendants made representations to plaintiffs with reference to the value and condition of the farm and the personal property, and plaintiffs relied and acted upon them to their damage, and they were false, *the purpose or intention of defendants in making the representations would be immaterial.*" (Emphasis added.)

Accord, *Essenburg v Russell,* 346 Mich 319, 323-324; 78 NW2d 136 (1956). *Goodrich v Waller,* 314 Mich 456, 467-468; 22 NW2d 862 (1946). See *Rosenberg v Cyrowski,* 227 Mich 508, 511; 198 NW 905 (1924).

Since the rule of innocent misrepresentation only applies to parties in privity of contract, the traditional requirement that the misrepresentation be made with the intention to induce the other party to act is automatically satisfied. Whenever a party engages in contractual negotiations that party attempts to persuade the other to accept the proposed terms, and vice-versa. The parties reach the goal of forming a mutually agreeable contract based upon the representations made in the course of bargaining. Thus, in situations involving privity of contract, all representations may be presumed to be made for the purpose of inducing the other party to enter the contract.

In the case at bar, USF&G, through its agents, appears to have represented to Black and Haughey that various parties had signed the indemnity agreement and that the Jackson Bank had subor-

dinated its security interest in the assets of Kwaske Brothers. Defendants, as competent businessmen, were concerned in spreading their potential liability over as many parties as possible and subordinating their liability to as many indemnitors as possible. They indicated this concern on several occasions by inquiring whether all of the bond requirements had been met. This was obviously an important consideration for defendants. Plaintiff wanted the indemnity agreement signed. As the months passed following the loan closing, USF&G wrote increasingly demanding memos to Neubacher inquiring when he would obtain the signed indemnification agreements set forth in the bond requirements. Neubacher in turn stepped up his discussions with defendants. The trial judge found that "statements made by Mr. Neubacher subsequent to the closing would constitute a misrepresentation, although there was no evidence that it was an intentional one". Whether intentionally or unintentionally, Neubacher misrepresented a material fact in the course of trying to get defendants to sign the indemnity agreement. It is evident he did so with the hope that defendants would act upon it by signing the agreement. As the above facts indicate, in a contractual bargaining situation it may justifiably be presumed that all material representations are made with the intention to induce the other party to act, *i.e.,* enter into the contract.

Therefore we hold that independent proof of intent to induce reliance is unnecessary to maintain an action in deceit under the doctrine of innocent misrepresentation inasmuch as a material statement made in the course of contractual negotiations is presumptively made with the intention that it should be relied upon. To the extent

that *Candler v Heigho, supra,* purports to require that every traditional common-law element of fraud must be specifically proven in a case of innocent misrepresentation, it is hereby overruled. See footnote 8 and accompanying text, *supra.*

## III. THE TRIAL COURT MISAPPLIED THE RULE THAT THE MISREPRESENTATION NEED ONLY "EXERT A MATERIAL INFLUENCE"

It is well settled in Michigan that the test for determining the existence of reliance is not whether the misrepresentation was the sole influence upon the complaining party in deciding to sign the agreement but rather is "whether the * * * misrepresentation exerted a *material* influence upon the minds of [the complainants], although it might be only 1 of several motives, acting together, which produced the result". *Callihan v Talkowski,* 372 Mich 1, 6; 124 NW2d 788 (1963) (emphasis added).

Was there such reliance in the case at bar? Defendant Black certainly indicated there was and minced no words in saying so:

"*[Defense Attorney McFee]:* Now, what reliance, Mr. Black, if any, did you put upon these—this conversation with Mr. Neubacher with regard to the indemnity agreement?

"*[Defendant Black]:* Put total reliance on it.

"*Q.* In what way?

"*A.* That all of the items that were told to us were conditions of the bond and that without any one of them, the bond would not be offered, would not be made available. That meant our signatures. That meant the bank's agreement; that meant Kwaske's signatures; that meant the subcontractors' agreements to sign the bond. All of them had to be there for the bond to be made. I, therefore, assumed that any one of them

missing, there would be no bond nor could any one be missing.

"*Q.* Well, now, I'm talking specifically, though, with regard to your willingness to sign an indemnity agreement which you eventually signed. What reliance or what consideration did you place on any of this conversation or these conditions?

"*A.* If any of these monetary conditions that had to do with Kwaske's money or his equipment or the contractor's money or the bank's subordination, if those were not present, we wouldn't have signed the bond. It would have placed us in total jeopardy.

* * *

"We relied on the equipment being there for the bonding company to have as security. We relied on the working capital being available. We relied on that being available to the contractor and then to the bonding company. We relied on the assets of Kwaskes, of all the brothers and their wives, and we relied on the subcontractors signing the bond in that should there be a default, that their claims would not be made because they were guarantors under the bond. We relied on each of these totally."

From such testimony the trial judge found: "It is * * * apparent that the two men [Black and Haughey] *relied, in part,* upon the fact that there were others who would be liable in the event that indemnification was required" (emphasis added). The court also noted that while plaintiff considered the bond requirements as underwriting conditions, "[t]o the defendants, they were factors in determining the extent of their liability if they signed the agreement. * * * As a result, I find that preliminary statements were made to the defendants and *these were certainly a factor in their decision to sign the indemnity agreement"* (emphasis added).

Therefore, following the rule in *Callihan* the trial judge should have ineluctably come to the

conclusion that the defendants did rely on plaintiffs' misrepresentations.

However, inconsistently with the *Callihan* rule, he concluded:

> "It is clear to me that the defendants did not rely on the December, 1971 statement *for they did not sign the indemnity agreement until several months later* and then *only after the agreement was modified to eliminate the requirement that their wives sign it.* The effect of the December, 1971, statement by Neubacher cannot be overlooked, however, but may only be considered along with other acts of plaintiff and its agents in determining whether defendants have established their affirmative defense." (Emphasis added.)

This conclusion contains both internal inconsistencies and a failure to follow the rule of *Callihan.* The fact that defendants did not sign the indemnity agreement until after plaintiff abandoned the requirement that the defendants' wives become coindemnitors in no way requires the conclusion that the defendants did not rely on the misrepresentation that the other bond requirements were satisfied. It is a complete *non sequitur.* On the contrary, it may even be considered evidence that defendants were sure the other requirements were satisfied, because there is no evidence that they had given up on those requirements.

Nor is the trial court's holding that defendants failed to rely on the December, 1971 misrepresentations consistent with its own understanding of *Callihan.* The trial judge, in specifically recognizing the applicability of *Callihan,* correctly paraphrased the rule: "If plaintiff's misrepresentations *exerted a material influence* on the minds of defendants *although* it might be *only one of several motives acting together,* which produced the re-

sult, this is sufficient reliance." (Emphasis supplied.) Having found that defendants "relied in part" upon plaintiff's misrepresentations and that the assurances that all the bond requirements had been met "were certainly a factor in their decision to sign the indemnity agreement" the trial judge nevertheless, inexplicably, found there was no reliance on the December, 1971 misrepresentation. Since the defendants "relied in part" on plaintiff's misrepresentations, that should have been sufficient under the *Callihan* rule. That the defendants did not immediately act upon plaintiff's misrepresentation, *i.e.,* sign the indemnity contract, but instead continued to bargain on other issues had nothing to do with whether defendants did or did not rely on plaintiff's misrepresentations. The trial court's argument here is erroneous.

## IV. SILENT FRAUD

Defendants also raise the affirmative defense of silent fraud. They point out that during the negotiations leading up to the closing USF&G had flatly stated that all of the enumerated bond requirements had to be satisfied, or at least agreed to, prior to the issuance of the labor and material and the performance bonds. They claim that plaintiff's agents saw or should have seen that defendants would rely on plaintiff's insisting on these conditions, because defendants showed they were very concerned with their potential liability and were looking to the other indemnitors sharing any indemnification with defendants. The defendants therefore argue that plaintiff had a duty to inform them of the reduction in the bond requirements. In addition, since Montie and Neubacher repeatedly assured defendants that they were the only parties who had not signed the indemnity agree-

ment, the two agents had a duty to inform defendants of the misstatement when they discovered that many of the bond requirements had not been satisfied.

It is generally recognized that "[f]raud may be consummated by suppression of facts and of the truth, as well as by open false assertions", *Fred Macey Co v Macey,* 143 Mich 138, 153; 106 NW 722 (1906), since "a suppression of the truth may amount to a suggestion of falsehood". *Stewart v Wyoming Cattle Ranche Co,* 128 US 383, 388; 9 S Ct 101; 32 L Ed 439 (1888). In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure. See 37 Am Jur 2d, Fraud and Deceit, § 146.

In its original findings of November 4, 1977 the trial judge summarily dismissed defendants' silent fraud claim, holding that there was "no duty on the part of the plaintiff to make a disclosure of the waivers [of the remaining bond requirements], *they [sic] having no knowledge of the effect the original statements of Montie's had on the defendants' decision".* (Emphasis added.) On motion for reconsideration the trial court explained its ruling.

"It is true that *some of the conditions originally called for were not met. If any misrepresentation occurred, it was through a statement that they had been.* As I indicated in the finding, the proofs satisfy me:

"1. The statement of what would be required in order to issue the bond was true when made.

"2. It was not made in an attempt to induce the defendants to act, although in their minds it was in fact an inducement.

"3. The plaintiff neither knew nor had any reason to believe that defendants' actions were governed at all by its own requirements.

"4. *When the changes took place, there was no duty*

*on the part of the plaintiff to speak.* At that time and throughout, the defendants had conveyed two objections to the plaintiff—one that their wives should not be required to sign the indemnity agreement, to which the plaintiff acceded; two, that there be a list of priorities among the indemnitors, which request was denied. *Not knowing and not having reason to believe, that the defendants looked to the other conditions as 'running' to them, the plaintiff's silence cannot, in my judgment, be construed to have been breach of a duty to speak."* (Emphasis added.)

Thus the trial court concluded that plaintiff had no duty to notify defendants of the modification of the bond requirements because it found that USF &G did not know, nor reasonably should have known, that defendants were relying on the representations that all of the bond requirements had been satisfied. We find this premise to be clearly erroneous.

In the instant case the trial court specifically found that Montie and Neubacher were agents of USF&G. Therefore if the agents knew, or reasonably should have known, that defendants were relying on all the bond requirements being completed that knowledge is imputed to the principal, USF&G. Seavey, Law of Agency (West, 1964), § 97, p 174. See 1 Restatement Agency, 2d, § 272, p 591.

We hold that the trial court was clearly in error in finding that plaintiff did not know, nor reasonably should have known, of defendants' reliance. Defendants had discussed with both agents their concern over their potential liability under the indemnity agreement and were openly attempting to limit this liability by 1) making sure that all of the proposed indemnitors had signed the indemnity agreement and that the Jackson Bank had subordinated its security interest in Kwaske Brothers' assets; 2) attempting to establish a prior-

ity of collections clause; and 3) eliminating the requirement that their wives sign the indemnity agreement. Therefore we find that Montie and Neubacher, as professional insurance agents experienced in the drafting and execution of indemnity agreements, knew, or reasonably should have known, that defendants were relying on the representations that all the bond requirements had been satisfied. See Part III, *supra.*

Once this determination has been made it logically follows that the agents had a duty to disclose that all the bond requirements had not been met. "[O]ne who remains silent when fair dealing requires him to speak may be guilty of fraudulent concealment." *Nowicki v Podgorski,* 359 Mich 18, 32; 101 NW2d 371 (1960). It is the general rule "that a party to a business transaction is under an obligation to exercise reasonable care to disclose to the other party, before the transaction is consummated, any subsequently acquired information which he recognizes as rendering untrue, or misleading, previous representations which, when made, were true or believed to be true". *Strand v Librascope, Inc,* 197 F Supp 743, 754 (ED Mich, 1961). See *Wolfe v A E Kusterer & Co,* 269 Mich 424; 257 NW 729 (1934). Accord, 3 Restatement Torts, 2d, § 551(2)(c), p 119. When Montie and Neubacher discovered that their representations concerning the bond requirements were inaccurate, and because they knew that defendants were very concerned with whether all of the other parties had signed the indemnity agreement, the insurance agents had a duty to clearly inform defendants of the new situation. This duty may have been satisfied by the delivery of the USF&G letter to defendants on March 28, 1972 insofar as the letter put defendants on notice that certain

parties listed in the bond requirements had not signed the indemnity agreement as of February 4, 1972, the date the letter was written. In other words, the USF&G letter notified defendants that the December 1971 representations were not true when made. However, it is far from clear whether the letter was intended to, or actually did, alter defendants' reasonable understanding of plaintiff's previous and continual assurances that all of the bond requirements had been satisfied since the letter was delivered almost two months after it was written and called for the delivery of the remaining indemnity agreements "at an early date". (See Part V, *infra.)* Since neither the trial nor appellate court reviewed the issue of whether the duty to notify was satisfied and since this issue was not briefed by the parties, we reverse only the finding that there was no duty to inform and remand to the trial court for further consideration not inconsistent with this opinion. We note, however, that whether or not there was a satisfaction of the duty is closely aligned with the question of whether or not there was an effective misrepresentation, which is discussed next.

## V. WAS THERE AN EFFECTIVE MISREPRESENTATION?

We now turn to the record to determine whether defendants successfully proved a misrepresentation. In reviewing the findings of the trial court we are unable to ascertain whether the trial court believed that plaintiff made a misrepresentation that defendants relied upon.

The trial court found that on December 28, 1971, at the closing, plaintiff answered affirmatively to defendants' question whether all the coindemnitors had signed and the bank had subordinated its security interest in the Kwaske Brothers'

assets, thereby making a misrepresentation. Defendants became aware that the December, 1971 misrepresentation was, or had been, false when on March 28, 1972, Neubacher gave Black a photocopy of a letter he had received from USF&G Bond Superintendent Pohl. Since the letter indicated that certain bond requirements remained unfulfilled as of February 4, 1972, the date the letter was written, defendants became aware that any representations made prior to or at the December 28, 1971 closing that the bond conditions were fulfilled were false.[11] Thus after defendants received the USF&G letter on March 28, 1972 the December 1971 misrepresentations, in and of themselves, were no longer effective.

Defendants Black and Haughey, however, both claimed that Neubacher assured them upon the delivery of the USF&G letter, and subsequently, that all of the bond requirements had been satisfied since the writing of the USF&G letter. Black was very definite and unequivocal as to what took place during Neubacher's visit:

"*[Plaintiff's Attorney Carter]:* So, is it not true, from reading this [letter], you were aware that the conditions that you were relying on had not at this time been satisfied?

[11] Whether this letter satisfied plaintiff's duties to clearly notify defendants that they could no longer rely on the statements that all the other parties to the indemnity agreement had signed, or were required to sign, is unclear. The letter directed Neubacher to promptly send the signed indemnity agreements of various recalcitrant parties to USF&G. Thus, even though the letter notified defendants that some of the bond requirements had not been met as of February 4, 1972 (two months prior to defendants' receipt of the letter) the letter also reaffirmed USF&G's policy that all of the bond requirements had to be met. Therefore, when delivering the letter to defendants Neubacher may have calmed any suspicions concerning prior misstatements by telling defendants that the other parties had since signed the agreement. Indeed, this is precisely what defendants contend.

"*[Defendant Black]:* On the contrary because *I asked Mr. Neubacher what the situation was.* That does not say that on March 28th that those were not available. It says on February 4th, they were not available. *Mr. Neubacher responded that those things had been taken care of and this, our signature, our indemnity was the only thing yet remaining,* and if you'll read it carefully, you'll find that it says that." (Emphasis added.)

Black later testified that he mailed a copy of the proposed indemnity agreement and the USF&G letter to his attorney with a handwritten note at the bottom describing the meeting with Neubacher. The note, dated March 28, 1972, and bearing a March 29, 1972 time stamp of the law office, in part stated:

"I told [Neubacher] the wives *would not* be expected to sign, and that we wanted assurance that we were limiting ourselves after Kwaske Bros. Constr. Co., Inc., and after the three brothers personally. He said thats *[sic]* what all these papers mean." (Emphasis in original.)

Neubacher admitted visiting defendants' office to discuss the signing of the indemnity agreement but denied stating that the bond requirements had been subsequently met.[12]

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[12] Neubacher testified on direct examination:

"*Q. [Mr. Carter]:* You've heard testimony of Mr. Black this morning that you were at his office in Battle Creek on or about March 28 of 1972 and that you handed him or delivered to him Defendants' Exhibit O which I have just handed you. Do you recall meeting Mr. Black at his offices on March 28th of 1972?

"*A. [Neubacher]: I went to Battle Creek to his offices. I can't recall exactly what date. I know I did go to his office that one time.*

"*Q.* Do you recall delivering what's been marked as Defendants' Exhibit O to him?

"*A.* I can't recall if I delivered this to him or if it was mailed.

"*Q.* At the time which you met him, did you make any representation to him that all the conditions required for USF&G to issue the bonds had been met?

"*A. I never made that statement, no.*

The trial court nevertheless found that defendants failed to show, by clear, satisfactory and convincing evidence,[13] that oral assurances were made on March 28, 1972, declaring: "The equivocal nature of the defendants' testimony contrasted with the positive nature of Neubacher's does not convince me." However, at a later point in the decision, the trial judge declared: "I further find that statements made by Mr. Neubacher *subsequent* to the closing [December 28, 1971] would constitute a misrepresentation, although there was no evidence that it was an intentional one." (Emphasis added.)

The trial court's confusing and contradictory findings necessitate that we remand for clarification. The court found (1) there was a misrepresentation *on* December 28, 1971, (2) that defendants failed to prove by clear and convincing evidence that there was a misrepresentation on March 28, 1972, but (3) there were "statements made by Mr. Neubacher *subsequent* to the closing" of December 28, 1971 which "constitute a misrepresentation". Which statements made at what time remains unclear. If any of the misrepresentations "subsequent to the closing" were also made subsequent to the receipt of the USF&G letter on March 28, 1972 or February 4, 1972 (for the significance of the February 4, 1972 date see Black's testimony

"*Q.* You've heard testimony this morning by Mr. Haughey that probably at sometime after that March 28th meeting that you met with him in Battle Creek, did you?

"*A.* I don't believe I ever had a meeting with Mr. Haughey, himself. Most of my dealings were with Mr. Black.

"*Q.* Did you ever at any time represent to Mr. Haughey that the conditions which USF&G had required for issue of the bond had been satisfied?

"*A. No, sir.*" (Emphasis added.)

[13] See *Youngs v Tuttle Hill Corp,* 373 Mich 145, 147; 128 NW2d 472 (1964); *A & M Land Development Co v Miller,* 354 Mich 681, 686; 94 NW2d 197 (1959).

above), then defendants may have reasonably relied on them and thereby have satisfied the first element necessary to maintain their affirmative defense of innocent misrepresentation. If, on the other hand, the trial court finds that none of the "statements made by Mr. Neubacher subsequent to the closing" were made on or after March 28, 1972 or February 4, 1972 then there can be no effective misrepresentation upon which defendants could have reasonably relied.

Furthermore, the antepenultimate paragraph of the trial judge's ten-page findings reads as follows:

> "As a result, I find that preliminary statements were made to the defendants and these were certainly a factor in their decision to sign the indemnity agreement."

Obviously if the statements exerted a material influence on the final decision to sign the indemnity agreement, and, if they were false, as was the case, then the only logical conclusion is that there was an actionable misrepresentation.

However, the trial judge in the next paragraph discusses the fact that plaintiff's misrepresentations were neither intentionally false nor made with the intention that defendants should rely upon them. Both propositions, of course, are extraneous to a consideration of innocent misrepresentation and consequently legally erroneous if applied to the findings in the antepenultimate paragraph.

Nonetheless, in the ultimate paragraph, the trial judge finds "that the defendants have failed to establish their affirmative defense". On the basis of the two preceding paragraphs this is a legally erroneous conclusion, and standing alone would be subject to reversal. But these three criti-

cal paragraphs do not necessarily jibe with the rest of the trial judge's findings and only add to the confusion.

Therefore we remand to the trial court to find whether defendants reasonably relied upon misrepresentations made by plaintiff or his agents at the time of their signing the indemnity agreement. The trial court shall provide defendants an opportunity to present evidence concerning the discussions between the parties over establishing a priority of collection among the indemnitors.[14] Insofar as the defendants no longer allege that a priority arrangement was contracted, the testimony presented shall only be considered for its probative value concerning 1) whether there were subsequent misrepresentations that the bond requirements had been satisfied, 2) whether defendants

[14] Defendants had claimed in their answer that the indemnity agreement contained a priority of collections clause. In fact, however, the clause was in an earlier proposed draft of the agreement which plaintiff had refused to accept. The impasse was resolved when plaintiff agreed not to require defendants' wives to become indemnitors in exchange for defendants agreeing to sign the indemnity agreement without demanding a priority of collection clause. When defense counsel realized that he had mistakenly read the wrong agreement in answering the complaint he abandoned the priority defense. Thus plaintiff objected to the admission of testimony concerning past discussion between the parties concerning priority of collection among the indemnitors. Defense counsel unsuccessfully attempted to explain his position to the court:

"*The Court:* What is the materiality of [the statements by agent Montie suggesting the possibility of arranging for a priority of collection]?

"*Mr. McFee:* Well, from the standpoint that *there were to be other Kwaskes on the agreement and all of these people were on the master surety agreement.*

"*The Court:* I think, if I understand your objection, Mr. Carter, to this specific question as to whether there was to be some priority to demand for liability.

"*Mr. McFee:* We are not alleging that there was to be any specific priority, but I'm saying this was part of the conversation that took place at that time and it *shows how important these representations were to my client's mind,* all of these things.

"*The Court:* I'm going to sustain the objection. I don't see the materiality of it." (Emphasis added.)

were concerned with the scope of their potential liability and communicated this to plaintiff through its agents, and 3) whether the defendants acted in reliance on the fact that there would be other indemnitors to the agreement.

## VI. REMEDY

Should the trial court find defendants have satisfied their burden of proof in raising the affirmative defense of innocent misrepresentation or that there was silent fraud, then the court will be given the task of awarding an appropriate remedy. Defendants seek to have the entire indemnity agreement set aside, arguing that "it is only equitable to void the agreement when it is determined that the assurances were false". Plaintiff, on the other hand, argues that the indemnity agreement should be enforced as written.

The defenses of innocent misrepresentation and silent fraud are not based in law but in equity. The equitable court awarding a remedy must look to the most just result. Therefore, should the court on remand find there was innocent misrepresentation or silent fraud it must decide which remedy would be the most equitable under the unique circumstances of the case. The court is not confined to the polar opposite remedies urged by the opposing parties: full enforcement or total abrogation of the indemnity agreement. Other remedies, such as reformation, restitution, or partial enforcement of the contract, may be examined. We leave the resolution of the proper remedy, if any, to the court below.

## CONCLUSION

The Court of Appeals erred in attempting to

decide a case of innocent misrepresentation on the basis of failure to prove an element required only in the traditional common-law rule of misrepresentation but not in the innocent misrepresentation rule. Its judgment is consequently reversed. The trial court erred in the same particular. It in addition erred in misapplying the *Callihan* rule as to what constitutes reliance on a misrepresentation. It also erred in misapplying the rule of silent fraud. Therefore, we remand for consideration whether plaintiff satisfied its duty to inform defendants that the earlier representations that all of the bond requirements had been satisfied were false in finding plaintiff knew or reasonably should have known of defendants' reliance on the misrepresentation. Finally, we are unable to read the trial court's findings as to whether or not there was an effective misrepresentation. For these reasons we reverse and remand to the trial court to reconsider the case in the light of the rulings of law we have made and to clarify its findings on the fact of misrepresentation. In case it finds there was in fact an actionable misrepresentation we have provided the trial court some guidance on the nature of the remedy that would be appropriate.

LEVIN, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred with WILLIAMS, J.

KAVANAGH, J. *(for remand).* I agree that this matter must be remanded, for it is not clear what facts the trial court found as a basis for his decision.

I write separately, however, because I fear the discussions of "innocent misrepresentation" and "fraudulent misrepresentation" and "silent fraud" will confound the confusion which has marked the handling of this case. However valid or important

such distinctions might be in suits for damages, the claim of misrepresentation here is asserted as a defense in a suit to enforce a contract.

Plaintiff's suit to enforce the indemnity contract is resisted by defendants' claim that they were induced to enter into the contract by the misrepresentations of the plaintiff's agents.

If the trial court finds that the plaintiff

1) Made a representation of a material fact,

2) That such representation was false,

3) That the defendants relied on such representation as all or part of the inducement to enter into the contract, *Converse v Blumrich,* 14 Mich 109; 90 Am Dec 230 (1866), he should grant relief to the defendants.

Unless the trial court makes all the above findings, he should enforce the contract.

RYAN, J., concurred with KAVANAGH, J.

COLEMAN, C.J., did not participate in the decision of this case.

PEOPLE v URYNOWICZ

Docket No. 66737. Decided November 23, 1981. On application by the people for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and reinstated the judgment of the circuit court.

Alphonse J. Urynowicz was convicted on his plea of guilty in Jackson Circuit Court, Gordon W. Britten, J., of first-degree criminal sexual conduct. The defendant agreed to plead guilty in return for dismissal of a supplemental information charging him under the habitual offender statute and the prosecutor's promise not to proceed against him with charges of criminal sexual conduct as to certain other acts which had been investigated by the State Police. On appeal the defendant claimed that because he had a prior conviction of a sexual offense, the trial judge should have advised him of the five-year mandatory minimum sentence for subsequent criminal sexual offenses required by the criminal sexual conduct statute. The Court of Appeals, Danhof, C.J., and Bronson and Cynar, JJ., reversed in a memorandum opinion and, on rehearing, held that the fact that the defendant was not specifically charged under the criminal sexual conduct statute as a second offender did not change the requirement that he must be advised of the mandatory minimum sentence for a second offense of criminal sexual conduct (Docket No. 48277). The people apply for leave to appeal. *Held:*

Statutory provisions with mandatory enhancement of the sentence for second offenders require that, before a defendant's punishment for the current offense can be enlarged, the earlier conviction must be charged and proved. The defendant here was not charged as a second offender under the criminal sexual conduct statute. Consequently, there was no mandatory minimum of which advice was required in the guilty-plea proceeding.

The judgment of the Court of Appeals is reversed, and the judgment of the circuit court is reinstated.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,*

Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people.

*Myron E. Sanderson* for defendant.

PER CURIAM. The question before us in this criminal sexual conduct case is the failure of the trial judge to advise the defendant, while taking his guilty plea, of a mandatory minimum sentence, as required by GCR 1963, 785.7(1)(d). While it is conceded that the advice was not given, the prosecutor maintains that it was not necessary in this case because the defendant must first have been charged as a second offender under MCL 750.520f; MSA 28.788(6) before the mandatory minimum could be imposed. Since the defendant was not so charged, says the prosecutor, there was no mandatory minimum of which to advise him. We agree.

I

The defendant was convicted on May 4, 1973, in Jackson Circuit Court of gross indecency. The information in this case charged that the defendant

"did engage in sexual penetration with another person, * * * said person being under 13 years of age; contrary to [MCL 750.520b(1)(a); MSA 28.788(2)(1)(a)]."

The defendant was also charged as a second-felony offender under the habitual criminal statute, MCL 769.10; MSA 28.1082. He pled guilty of first-degree criminal sexual conduct on July 13, 1979, in return for dismissal of the supplemental information charging him as an habitual offender and the prosecutor's promise not to proceed against him as to other acts which the state police investigation

disclosed might give rise to further criminal sexual conduct charges. The defendant was sentenced to life imprisonment.

II

The defendant was told that the offense of which he pled guilty carried a maximum sentence of life imprisonment. The Court of Appeals initially reversed in a memorandum opinion of October 9, 1980 because of the trial court's failure to advise the defendant of the mandatory minimum five-year sentence under MCL 750.520f; MSA 28.788(6), as required by GCR 1963, 785.7(1)(d). On November 20, 1980, the Court of Appeals granted the prosecutor's application for rehearing to consider the question of "whether defendant must be charged as a second or subsequent offender in order to be subject to the mandatory five-year penalty of MCL 750.520f; MSA 28.788(6)". In an unpublished per curiam opinion of February 10, 1981, the Court of Appeals adhered to its earlier decision:

"The language of the statute clearly requires the mandatory minimum for second or subsequent offenders. There is no indication of a legislative intent to make applicability of the mandatory minimum a matter for the discretion of the prosecutor. See *People v McFadden,* 73 Mich App 232; 251 NW2d 297 (1977).

"The prosecutor claims that defendant could not be subjected to the mandatory minimum sentence under principles of due process, stating that fair notice of the minimum sentence provision was not given. We agree that defendant was entitled to some notice of the mandatory minimum; the court should have informed him of it at the plea proceeding as required by GCR 1963, 785.7(1)(d). We do not accept the prosecutor's analogies to cases arising under the habitual offender act, MCL 769.13; MSA 28.1085 and the driving under the influ-

ence of liquor (DUIL) statute, MCL 257.625; MSA 9.2325. The habitual offender act allows the prosecutor to decide whether or not to seek the enhanced sentence and requires a specific charge. Therefore, concepts of fair notice alluded to in *People v Fountain,* 407 Mich 96; 282 NW2d 168 (1979), require that the defendant be informed at an early stage that the additional sentence is being sought. The habitual offender act and the DUIL statute both involve increase to the maximum sentence rather than a mandatory minimum."

III

A

The statute in question provides:

"(1) If a person is convicted of a second or subsequent offense under section 520b, 520c, or 520d [first-, second-, or third-degree criminal sexual conduct], the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years.

"(2) For purposes of this section, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under section 520b, 520c, or 520d or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense." MCL 750.520f; MSA 28.788(6).

The defendant's 1973 conviction of gross indecency would bring him within the definition of a second offender in § 520f(2).

B

We have said in the past that second-offender provisions with mandatory sentence enhancement require that the information must charge the earlier conviction before a defendant may be liable

for the additional punishment. For example, in *People v McDonald,* 233 Mich 98; 206 NW 516 (1925), the Court reviewed a case in which the charge was possession of intoxicating liquor, second offense. The statute provided "and for every second and subsequent offense * * * he shall * * * be sentenced to imprisonment * * *". 1919 (Ex Sess) PA 3. On appeal, McDonald alleged that proof had not been offered at the examination that he had been earlier convicted of a similar offense. The Court said:

> "The question first presented is whether, without such proof, an averment thereof may be made in the information and a conviction and sentence therefor sustained. The validity of the provision for additional punishment for second offenders was passed upon and sustained in *People v Roth,* 228 Mich 447 [200 NW 136 (1924)]. The information must contain an averment of former conviction, and there must be proof on the trial to maintain it, to justify a conviction and sentence therefor." 233 Mich 100-101.

In *People v Butler,* 122 Mich 35; 80 NW 883 (1899), the defendant was sentenced under 1897 CL 11786, which provided that had he been twice before sentenced to imprisonment, "he shall be sentenced to imprisonment at hard labor for life, or for a term of not less than seven years in addition to the punishment prescribed by law for the offense of which he shall then be convicted". The prosecutor had charged in the information only the fact of former convictions, not stating the times and places of the prior convictions, and the defendant thought the latter omission to be error. The Court said that the information was sufficient. The statute in that case did specifically require pleading of the prior offenses in the information, but the Court said the statute "does not change

the rule as to the substantial requisites of an indictment * * *. The information must inform the accused of the nature of the offense charged". 122 Mich 37.

More recently, in *People v Mellor,* 302 Mich 537; 5 NW2d 455 (1942), this Court departed from the *Butler* and *McDonald* path. The prosecution was for driving under the influence of liquor, and Mellor was sentenced as a second offender. His claim was that the aggravation of sentence for a 1941 offense by a 1935 conviction violated the six-year statute of limitations. In the course of rejecting this argument, the Court said:

"Whether the statute of limitations has run against the offense committed in 1935 is immaterial as defendant was not charged or prosecuted for that offense. He was charged and prosecuted only for the offense alleged to have been committed on April 27, 1941. The former conviction was merely an additional fact or circumstance to be considered in imposing a severer penalty for the second conviction. Nor do we think the information is faulty because it does not contain two counts. The prior offense is not an element of the instant offense. It merely applies to punishment after conviction." 302 Mich 540.

In *People v Miller,* 357 Mich 400; 98 NW2d 524 (1959), the prosecutor charged driving under the influence of liquor, second offense, and offered in evidence the prior conviction. The judge instructed the jury that in order to convict, it must find the defendant was the same person who was convicted earlier of driving under the influence of liquor. Without discussion or reference to *Mellor,* the Court said, "In this procedure there was no error". 357 Mich 410. Justice LEVIN tried to reconcile *Miller* and *Mellor* in *People v Bosca,* 25 Mich App 455, 457-458; 181 NW2d 678 (1970):

"In *Miller* the Court made no reference to its earlier

decision in *Mellor.* The holdings in the two cases are not inconsistent. In *Mellor* the defendant claimed that because his first conviction preceded his second conviction by more than six years, the statute of limitations had run and he could not be sentenced as a second offender. The Court's statements, in rejecting this contention, that the 'former conviction was merely an additional fact or circumstance to be considered in imposing a severer penalty for the second conviction' and that 'the prior offense is not an element of the instant offense,' cannot properly be read as negating the need both to charge and prove, as was done in *Miller,* the earlier conviction before the punishment for the currently charged offense can be enhanced. The currently charged offense can in truth be charged and proved without reference to the earlier conviction. In that sense the earlier conviction is not, as said in *Mellor,* an element of the 'instant [or current] offense.' But, nevertheless, before a defendant's punishment for the current offense can be enlarged, the earlier conviction must be charged and proved."

In *People v Wright,* 405 Mich 832 (1979), the Court examined the sentence enhancement provision of the Controlled Substances Act. MCL 335.348; MSA 18.1070(48). The defendant had been charged only with delivery of cocaine and conspiracy to deliver cocaine, but he was sentenced as a second offender to twice the term of imprisonment authorized. The Court said that doubling the sentence was improper and cited *Oyler v Boles,* 368 US 448; 82 S Ct 501; 7 L Ed 2d 446 (1962), in which the United States Supreme Court required, as a matter of due process, that a defendant receive reasonable notice and an opportunity to be heard on a recidivist charge.

C

We believe that Justice LEVIN captured the essence of this Court's earlier decisions when he wrote for the Court of Appeals in *Bosca* that "before a defendant's punishment for the current offense can be enlarged, the earlier conviction

must be charged and proved".[1] This defendant was not charged under § 520f. Consequently, there was no mandatory minimum of which advice under GCR 1963, 785.7(1)(d) was required. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgment of the Court of Appeals and reinstate the circuit court judgment.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

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[1] We note also his statement "that steps should be taken to avoid placing before the jury [the defendant's] past criminal record before a verdict is rendered on the currently charged offense". 25 Mich App 459.

PEOPLE v KING

Docket No. 65247. Decided November 23, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and remanded the case to Genesee Circuit Court for further proceedings. Rehearing denied *post,* 1104.

Russell E. King was charged with first-degree murder for shooting Rick Stroble to death. The 67th District Court, Gerald D. Snodgrass, J., bound the defendant over for trial on a charge of manslaughter. The Genesee Circuit Court, Ronald W. Black, J., reviewed the magistrate's order for abuse of discretion and affirmed. The Court of Appeals, D. C. Riley, P.J., and R. B. Burns and N. J. Kaufman, JJ., on appeal by the prosecutor by leave granted, reversed and remanded for trial on the charge of first-degree murder (Docket No. 45074). Defendant applies for leave to appeal.

In a per curiam opinion signed by Justices Kavanagh, Levin, Fitzgerald, and Ryan, the Supreme Court *held:*

The magistrate did not abuse his discretion in considering the evidence presented in defense and refusing to bind the defendant over on a charge of murder.

1. The function of the examining magistrate is to determine whether a crime has been committed and whether there is probable cause for charging the defendant with that crime. The magistrate must have good reason to believe the accused to be guilty of the crime charged and has the duty to pass on the weight and competency of the evidence and the credibility of the witnesses, and may consider evidence in defense. The magistrate should not, however, discharge when the evidence conflicts or raises reasonable doubt of the defendant's guilt, because that presents the classic issue for the trier of fact.

2. Without regard to the defense's evidence of intoxication and provocation, the Court of Appeals found the prosecution had presented evidence on each element of first-degree murder and therefore found an abuse of discretion in the magistrate's failure to bind over on that charge. In so doing, the Court of Appeals too narrowly conceived the magistrate's authority. The inquiry is not limited to whether the prosecution has presented

evidence on each element of the offense. The magistrate is required to make his determination after an examination of the whole matter. If the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged, but may bind him over on a lesser offense as to which he is so satisfied.

3. In this case, the magistrate, upon examination of the whole matter, found that there was insufficient reason to believe that the offense of first- or second-degree murder had been committed because, on the evidence presented, malice and premeditation were lacking. He found that the offense of manslaughter had been committed and probable cause to believe that the defendant had committed it. Review of the record discloses no abuse of discretion in the magistrate's refusal to bind over on a charge of first- or second-degree murder.

The judgment of the Court of Appeals is reversed, and the case is remanded to Genesee Circuit Court for further proceedings on the charge of manslaughter.

Justice Moody, joined by Chief Justice Coleman, dissenting, would hold that there was competent evidence produced on each element of the crime charged and that the examining magistrate abused his discretion by concluding otherwise.

1. The object of the preliminary examination is not to prove guilt or innocence beyond a reasonable doubt; the test of the sufficiency of evidence produced at a preliminary examination requires only that there must be evidence on each element of the crime charged or evidence from which those elements may be inferred. A defendant should not be discharged when the evidence at the preliminary examination is conflicting or raises reasonable doubt of guilt. Such questions should be left for the jury upon the trial. The standard for appellate review of a magistrate's decision at a preliminary examination is that the decision should not be disturbed unless a clear abuse of discretion is demonstrated.

2. The facts presented to the magistrate in this case demonstrated malice. The actions of the defendant could reflect at a minimum an intent to do great bodily harm or wanton and willful disregard of the fact that the natural tendency of his behavior was to cause death or great bodily harm. Testimony at the preliminary examination showed that there had been previous antagonism between the defendant and the decedent and that the defendant had been drinking liquor for a substantial time immediately before the killing. The defendant informed

the decedent approximately one-half hour before that he was going to "blow him away". The defendant then drove to the house of his estranged wife where the decedent was staying, armed with a loaded .22-caliber pistol. He demanded entry into the house, and tried to kick the door down. The defendant fired the fatal shot through the door while the decedent was leaning against it in an attempt to block the defendant's entry. The defendant burst into the house, and stated, in effect, "You got what you wanted". A struggle with other occupants of the house ensued.

3. In making his determination, the magistrate did not indicate that he found the evidence either incompetent or without credibility. There was credible evidence both supporting and negating the existence of malice, premeditation, and deliberation. The finding that the defendant was so intoxicated as to negate the requisite elements of first-degree murder and that the actions of the defendant did not at a minimum constitute a wanton and willful disregard of the likelihood that death or great bodily harm could result, are issues appropriately left to the finder of fact upon trial. Under the facts and circumstances of this case the magistrate clearly abused his discretion.

Justice Williams, dissenting, would remand the matter to the examining magistrate for arraignment on the charge of first-degree murder. He agreed with the opinion of the Court that the magistrate's duty is not only to determine whether the prosecution's evidence established a prima facie case but whether the defendant's evidence destroyed the prima facie case either by contrary evidence or by establishing an affirmative defense. However, in this case the examining magistrate invaded the province of the trier of fact as to whether there was a defense. The magistrate has the duty to consider an attempt by the defendant to prove a defense. However, if there is conflicting evidence on the defense, the case is subject to trial where the prosecution has otherwise made a prima facie case. The testimony at the preliminary examination in this case shows a factual conflict as to issues of defense presented, and therefore the examining magistrate abused his discretion in dismissing the charges of first- and second-degree murder.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people.

*Reese W. Stipes* for defendant.

PER CURIAM. We address the scope of the examining magistrate's function and appellate review of that function when an appellant alleges error in the decision of the examining magistrate, because our reading of the Court of Appeals opinion in this case and *People v Oster,* 67 Mich App 490; 241 NW2d 260 (1976), suggests a need to clarify our decisions.

I

The defendant was charged with first-degree murder for shooting Rick Stroble to death on December 30, 1978. The evidence at the preliminary examination showed that the defendant and his wife were separated and in the process of obtaining a divorce. The decedent was living with the defendant's wife and children. From midafternoon on December 29, until the early morning hours of December 30, the defendant consumed a considerable quantity of intoxicants. Around 6:30 a.m. on December 30, the defendant telephoned his wife's residence, spoke with the decedent, and made a threatening comment. The decedent taunted the defendant. Armed with a .22-caliber pistol, the defendant appeared at the door of the house 30 minutes later. The decedent attempted to block the defendant's entry into the house by leaning against the door. The defendant shot through the door, killing the decedent.

Barbara King, the defendant's daughter, stated that she had never heard the defendant threaten the decedent and had never seen any problem between them. Ms. King said that the defendant was drunk and stumbling and that his talk was slurred. James King, the defendant's son, testified

that while his father had threatened the deceased before, he had never taken any action; and he had never seen his father violent with the decedent. James King also acknowledged that defendant's speech was slurred and that he staggered. Larry Rushton testified that he drank with the defendant from 2 p.m. December 29 until 5:30 a.m. December 30. The defendant was driving erratically on the road and had smoked marijuana at a party.

The Kings testified that when the defendant came to the house he was acting "crazy", "weird"; no one answered the door for two or three minutes when he came; he would not have known who was holding the door, or who was behind it when he shot. Defendant's friend, Dixie Pearce, to whose home he went after the shooting, testified concerning the defendant's statements that he had gone home to get his keys to the Duck Club to which he belonged; they would not let him in; he shot through the door; and the decedent was in the way.

The examining magistrate bound the defendant over for trial on the charge of manslaughter:

"It is my obligation as a district judge to determine whether or not a crime has been committed and what crime and whether or not there is reasonable or probable cause to believe the respondent did perpetrate that crime. We're dealing with statutory offenses for purposes of the record and for enumeration, [MCL 750.316; MSA 28.548] indicates that all murder which shall be perpetrated by any means of poison, lying in wait, or any kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate arson, et cetera, shall be first-degree murder.

* * *

"Intoxication, in order to constitute defense to specific intent crimes, in this case only, first-degree murder,

must be so complete that defendant didn't know what he was doing, or if he knew what he was doing, he didn't know why or didn't know that what he was doing was naturally culpable or—ah—causing harm alleged to be intended. That's a—ah—Court of Appeals case cited *[People v Berryhill,* 8 Mich App 497; 154 NW2d 593 (1967)]. Evidence of intoxication can—ah—negate requisite specific intent necessary to sustain defendant's conviction for a crime which requires proof of specific intent. In this case it would be only relative to the first-degree murder charge. There is no error in the court's refusal to instruct on a defense of intoxication where the defendant was charged with second-degree murder, which is not a specific intent crime. That comes from the case previously cited. To entirely eliminate voluntary intoxication as a defense to a specific intent crime defendant must while sober have formed the specific intent requisite to commission of the particular crime he is charged with—ah—committing, that, to-wit: is the crime charged of first-degree murder, not speaking yet to second-degree murder.

"It is my opinion, after listening to the facts of this case that I do not find sufficient evidence to warrant the charge of first-degree murder.

"Therefore, we're talking about second-degree murder and we're talking about manslaughter. What degree of crime has this court found? Speaking to that, there is a specific reference to that exact point in *[People v Lilley,* 43 Mich 521; 5 NW 982 (1880)]. It says, when reflection and deliberation are present and it appears that the assault was made with the intent to take a life, under circumstances where the killing would—killing would not be lawful—ah—or excusable then if the death should ensue the assaulter would be guilty of assault with intent to commit murder.

"In this particular case, I have difficulty finding that the respondent acted with the intent to take a life. I'll indicate that there is sufficient evidence upon this record to indicate that he did not.

"It is not necessary, as the Court so aptly points out in *[People v Raher,* 92 Mich 165; 52 NW 625 (1892)], it is not necessary for the prosecution to show that the assaulter extended, entertained a specific intent to kill

the person who was injured where it appears that he committed an assault under such circumstances that the natural and usual consequences would be to take a human life.

"I find it extremely difficult, if not impossible, to find that the natural and unusual *[sic]* consequence of firing that gun through that door in that situation which I listened to testimony for six hours constitutes a natural and usual consequence which could be found in the respondent.

"Therefore, it is my opinion that the prosecution has established the burden of proof to show that the crime of manslaughter has been committed and that there is reasonable or probable cause to believe the respondent committed that offense."

## II

The prosecutor sought review of the district judge's decision on binding over. The circuit court identified its task as a review for abuse of discretion under *People v Doss,* 406 Mich 90; 276 NW2d 9 (1979), and *People v Dellabonda,* 265 Mich 486; 251 NW 594 (1933), and affirmed. The prosecutor pursued the issue to the Court of Appeals, and that Court reversed in an unpublished per curiam opinion of May 8, 1980:

"As the magistrate noted, there was evidence tending to negate deliberation, premeditation and the specific intent to kill. Such evidence suggested defendant might have been drunk at the time, that he was angry, jealous and possibly provoked by the decedent. Yet, it seems clear that, on the magistrate's inquiry as to whether a crime had been committed, there was evidence of first-degree murder. *The magistrate's inquiry should have ended at that point and the defendant should have been bound over on the first-degree murder charge.* By weighing defenses and analyzing conflicting evidence, the magistrate exceeded the scope of his responsibilities. This is best illustrated by a [quotation] from *People*

*v Oster,* 67 Mich App 490, 496; 241 NW2d 260 (1976). There, in response to defendant's contention that the element of malice was negated by provocation, we upheld that magistrate's bindover upon an open murder charge, stating:

" 'It must be remembered that it is not the function of the examining magistrate to carefully weigh the evidence and discharge the accused when the evidence conflicts or raises a reasonable doubt of his guilt; such questions should be left for the jury. *People v Medley,* 339 Mich 486; 64 NW2d 708 (1954). The evidence presented at the examination showed that defendant stabbed Goodman with a knife and that Goodman died as a result. This clearly is sufficient to bind defendant over on a second-degree murder charge, as the malice necessary for that charge may be presumed from the use of a deadly weapon to perpetrate the killing. *People v Juniel* [62 Mich App 529; 233 NW2d 635 (1975)], *People v Wright,* 25 Mich App 499; 181 NW2d 649 (1970), *lv den* 384 Mich 804 (1971).

" 'Defendant's argument that the inference of malice was negated by provocation is inapposite. That is not a question for the examining magistrate. Defendant would expand the function of magistrate to trial judge and jury.'

"In accord: *People v Goodchild,* 68 Mich App 226; 242 NW2d 465 (1976), *People v [Bruce] Ramsey,* 89 Mich App 468; 280 NW2d 565 (1979), and *People v Doss, supra.*

"In view of the foregoing, we find that the magistrate exceeded the scope of his powers and thereby abused his discretion. Accordingly, we reverse and remand this cause for trial upon the charge of first-degree murder." (Emphasis added.)

The defendant is now before this Court with an application for leave to appeal.

## III

The examining magistrate's function is to determine whether a crime has been committed and

whether there is probable cause for charging the defendant with that crime. MCL 766.13; MSA 28.931.

"The magistrate, before whom any person is brought upon the charge of having committed an offense not cognizable by a justice of the peace, shall proceed to examine the complainant and the witnesses in support of the prosecution, on oath, in the presence of the prisoner, *in regard to the offense charged, and in regard to any other matters connected with such charge, which he may deem pertinent.*—[1871 CL 7855]. And it is only when it shall appear from such examination that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, that he can be held for trial. —[1871 CL 7859, 7860]. The clear evident intent of this statute was, that the magistrate should exercise his best judgment in the matter; that he should from the testimony determine whether the crime charged in the warrant had been committed, or where, as in this case, the offense charged includes one or more of lesser degree, the magistrate should determine which offense, if any, had been committed, so that the accused might not be placed upon trial in the circuit to answer to a charge different or greater than the one upon which he had been examined, and to answer which he had been held for trial." (Emphasis changed.) *Yaner v People,* 34 Mich 286, 288-289 (1876).

The magistrate "must have * * * good reason to believe appellant guilty of the crime charged".[1] The magistrate has "the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses"[2] and may consider evidence in defense.[3] He or she

[1] *Dellabonda, supra,* 265 Mich 490.

[2] *People v Paille #2,* 383 Mich 621, 627; 178 NW2d 465 (1970); *People v Talley,* 410 Mich 378; 301 NW2d 809 (1981).

[3] See, *e.g., Doss, supra,* suggesting the magistrate may consider the defense of justification.

should not, however, discharge "when evidence conflicts or raises reasonable doubt of [the defendant's] guilt",[4] since that presents the classic issue for the trier of fact.

Without regard to the defense's evidence of intoxication and provocation, the Court of Appeals found the prosecution had presented evidence on each element of first-degree murder and therefore found an abuse of discretion in the magistrate's failure to bind over on that charge. In so doing, the Court of Appeals too narrowly conceived the scope of the inquiry. The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The magistrate is required to make his determination "after an examination of the whole matter".[5] Although the prosecution has presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged but may bind him over on a lesser offense as to which he is so satisfied.

In the instant case, the magistrate, upon an examination of the whole matter, found that there was sufficient evidence to indicate that the defendant did not intend to take a life and that he had not committed an assault under such circumstances that the natural and usual consequences would be to take a life. He found insufficient reason to believe that the offense of first- or second-degree murder had been committed because,

[4] *Doss, supra,* 406 Mich 103; *People v Medley,* 339 Mich 486; 64 NW2d 708 (1954).

[5] *People v Evans,* 72 Mich 367, 387; 40 NW 473 (1888).

based on the evidence presented, malice and premeditation were lacking. He found that the offense of manslaughter had been committed and probable cause to believe that the defendant had committed it. Our review discloses no abuse of discretion in the magistrate's refusal to bind over on first- or second-degree murder.

In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgment of the Court of Appeals and remand the case to Genesee Circuit Court for further proceedings on the charge of manslaughter. The people's motion to direct the Genesee Circuit Court to arraign the defendant and determine the matter of bond thus becomes moot and is denied.

KAVANAGH, LEVIN, FITZGERALD, and RYAN, JJ., concurred.

BLAIR MOODY, JR., J. *(dissenting).* I respectfully dissent from the opinion of the Court. The underlying issue presented in this case is whether there was competent evidence before the magistrate on which to base a finding that the crime charged, murder in the first degree, had been committed. Upon a close review of the preliminary examination transcript it is clear that there was competent evidence produced on each element of the crime charged. The magistrate abused his discretion by concluding otherwise. Accordingly, I would affirm the opinion of the Court of Appeals and remand this matter for trial upon the charge of first-degree murder.

Under MCL 766.13; MSA 28.931, the magistrate has the duty to bind a defendant over for trial if it is found at the conclusion of the preliminary examination that a felony has been committed and

there is probable cause to believe that the defendant committed it.

In conducting this function, there is no question that the magistrate should consider all testimony in regard to the offense charged and any other pertinent matters connected with such charge. Furthermore, the magistrate should exercise his or her best judgment in the matter and determine whether competent evidence supports the charged crime or some lesser included offense, if any. See *Yaner v People,* 34 Mich 286 (1876).[1]

It is also clear that in determining whether a crime has been committed, a magistrate has the right and duty to pass judgment on the weight and competency of the evidence as well as the credibility of the witnesses. *People v Paille #2,* 383 Mich 621, 627; 178 NW2d 465 (1970). The object of the preliminary examination is not to prove guilt or innocence beyond a reasonable doubt. *People v Doss,* 406 Mich 90, 103; 276 NW2d 9 (1979). However, the test of the sufficiency of evidence produced at a preliminary examination requires that there must be evidence on each element of the crime charged or evidence from which those elements may be inferred. *Doss, supra,* 100-101.

Regarding the requirement of "probable cause", our Court has previously offered direction in *People v Asta,* 337 Mich 590, 609-610; 60 NW2d 472 (1953), as follows:

"The matter of 'probable cause', as the expression is used in the statute, has reference to the connection of

[1] The opinion of the Court quotes a passage from *Yaner.* The *Yaner* Court thereafter also stated:

"We do not desire to be understood that the magistrate must nicely weigh evidence as a petit jury would, or that he must discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; all such questions should be left for the jury upon the trial." *Yaner, supra,* 289.

the defendants with the alleged offense rather than to the *corpus delicti,* that is, to the fact that the crime charged has been committed by some person or persons."

See also *Doss, supra,* 100; *Paille #2, supra,* 628.

Turning to an assessment of whether the crime charged has been committed, *the basic query is whether competent evidence has been presented on which to base a finding that the crime charged, or some included offense, has been committed.* In *Asta,* where the defendants were charged with the crime of conspiracy, the circuit judge found that there was a "complete lack of such proof". Our Court stated:

"A careful analysis of the proofs offered on the examination impels us to a like conclusion.

* * *

"The circuit judge correctly determined that there was no competent evidence taken on the examination to show that the crime charged against defendants had been committed." *Asta, supra,* 610, 614.

Likewise, in *People v Medley,* 339 Mich 486; 64 NW2d 708 (1954), the defendant was bound over after preliminary examination on a charge of assault with intent to kill. The circuit court granted a motion to quash the information on the basis that there was no showing that the defendant intended to kill the victim. This Court reversed, stating:

"The question of what his intention was in so doing may be determined from the evidence produced at the examination.

* * *

"In our opinion there was evidence produced at the

examination on the question." *Medley, supra,* 493. See also *People v Auerbach,* 176 Mich 23, 42; 141 NW 869 (1913).[2]

Finally, with respect to the responsibility of the magistrate, a defendant should not be discharged when the evidence is conflicting or raises reasonable doubt of guilt. Such questions should be left for the jury upon the trial. *Doss, supra,* 103.

In this regard the *Medley* Court approved as "well stated" the following passage from 1 Gillespie, Michigan Criminal Law & Procedure (1st ed), § 224, pp 254-255:

" 'The object of the examination is not to determine guilt or innocence, and it is not as necessary to make strict proof as on the trial. The magistrate does not act judicially in a technical sense. He is not required to nicely weigh the evidence as a petit jury, or to discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt, as all such questions should be left to the jury upon the trial.' " 339 Mich 492.

The opinion of the Court, citing *People v Evans,* 72 Mich 367, 387; 40 NW 473 (1888), emphasizes that the magistrate is required to make his determination "after an examination of the whole matter". This phrase, mentioned in dicta, simply quoted what the statute then required the magis-

[2] In *Auerbach,* the Court stated:

"It is urged by respondent's counsel that the court should have dismissed the proceedings and quashed the information before the jury was impaneled, because the preliminary examination, a record of which was before the court, showed that there was no competent evidence introduced before the examining magistrate authorizing him to hold the respondent for trial.

"We have examined the record relating to the examination before the magistrate, and are unable to agree with respondent's counsel that, as a matter of law, we should say there was not sufficient evidence to hold the respondent for trial." *Auerbach, supra,* 42.

trate to do. From this phrase a quantum leap is made by this Court's opinion to conclude that "[t]he inquiry is not limited to whether the prosecution has presented evidence on each element of the offense".

The reference in *Evans* affords no precedential basis upon which to predicate a new rule which permits the magistrate to disregard the fact that competent evidence has been presented on each element of the crime charged. Such a conclusion allows the magistrate inappropriately "to nicely weigh the evidence as a petit jury". The function of a magistrate is not that of a jury. See *People v Weiden,* 239 Mich 169; 214 NW 120 (1927).

With respect to appellate review of a magistrate's determination at a preliminary examination, it is well settled that the standard to be observed is that the decision should not be disturbed unless a clear abuse of discretion is demonstrated. *Doss, supra,* 101; *Medley, supra,* 492-493; *People v Dellabonda,* 265 Mich 486, 491; 251 NW 594 (1933).

In the instant case, the magistrate did not find "sufficient evidence" to bind over the defendant on either first- or second-degree murder. With respect to the first-degree murder charge, the magistrate stated:

> "Intoxication, in order to constitute defense to specific intent crimes, in this case only, first-degree murder, must be so complete that the defendant didn't know what he was doing, or if he knew what he was doing, he didn't know why or didn't know that what he was doing was naturally culpable or * * * causing harm alleged to be intended. That's a * * * Court of Appeals case cited *[People v Berryhill,* 8 Mich App 497; 154 NW2d 593 (1967)]. Evidence of intoxication can * * * negate requisite specific intent necessary to sustain defendant's conviction for a crime which requires proof of specific

intent. In this case it would be only relative to the first-degree murder charge. * * * To entirely eliminate voluntary intoxication as a defense to a specific intent crime defendant must while sober have formed the specific intent requisite to commission of the particular crime he is charged with * * * committing, that, to-wit: is the crime charged of first-degree murder, not speaking yet to second-degree murder.

"It is my opinion, after listening to the facts of this case that I do not find sufficient evidence to warrant the charge of first-degree murder."

Turning to the second-degree murder charge, the magistrate related:

"In this particular case, I have difficulty finding that the respondent acted with the intent to take a life. I'll indicate that there is sufficient evidence upon this record to indicate that he did not.

"It is not necessary, as the Court so aptly points out in *[People v Raher,* 92 Mich 165; 52 NW 625 (1892)], it is not necessary for the prosecution to show that the assaulter extended, entertained a specific intent to kill the person who was injured where it appears that he committed an assault under such circumstances that the natural and usual consequences would be to take a human life.

"I find it extremely difficult, if not impossible, to find that the natural and unusual *[sic]* consequence of firing that gun through that door in that situation which I listened to testimony for six hours constitutes a natural and usual consequence which could be found in the respondent."

Upon a full evaluation of the record, it is concluded that the magistrate clearly abused his discretion in not binding defendant over as charged. As stated by the Court of Appeals in the instant case:

"As the magistrate noted, there was evidence tending

to negate deliberation, premeditation and the specific intent to kill. Such evidence suggested defendant might have been drunk at the time, that he was angry, jealous and possibly provoked by the decedent. Yet, it seems clear that, on the magistrate's inquiry as to whether a crime had been committed, there was evidence of first-degree murder."

Turning to the included offense of second-degree murder, the magistrate's determination that it was "extremely difficult, if not impossible", to find that the natural and usual consequence of firing a gun through the door under the circumstances would be to take a human life was also an abuse of discretion.

The facts presented to the magistrate demonstrated malice. The actions of the defendant could reflect at a minimum an intent to do great bodily harm or wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. See *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980).

Testimony at the preliminary examination revealed that the defendant and decedent had known each other for a substantial period of time. There had been previous antagonism between them. The decedent was living with the defendant's estranged wife. Testimony indicated that the defendant had been drinking liquor for a substantial period of time immediately prior to the shooting. The defendant informed the decedent on the telephone approximately one-half hour before the event that he was going to "blow him away".

Within approximately one-half hour, the defendant drove to the house of his estranged wife where the decedent was staying. He was armed with a loaded .22-caliber pistol. Testimony indi-

cated the pistol was usually kept unloaded. The defendant, with menacing language, demanded entry into the house and tried to kick down the door. The decedent held the door. The defendant and decedent pushed the door back and forth. Ultimately, the defendant fired the fatal shot through the door while the decedent was leaning against it in an attempt to block the defendant's entry. The decedent fell to the floor.

Eyewitness testimony indicated that the defendant burst into the house, stomped the decedent on his shoulder, pointed the gun at him and stated, in effect, "You got what you wanted". A struggle ensued while the occupants of the house attempted to disarm the defendant. During the fracas, the gun was pointed directly at the stomach of the defendant's wife. A young son of the defendant broke open the pistol and got the bullets out. The defendant then turned, stomped on the face of the decedent, called the decedent a scurrilous name and left the home.

There was testimony that the defendant became mean when he consumed alcohol excessively. There was also eyewitness testimony that he did not appear to be "staggering drunk" and that he "knew what he was doing".

The question in this case is whether there was competent evidence for the magistrate to base a finding that the crime of murder, in the first degree or second degree, had been committed.

In making his determination, the magistrate did not indicate that he found the eyewitness evidence either incompetent or without credibility. There was credible evidence both supporting and negating the existence of malice, premeditation and deliberation. The finding that the defendant was so intoxicated as to negate the requisite elements of

first-degree murder and that the actions of the defendant did not at a minimum constitute a wanton and willful disregard of the likelihood that death or great bodily harm could result, are issues appropriately left to the finder of fact upon trial. Under the facts and circumstances of this case the magistrate clearly abused his discretion.

Thus, I would affirm the opinion of the Court of Appeals and remand this matter for arraignment upon the charge of first-degree murder.

COLEMAN, C.J., concurred with BLAIR MOODY, JR., J.

WILLIAMS, J. *(for remand to the magistrate).* This case reviews a magistrate's action in a preliminary examination. Two questions are involved: first, the proper extent of a magistrate's examination; second, whether the magistrate erred by abuse of discretion.

As to the proper extent of a magistrate's examination, I agree with the per curiam opinion that the magistrate's duty is not only to determine whether the prosecution's evidence established a prima facie case but also whether the defendant's evidence destroyed the prosecution's prima facie case by either contrary evidence as to the primary case or by establishing an affirmative defense. Of course, if the prosecution establishes a prima facie case by its evidence, and if defendant's evidence merely raises a question of fact as to that case or his defense, the case must be bound over to the trial court.

As to whether the magistrate erred by abuse of discretion, I agree with Justice MOODY that in the instant case the magistrate invaded the province of the trial judge and trier of fact as to whether an affirmative defense existed.

In *People v Doss,* 406 Mich 90, 101-103; 276 NW2d 9 (1979), in a unanimous decision, this Court considered whether the magistrate had abused "his discretion in finding that defendant was not justified as a matter of law in taking the life of the decedent". In holding that the magistrate had not abused his discretion, this Court did two things in the *Doss* case of concern in this case. First, it recognized implicitly that the magistrate had the duty to consider the defendant's right to try to prove self-defense in a preliminary examination. Second, it recognized explicitly that if the case of self-defense was based on conflicting evidence, the case was subject to jury trial since the prosecution had otherwise made a prima facie case.

*Doss* therefore supports the instant per curiam opinion's holding that the magistrate must consider the defendant's affirmative defense as well as the prosecution's case.

*Doss,* on the other hand, makes clear what both the per curiam opinion and my brother MOODY agree on, and that is that the magistrate has no authority to dismiss a defendant where the prosecution had made a prima facie case but where the defendant's defense is subject to conflicting evidence. In my opinion Justice MOODY has correctly analyzed the testimony and found that defendant's defense was subject to factual conflict.

As a consequence, I would hold that the examining magistrate abused his discretion in dismissing the charges as to first- and second-degree murder. I would further hold that the Court of Appeals erred as a matter of law in ruling that a magistrate is limited to determining whether the prosecutor had established a prima facie affirmative case without considering the defendant's testimony and defen-

ses. I would therefore reverse the Court of Appeals opinion on the law but concur in the reversal of the circuit court's and the magistrate's action. As a consequence, I would remand the matter to the magistrate for arraignment upon the charge of first-degree murder not inconsistent with this opinion.

PEOPLE v WHALEN

Docket No. 67157. Decided November 23, 1981. On application by the people for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the order of the trial court and reinstated the defendant's original sentences.

John J. Whalen was convicted by a jury in Lenawee Circuit Court, Rex B. Martin, J., of breaking and entering an occupied dwelling and of larceny in a building. He was sentenced to 6 years and 8 months to 10 years imprisonment for breaking and entering, and 2 years and 8 months to 4 years for larceny. The defendant filed delayed motions for a new trial and resentencing, claiming that he was entitled to relief because agents of the FBI had previously promised him that he would not serve time in prison for his state convictions if he worked for them as an informant. By the time the improper promises came to the attention of the agents' supervisors, the defendant had worked for several years as an informant and had been convicted and sentenced on the state charges. After an evidentiary hearing, the Lenawee Circuit Court, Stanley Everett, J., declared that the defendant's sentences were invalid because they failed to take into account the promises of the FBI agents, and resentenced the defendant to five years of probation. The Court of Appeals, Beasley, P.J., and Bashara and MacKenzie, JJ., affirmed in an unpublished per curiam opinion (Docket No. 51377). The people apply for leave to appeal. *Held:*

A trial court cannot set aside a valid sentence and impose a new one; to do so would infringe on the exclusive power of the Governor under the constitution to commute sentences. A court's authority to resentence depends, therefore, on whether the previously imposed sentence is invalid. The trial court in this case did not declare the sentences invalid on any recognized ground, but relied on the fact that the promises had been made and the belief that they should be kept. No public policy of the state justifies declaring the sentences invalid on the ground stated. No claim is made that the defendant was sentenced on inaccurate information. The existence of unenforceable promises made by FBI agents to a criminal defendant

does not provide a justification for declaring a valid sentence invalid.

The order of the trial court is reversed, and the defendant's original sentences are reinstated.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *John A. Wilson* and *A. Michael Leffler,* Assistants Attorney General, for the people.

*Frank J. Ragen* for defendant.

PER CURIAM. The issue presented is whether the trial court erred in vacating a lawfully imposed sentence and in resentencing the defendant because of the existence of unenforceable promises made to the defendant by federal authorities.

I

The defendant in this case was originally convicted in Lenawee Circuit Court in 1970 of breaking and entering an occupied dwelling and larceny in a building. This Court reversed the convictions in 1973.[1] In 1974, defendant was retried, reconvicted and resentenced to 6 years and 8 months to 10 years imprisonment on the breaking and entering conviction and 2 years and 8 months to 4 years on the larceny conviction. The convictions were affirmed by the Court of Appeals[2] and this Court denied leave to appeal.[3]

In 1979 defendant filed delayed motions for new trial and resentencing in Lenawee Circuit Court,

[1] *People v Whalen,* 390 Mich 672; 213 NW2d 116 (1973).

[2] *People v Whalen,* 65 Mich App 687; 238 NW2d 376 (1975).

[3] *People v Whalen,* 395 Mich 827 (1976).

claiming, for the first time in a Michigan court,[4] that he was entitled to have the state convictions or sentences vacated because of unkept promises made to him by FBI agents relating to his state convictions.

At an evidentiary hearing witnesses verified that FBI agents had indeed promised defendant that he "would do no time" for his Michigan convictions if he provided informant services, and that the defendant did provide such services between 1971 and 1975. Testimony also established that because of ongoing investigations, the defendant was instructed to tell no one of the agreement, including the attorney who represented him on the state charges and the trial judge. Consequently, at the time defendant was tried and sentenced, neither defense counsel nor the trial judge was aware of the promises. FBI authorities acknowledged that the promises that had been made were unenforceable and should not have been made; however, by the time the improper promises came to the attention of FBI supervisors, the defendant had supplied several years of informant services and been convicted and sentenced on the state charges.

At the conclusion of the evidentiary hearing, the trial court declared defendant's prior sentences invalid "because it failed to take into account the promises which were made which I feel have to be fulfilled". After vacating the sentences, the trial court resentenced the defendant to five years probation.

[4] Following imposition of the state sentences, the defendant was turned over to federal authorities pursuant to an agreement between the United States Bureau of Prisons and the Michigan Department of Corrections, and he was ultimately placed in a federal correctional facility in California. While there, defendant challenged his state convictions and sentences in the federal courts, without success.

The prosecution appealed, seeking reinstatement of the defendant's sentences, but the Court of Appeals affirmed in an unpublished per curiam opinion, finding no clear error or abuse of discretion.

We reverse because we find that the trial court exceeded its authority in vacating valid sentences.

## II

In Michigan, a trial court's authority to resentence a defendant is limited. In *People v Fox,* 312 Mich 577, 582; 20 NW2d 732 (1945), this Court held that a trial court is without authority to set aside a valid sentence and impose a new one, because to do so "would infringe upon the exclusive power of the governor under the Constitution to commute sentence".[5]

A court's authority to resentence depends, therefore, on whether the previously imposed sentence is invalid. Clearly a sentence beyond statutory limits is invalid.[6] A sentence within statutory limits may also be invalid on a number of grounds. It is invalid if the sentencing court relies on constitutionally impermissible considerations, such as the defendant's constitutionally infirm prior convictions,[7] or improperly assumes a defendant's guilt

[5] Although the *Fox* case was construing Const 1908, art 6, § 9, we have held that the similar provision in Const 1963, art 5, § 14, is subject to a comparable interpretation, *People v Joseph,* 384 Mich 24, 33; 179 NW2d 383 (1970). The current provision states:

"The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons therefor."

[6] *People v Baum,* 251 Mich 187; 231 NW 95 (1930).

[7] *United States v Tucker,* 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972); *People v Moore,* 391 Mich 426; 216 NW2d 770 (1974).

of a charge which has not yet come to trial,[8] or the court fails to exercise its discretion because it is laboring under a misconception of the law,[9] or conforms the sentence to a local sentencing policy rather than imposing an individualized sentence.[10] More recently, this Court has held invalid sentences which do not comply with essential procedural requirements such as failure to utilize a "reasonably updated" presentence report[11] or to provide the defendant and his counsel with the opportunity to address the court before sentence is imposed.[12]

The trial court in the instant case did not declare the defendant's prior sentences invalid on any recognized ground. Rather, the court premised its holding on the fact that the sentences imposed did not take into account the promises that had been made to the defendant, and on the belief that the promises should be kept.

However, no public policy of the state justifies declaring this defendant's sentences invalid. No claim is made that the defendant was sentenced on the basis of inaccurate information. And although information pertaining to the promises was kept from the Michigan authorities, the existence of unenforceable promises made by FBI agents to a criminal defendant does not provide a justifiable basis for declaring a valid sentence invalid, and thus infringing on the exclusive power of the governor to commute sentences.

Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the

[8] *People v Grimmett,* 388 Mich 590; 202 NW2d 278 (1972).

[9] *People v Mauch,* 23 Mich App 723; 179 NW2d 184 (1970); *People v Daniels,* 69 Mich App 345; 244 NW2d 472 (1976).

[10] *People v Chapa,* 407 Mich 309; 284 NW2d 340 (1979).

[11] *People v Triplett,* 407 Mich 510; 287 NW2d 165 (1980).

[12] *People v Berry,* 409 Mich 774; 298 NW2d 434 (1980).

trial court's order which granted defendant's motion for resentencing, vacated defendant's sentences and imposed a new sentence; and we order defendant's original sentences reinstated.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

BOWER v WHITEHALL LEATHER COMPANY

Docket No. 64020. Argued November 13, 1980 (Calendar No. 5).—Decided November 23, 1981.

Ferrell Bower claimed workers' compensation benefits against the Whitehall Leather Company, his former employer, and the Second Injury Fund. Bower suffered a series of injuries which were work-related and made it physically impossible for him to perform the labor which his job required. He and his wife moved to Florida, where they both obtained employment. The plaintiff's job was one which he could perform comfortably, at slightly lower wages than those Whitehall had paid him. During the hearing on the claim, Whitehall offered him "favored work" which was less strenuous than his old job at the same salary he had been paid before. The plaintiff rejected the offer because it would have required him to return to Michigan and to do work which he was not sure he could do. The Workers' Compensation Appeal Board decided that the plaintiff was physically able to do the favored work but that he was not disqualified for differential benefits because his refusal of the offer was reasonable under all the circumstances. The Court of Appeals, MacKenzie, P.J., and D. E. Holbrook, Jr., and Cynar, JJ., reversed in a per curiam opinion on the ground that, as a matter of law, the plaintiff's refusal to accept a good-faith offer of favored work disqualified him from benefits (Docket No. 78-5290). The plaintiff appeals. In an opinion by Justice Moody, joined by Justices Kavanagh, Williams, Levin, and Fitzgerald, the Supreme Court *held:*

The reasonableness of a refusal of an offer of favored work

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REFERENCES FOR POINTS IN HEADNOTES

[1] 82 Am Jur 2d, Workmen's Compensation §§ 349, 366.
Crediting employer or insurance carrier with earnings of employee re-employed, or continued in employment, after injury. 84 ALR2d 1108.

[2] 22 Am Jur 2d, Damages § 200 *et seq.*

[3] 82 Am Jur 2d, Workmen's Compensation § 511.

[4-6, 9] 82 Am Jur 2d, Workmen's Compensation § 349.

[5, 10-12] 82 Am Jur 2d, Workmen's Compensation § 540 *et seq.*

[7, 8] 81 Am Jur 2d, Workmen's Compensation §§ 2, 28.

must be considered in determining whether a claimant is disqualified, and facts other than the claimant's physical ability to perform the work may be taken into account in assessing the reasonableness of the refusal.

1. Nothing in the Worker's Disability Compensation Act indicates that the Legislature intended to make a harsh and rigid rule of disqualification that an injured employee who rejects a good-faith offer of less strenuous work, which the employee is physically able to perform, is not entitled to workers' compensation benefits. The favored-work doctrine is a purely judicial creation. Its primary purpose is to permit the mitigation of an employer's liability for workers' compensation benefits, but it also serves a rehabilitative function by encouraging the employee to return to productive employment rather than remain idle.

2. The reasonableness of the refusal of favored work should be considered in deciding whether benefits should be forfeited because reasonableness is the basic principle underlying both purposes of the rule. The common-law doctrine of mitigation of damages does not operate against a recovery of full damages if the effort, risk, sacrifice, or expense which the person wronged must incur in order to minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it. The Worker's Disability Compensation Act specifically uses the reasonableness of a refusal to accept rehabilitation to determine the forfeiture of benefits on that ground.

3. The burden is on the employer to show that it offered the plaintiff work which he could perform. The Court has implicitly recognized that a claimant is under no obligation to comply with an unreasonable and arbitrary demand of an employer to accept whatever work the employer thought suitable in order to show cooperation. Further, forfeiture of benefits is a drastic remedy and the Court would not consider the application of such a harsh penalty without an assessment of the reasonableness of the employee's actions.

4. Application of the standard of reasonableness requires a court to examine the facts and circumstances in each case. Physical capacity to perform the offered work is not the only question in determining reasonableness of refusal, because other facts may also be relevant to important policies of the statute which should not be obstructed through a rigid application of the favored-work doctrine. The general rule has frequently been stated to be that an injured employee who refuses to accept favored work which the employee is capable of performing is not entitled to benefits. But in many cases the

rule is dictum, and a great majority of the cases which are cited in support of the rule, the interruption-of-work cases, are limited to their narrow factual circumstances that an employee who was performing favored work for his employer was unable to continue the work because of a supervening independent event. The basic rule that emerges from these cases is that 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 or attributable to the employee. The critical factor justifying a denial of benefits is that the employee has willfully, through some choice of his own, left a job he could physically perform. In this case, however, the defendant employer wishes to force the employee to leave lighter work that he is capable of performing, although with another employer. Certainly, the same facts that justify the denial of benefits when the employee voluntarily leaves favored work should not force him to quit another job when he wishes to continue working; therefore, the analysis of the interruption-of-work cases should not be blindly transplanted to this case.

5. The Worker's Disability Compensation Act was designed to help relieve the social and economic difficulties faced by injured workers; as remedial legislation, it must be liberally construed to grant, rather than to deny, benefits. The purpose of the law is also to encourage the employee to rehabilitate himself because it is in the interests of the employer, the employee, and the public to have the employee return to gainful employment as soon as possible. The plaintiff in this case, acting in good faith, obtained suitable substitute employment six months before the defendant offered him a job. Bower did not leave Michigan to avoid work but, in part, to find it; such acts, showing initiative and industriousness, should be encouraged. To deny benefits in these circumstances would undercut the rehabilitative and mitigative purposes of the Worker's Disability Compensation Act, and would also discourage employers from taking the risk of hiring, and perhaps retraining, injured persons. Further, if the employer does not voluntarily pay workers' compensation, the employee may be without any means of support until an award of benefits is made by the referee at the hearing. The employer should not be able to claim the benefit of Bower's actions to reduce its liability for workers' compensation benefits, and then rely upon those actions to disqualify him when it offers him a job, nine months after he moved to Florida.

6. The Court cannot approve a blanket rule that would, by

the threat of forfeiture of benefits, give an employer the power to force an employee to return to Michigan. The physical upheaval, the economic and emotional costs of relocation, and the justifications for the refusal of an offer of favored work may be different in each case. Not every personal consideration may excuse a refusal of favored work. Nor may an employee avoid returning to work tendered in good faith by merely removing himself from the locality of the employer. Only where the claimant's actions further the policies of the Worker's Disability Compensation Act can such a rejection be justified.

7. The Workers' Compensation Appeal Board applied the correct legal test of reasonableness in evaluating the plaintiff's refusal of the offer of favored work, and therefore its findings of fact are conclusive in the absence of fraud and cannot be disturbed if supported by competent evidence in the record. The Workers' Compensation Appeal Board found that the offer of work was within the plaintiff's physical capacity, and that the offer was timely made in good faith. It also found that, in the light of all the circumstances, Bower's refusal of the favored work was reasonable and did not require a forfeiture of benefits. Review of the record shows that the findings are amply supported.

The decision of the Court of Appeals is reversed and the case is remanded to the Workers' Compensation Appeal Board for further proceedings.

Chief Justice Coleman and Justice Ryan concurred in the result solely for the reasons stated in paragraph 7 above, but did not subscribe to the analysis in the rest of the opinion.

93 Mich App 257; 286 NW2d 877 (1979) reversed.

1. WORKERS' COMPENSATION — FAVORED WORK — PUBLIC POLICY.

The "favored work" doctrine is a purely judicial creation which permits the wages earned at less strenuous work after a work-related injury to be set off against workers' compensation benefits and thus mitigate the loss, and it also serves a rehabilitative function by encouraging the employee to return to productive work rather than to remain idle.

2. DAMAGES — MITIGATION — REASONABLENESS.

The common-law doctrine of mitigation of damages does not operate against a recovery of full damages if the effort, risk, sacrifice, or expense which the person wronged must incur in order to minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it.

3. WORKERS' COMPENSATION — DISQUALIFICATION — FAVORED WORK — BURDEN OF PROOF.

The burden is on an employer asserting that an injured employee should be disqualified for workers' compensation benefits by his refusal of an offer of favored work to show that it offered the claimant favored work which the employee could perform.

4. WORKERS' COMPENSATION — DISQUALIFICATION — FAVORED WORK.

Forfeiture of workers' compensation benefits for refusing an offer of favored work is a drastic remedy and cannot be applied without an assessment of the reasonableness of the employee's actions.

5. WORKERS' COMPENSATION — DISQUALIFICATION — FAVORED WORK.

It may be reasonable for an injured employee claiming workers' compensation benefits to refuse an offer of favored work which the employee is physically able to perform; the factfinder must examine the facts and circumstances in each case which are relevant to the important policies of the Worker's Disability Compensation Act, rather than rigidly apply the favored work doctrine to disqualify the employee for workers' compensation benefits.

6. WORKERS' COMPENSATION — DISQUALIFICATION — FAVORED WORK.

The critical factor justifying a denial of workers' compensation benefits because of an interruption of favored work by the injured employee is that the employee has willfully, through some choice of his own, left a job he could physically perform.

7. WORKERS' COMPENSATION — STATUTES — CONSTRUCTION — LEGISLATIVE PURPOSE.

The Worker's 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 to deny benefits (MCL 418.101 *et seq.;* MSA 17.237[101] *et seq.).*

8. WORKERS' COMPENSATION — STATUTES — CONSTRUCTION — LEGISLATIVE PURPOSE.

The purpose of the Worker's Disability Compensation Act is not only to compensate the employee while he is incapacitated, but also to encourage him to rehabilitate himself; it is in the interest of the employer, the employee, and the public to have the employee return to gainful employment as soon as possible (MCL 418.101 *et seq.;* MSA 17.237[101] *et seq.).*

9. WORKERS' COMPENSATION — DISQUALIFICATION — FAVORED WORK.
An injured employee should not be disqualified for workers' compensation benefits where the employee, after his work-related injury, moved from Michigan to Florida and obtained other employment there which he could perform, and later refused an offer of favored work in Michigan, which was made six months later at the hearing on his claim; to deny benefits in such a case not only would be a harsh and unjust result but also would severely undercut the rehabilitative and mitigative purposes of the Worker's Disability Compensation Act.

10. WORKERS' COMPENSATION — DISQUALIFICATION — FAVORED WORK.
An employer may not, by the threat of forfeiture of workers' compensation benefits, force an injured employee to accept an offer of favored work without an assessment by the Bureau of Workers' Compensation of the physical and emotional reasons for the employee's refusal of the offer; however, not every personal consideration or change of residence may excuse, under the policies of the Worker's Disability Compensation Act, a refusal of a good-faith offer of favored work which the employee is physically able to do.

11. WORKERS' COMPENSATION — DISQUALIFICATION — FAVORED WORK.
The Workers' Compensation Appeal Board properly took into account the non-physical circumstances of a claimant's refusal of a good-faith offer of favored work which the employee was physically capable of performing where the employee, after his work-related injury, moved from Michigan to Florida and obtained other employment there, and then refused an offer of favored work in Michigan which was made six months later at the hearing on his claim.

12. WORKERS' COMPENSATION — DISQUALIFICATION — FAVORED WORK.
A decision by the Workers' Compensation Appeal Board that an injured employee's refusal of a good-faith offer of favored work, made by his former employer in Michigan, was reasonable and that it did not require a forfeiture of workers' compensation benefits is amply supported on the record where the claimant had moved to Florida after his injury, he actively sought and obtained other employment in Florida, the proceeds of which mitigate the workers' compensation benefits otherwise payable, his wife also obtained employment in Florida, and they had established a permanent new residence there more than nine months before his former employer offered him favored employment.

*McCroskey, Libner, Van Leuven, Feldman, Cochrane & Brock* for plaintiff.

*Landman, Luyendyk, Latimer, Clink & Robb* (by *Jon D. Vander Ploeg)* for defendant Whitehall Leather Company.

Amicus Curiae:

*Miller, Cohen, Martens & Sugerman, P.C.* (by *Bruce A. Miller* and *Renate Klass; Jorden Rossen,* Associate General Counsel, of counsel), for International Union, United Automobile, Aerospace & Agricultural Implement Workers of America.

BLAIR MOODY, JR., J. The issue presented in this case is whether a partially disabled worker must forfeit all rights to workers' disability benefits because he will not leave a job in Florida to accept his former employer's offer of favored work when (1) he is physically able to perform the work; (2) the employer did not offer the work until the day of the hearing on the disability claim, nearly one year after the submission of that claim; and (3) the worker, in the meantime, had moved his family to Florida and accepted substitute lighter work there, the wages of which are credited against the employer's liability for compensation.

Consistent with the policy of both the Worker's Disability Compensation Act and the judicially created favored-work doctrine to encourage disabled workers to seek jobs within their physical capabilities rather than remain idle, we hold that the worker in these circumstances may refuse the proffered employment without forfeiting his workers' disability 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. Accordingly, we reverse the decision of the Court of Appeals and reinstate the WCAB award of continuing benefits to plaintiff.

## I

Plaintiff Ferrell Bower, a long-time supervisory employee at defendant Whitehall Leather Company, suffered a non-work-related injury to his left knee in April, 1970. After surgery, he was able to return to his work as a foreman and leather sorter without physical difficulty.

It is undisputed that the fact that Mr. Bower was a conscientious, hard-working employee, who did not want to shift his work onto others, helped contribute to a series of subsequent injuries.

In February, 1971, a wagon tongue fell apart as plaintiff was pulling it, and he fell, reinjuring his left knee. A few days later he suffered further injury to the same knee when he fell off the side of a steel mat. As a result, he was forced to undergo additional surgery on the knee in April, 1971.

Mr. Bower returned to his job, but once again, in April, 1973, he fell and reinjured the knee, this time after stepping on a ball bearing. The knee became progressively worse, and in the fall of 1973, plaintiff took a three-month paid leave of absence and went to Florida, where he was given swimming exercises and other physical therapy.

By December, 1973, Mr. Bower's knee had improved sufficiently to enable him to return to work at Whitehall Leather. However, as a result of a

strike in the summer of 1974, management employees such as plaintiff were forced to perform regular labor. The additional work, both parties agree, was beyond Mr. Bower's physical capacity, and on July 19, 1974, feeling he "just couldn't take it any more", he finally left his job at Whitehall.

Mr. Bower and his wife then moved to Florida, where both sought and found work. Initially, plaintiff took a job as a security guard for a golf club. Then, in November, 1974, he found more permanent employment as an internal detective for a department store. Though his wages were somewhat less than his earnings at Whitehall, he could perform the job comfortably in spite of his physical limitations.

Subsequently, during the course of the hearing on Bower's disability claim, more than nine months after Bower left Whitehall, defendant offered plaintiff favored work at a salary equal to that he had previously earned at Whitehall. According to the employer, this offer was made in good faith and at the first opportunity; Whitehall was not able to obtain medical testimony indicating that Bower was capable of performing lighter work until three weeks before the trial.

Acceptance would have required Bower to quit his Florida job and return to Michigan to work he was not sure he could physically perform. Therefore, he rejected Whitehall's offer.

The administrative law judge awarded continuing differential benefits to plaintiff based on the injuries incurred during the course of his employment at Whitehall. Bower's Florida wages were credited against Whitehall's compensation liability.[1]

A unanimous Workers' Compensation Appeal

[1] MCL 418.351; MSA 17.237(351); MCL 418.371; MSA 17.237(371).

Board (WCAB) affirmed. *Bower v Whitehall Leather Co,* 1977 WCABO 3920. The WCAB found that although plaintiff remained disabled from general common labor, he was physically able to perform the favored work offered by defendant. It found further that Whitehall's offer was made in good faith. Nevertheless, the board held that Bower's refusal of the proffered employment did not result in a forfeiture of benefits because his refusal was reasonable under all the circumstances.

Defendant's application for leave to appeal was denied by the Court of Appeals. Whitehall appealed to this Court, and we remanded the case to the Court of Appeals for consideration as on leave granted. 403 Mich 844 (1978).

In a published per curiam opinion, the Court of Appeals reversed the WCAB. *Bower v Whitehall Leather Co,* 93 Mich App 257; 286 NW2d 877 (1979). It held that Bower's refusal to accept the good-faith offer of favored work within his physical capabilities terminated his right to disability benefits.

This Court granted leave to appeal. 408 Mich 930 (1980).

## II

Defendant Whitehall Leather contends, and the Court of Appeals agrees that, as a matter of law, an injured employee who rejects a good-faith offer of favored work that the employee is physically capable of performing is not entitled to disability benefits. Whitehall argues further that the WCAB erred in including the factor of the reasonableness of the refusal as part of the standard used to determine whether Bower must forfeit his benefits. However, nothing in the Worker's Disability Com-

pensation Act indicates that the Legislature intended such a rule, and we decline to judicially adopt this harsh and rigid view of employees' rights and obligations.

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).

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. *Pulley v Detroit Engineering & Machine Co,* 378 Mich 418; 145 NW2d 40 (1966).

To hold that the reasonableness of an employee's action in refusing favored work cannot be considered in determining whether benefits should be forfeited would be to contradict the basic principle underlying both these purposes. The common-law doctrine of mitigation is founded upon notions of reasonableness:

> "If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a *reasonable* man might well decline to incur it, a failure to do so imposes no disability against recovering full damages." McCormick, Damages, § 35, p 133.

Further, in the area of rehabilitation, the Worker's Disability Compensation Act itself specifically incorporates the factor of reasonableness in judging forfeiture:

"If there is an *unjustifiable* refusal to accept rehabilitation pursuant to a decision of the director, the director shall order a loss or reduction of compensation in an amount determined by the director for each week of the period of refusal." MCL 418.319(1); MSA 17.237(319)(1). (Emphasis added.)

While it has not before confronted the issue directly, this Court has implicitly recognized that the favored-work doctrine must be tempered with reasonableness. In a major favored-work case, *Kolenko v United States Rubber Products, Inc,* 285 Mich 159; 280 NW 148 (1938), the employer refused to describe the nature of the proffered work before demanding that the employee accept it. Rejecting defendant's argument that refusal of the favored work in these circumstances should result in forfeiture of benefits, the Court stated:

"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 demand 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." *Kolenko,* 162.[2] (Emphasis added.)

Finally, even without prior explicit recognition by this Court, we should not ignore the standard of reasonableness. 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.

This approach is also consistent with decisions based upon other portions of the Worker's Disability Compensation Act which involve potential forfeiture of benefits. For example, a claimant does not lose his right to compensation if he reasonably refuses to submit to corrective surgery, *Dyer v General Motors Corp,* 318 Mich 216; 27 NW2d 533 (1947); or if he reasonably refuses to follow recommended exercise, *Brown v Premier Manufacturing Co,* 77 Mich App 573; 259 NW2d 143 (1977).[3] In

[2] See also *Ayoub v Ford Motor Co,* 101 Mich App 740; 300 NW2d 508 (1980), where the Court determined that claimant did not act in good faith in abandoning favored work, and *Christiansen v Eaton, Yale & Towne, Inc,* 89 Mich App 440; 280 NW2d 463 (1978), where the Court held that plaintiff, who refused favored work based solely on his opinion that there were absolutely no jobs in the employer's plant that he could physically perform, acted in bad faith. In *Christiansen,* the Court of Appeals indicated that plaintiff, who, unlike Mr. Bower, was not working at the time, should have at least examined the jobs offered.

[3] "It is important to note that the department found: 'The proposed surgery was in the nature of an *exploratory* operation.' There is no showing in the record that the proffered operation was not one fraught with danger to plaintiff's life or health, or that he might not incur extraordinary suffering in consequence thereof. Nor was plaintiff assured that the tendered operation offered a reasonable prospect of relieving or correcting his incapacity. Instead the operation was, as

other states, where an employee may forfeit or suffer a reduction in benefits if he does not seek substitute employment to mitigate the employer's damages, his search for work within his physical capacity is required only to be reasonable. *Becker v General Electric Co,* 210 App Div 495; 206 NYS 437 (1924); *Thompson v Wells-Lamont Corp,* 362 So 2d 638 (Miss, 1978); *Schnatzmeyer v Industrial Comm,* 77 Ariz 266; 270 P2d 794 (1954).

Additionally, specifically in the favored-work situation, the validity of the employer's work offer is judged in terms of good faith or reasonableness. *Kolenko.*

Therefore, to determine whether an employee forfeits workers' compensation benefits for refusing a good-faith offer of favored employment, the reasonableness of the employee's actions in so refusing must be considered.

## III

Application of a reasonableness standard requires a court to examine the facts and circumstances in each case. Defendant Whitehall argues that even if a claimant's actions must be evaluated in terms of reasonableness, as a matter of law it is never reasonable to refuse favored work the employee is physically able to perform; in other words, the court may consider only facts and circumstances relating to physical capability. We

the department found, purely exploratory. Its purpose was not remedial, but instead by it, defendant hoped to discover the cause of plaintiff's incapacity. Plaintiff's refusal under the circumstances to submit to the operation did not constitute a reason or ground for denying compensation." *Dyer,* 220-221.

"We * * * hold that the correct standards to apply to this question of the reasonableness of a failure to follow recommended exercise, are: (1) the pain necessarily produced, (2) the claimant's age, and (3) the probability of benefit from the course of treatment." *Brown,* 579.

disagree. The facts of the instant case especially illustrate that non-physical factors may also be relevant to important policies of the statute which should not be discouraged through a rigid application of the favored-work doctrine.[4]

It is true that Michigan appellate courts have stated by rote the general rule regarding forfeiture of benefits because of refusal to perform favored work in absolute terms:

> "An injured employee who refuses to accept an offer of employment for 'favored work', which said employee is capable of performing, is not entitled to workmen's compensation benefits." *Hope v Welch Grape Juice Co,* 46 Mich App 128, 129; 207 NW2d 476 (1973), citing *Lynch v Briggs Manufacturing Co,* 329 Mich 168; 45 NW2d 20 (1950).[5]

By "capable of performing", the courts mean physically capable. *Lynch.* This Court has also stated that "[i]t is the duty of a disabled employee to cooperate * * * by accepting tendered favored employment which he is physically able to perform". *Todd v Hudson Motor Car Co,* 328 Mich 283, 289; 43 NW2d 854 (1950).

In many cases, however, the rule cited is obiter dictum; either the employer did not adequately comply with the requirement that it offer employment; *i.e.,* the favored-work offer was not specific or firm, *Hope,*[6] or the employer did not satisfy its

[4] Of course, nothing in this opinion should be construed as altering or modifying the rule that an employee who refuses an offer of favored work that he is *not* physically capable of performing does not forfeit compensation benefits.

[5] See also, *e.g., Pulley v Detroit Engineering & Machine Co,* 378 Mich 418; 145 NW2d 40 (1966); *Pigue v General Motors Corp,* 317 Mich 311; 26 NW2d 900 (1947).

[6] In *Hope,* the contract required the employer to obtain the union's approval before it could tailor lighter work to an injured worker's capability. The employer did not make the necessary arrangements

burden of proving that it offered work the employee could physically perform, *Kolenko,* or the circumstances indicated that, in fact, the claimant was not able to perform the proffered work. *Powell.*[7]

Further, a great majority of the cases cited in support of the general rule, including *Pigue v General Motors Corp,* 317 Mich 311; 26 NW2d 900 (1947), upon which the Court of Appeals relied in the instant case, are limited by narrow factual circumstances which differ from the situation presented in the instant case. In *Pigue* and related cases, the employee was already performing favored work for his original employer and a supervening independent event rendered him unable to continue. Under such circumstances, the issue presented is whether the occurrence of the particular non-work-related factor, which interrupts the performance of favored work, affects the employee's right to compensation for a prior injury.

To determine whether benefits should be awarded in the context of the special facts of these interruption-of-work cases, Michigan courts developed a corollary to the physically capable rule. The basic rule of law that emerges from these cases 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.

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with the union before offering claimant favored employment. The Court held, therefore, that no specific, firm offer had been made.

[7] In *Powell,* one of the more recent cases to cite the rule, this Court noted:

"The result [grant of compensation] *can* be different, of course, in a case in which a plaintiff is physically able to perform favored work and has refused." 406 Mich 332, 354, fn 10. (Emphasis added.)

The careful use of the word "can" rather than "must" should be emphasized. See also *Frammolino v Richmond Products Co,* 79 Mich App 18; 260 NW2d 908 (1977).

Thus, interruptions of work caused by voluntary actions of the employee, such as abandonment of work to participate in a strike, *Pigue,* failure to return without explanation at the end of a leave of absence, *Pulley v Detroit Engineering & Machine Co,* 378 Mich 418; 145 NW2d 40 (1966), failure to notify the employer of medical restrictions, *Ayoub v Ford Motor Co,* 101 Mich App 740; 300 NW2d 508 (1980), or discharge because of gambling, *Todd,* or drunkenness, *Garrett v Chrysler Corp,* 337 Mich 192; 59 NW2d 259 (1953), results in a forfeiture of benefits.

On the other hand, stoppage of favored work due to events the employee cannot control, such as being struck by an automobile, *Lynch,* mandatory retirement, *Evans v United States Rubber Co,* 379 Mich 457; 152 NW2d 641 (1967), or non-work-related health problems, *e.g.,* insanity, *Ward v Heth Brothers,* 212 Mich 180; 180 NW 245 (1920); leprosy, *Sotomayor v Ford Motor Co,* 300 Mich 107; 1 NW2d 472 (1942), or cancer, *Powell,* does not defeat compensation.[8]

[8] In an apparent exception to the rule, our Court in *Dunavant v General Motors Corp,* 325 Mich 482; 38 NW2d 912 (1949), held that plaintiff, already receiving compensation for a hand injury, was not entitled to an increase in benefits when he contracted tuberculosis and was unable to perform favored work. *Dunavant* was effectively overruled in *Powell v Casco Nelmor Corp,* 406 Mich 332, 354, fn 11; 279 NW2d 769 (1979).

However, although the general rule in interruption-of-work cases is stated in absolute terms, a number of exceptions should be noted. Unlike *Dunavant,* these exceptions have not been overruled.

In several cases the courts have granted benefits where the interruption of favored work was, at least arguably, brought about by some voluntary act of the employee. In *Neagle v State Library,* 6 Mich App 148; 148 NW2d 507 (1967), the Court of Appeals upheld an award of benefits to an employee who was discharged from favored employment because of misconduct, specifically for taking long coffee breaks and having the odor of alcohol on his breath. The Court affirmed the decision of the appeal board, which had found that the employer had condoned the worker's behavior for many years and, more importantly, that the claimant's conduct was not so egregious as to require forfeiture of benefits. Similarly, though it reserved judg-

Defendant Whitehall argues that we should apply the rule of these cases to the instant situation. Therefore, since the WCAB found that Mr. Bower was physically capable of performing the proffered work, and since his voluntary and discretionary act in leaving the state and moving to Florida was the effective cause of his inability to accept the work, he should return to Michigan and work for Whitehall or forfeit his right to compensation.

However, an analysis of the interruption-of-work cases illustrates why it would be completely inappropriate to apply that rule to the instant case. The reason goes beyond the difference between quitting a job, leaving one's employer unprepared and unequipped, and declining to take the job in the first place, although this is a threshold factor to consider. The difference between the circumstances involved in cases such as *Pigue* and the instant situation directly implicates the stable employment policy that lies at the core of not only

ment on the question whether dismissal for reasons less than moral turpitude or illegality relieves an employer of its compensation liability, another Court of Appeals panel, in *Tury v General Motors Corp,* 80 Mich App 379; 264 NW2d 2 (1978), upheld an award of compensation for an employee discharged from lighter work for making a false statement about a co-worker. But see *Scott v Kalamazoo College,* 77 Mich App 194; 258 NW2d 191 (1977).

In *Dyer v General Motors Corp,* 318 Mich 216; 27 NW2d 533 (1947), this Court upheld claimant's right to continuing benefits even though he was discharged, as required by contract, for failure to pay union dues. The Court, however, based its decision on the fact that even while performing favored work, plaintiff had been receiving the maximum statutory benefits for his disability. Therefore, the employer was not prejudiced by the continuation of benefits after the termination of Dyer's employment.

In *PPG Industries, Inc v Aites,* 7 Pa Commw Ct 588; 300 A2d 902 (1973), claimant quit favored work to become a minister. When he later found he could not earn a living wage at that profession, he attempted to find additional lighter work. The Court held that by leaving favored employment, he did not forever waive his right to compensation. Once he attempted to secure additional employment other than as a minister, he again became eligible to receive benefits when his old favored position was no longer available.

our social welfare programs, but also our entire economic system.

In the interruption-of-work cases, the critical factor justifying the denial of benefits is that the employee has willfully, through some choice of his own, left a job he could physically perform. Yet in the instant case, defendant employer wishes to force the employee to do just that, *i.e.,* leave lighter work, albeit with another employer, that the employee is capable of performing. In other words, Whitehall asks us to punish Mr. Bower, by means of a forfeiture of benefits, for refusing to do exactly what is condemned in the interruption-of-work cases.

With this distinction in mind, the analysis developed in the *Pigue* line of cases should not be blindly transplanted to the instant case. Certainly the same factors that justify the denial of benefits when the employee voluntarily leaves work should not force him to quit when he wishes to continue working.

Only in a very few cases has any Michigan court, and never this Court, directly faced the relevance of physical capability and denied benefits because an employee refused to accept favored employment that he was able to perform. For example, in *Christiansen v Eaton, Yale & Towne, Inc,* 89 Mich App 440; 280 NW2d 463 (1978), the claimant refused to attempt the proffered employment because he felt it was beyond his physical capabilities. The WCAB found that the job appeared to be within his capacity and terminated compensation, and the Court of Appeals affirmed.[9]

[9] See *Morris v General Motors Corp,* 57 Mich App 534; 226 NW2d 554 (1975), where the Court of Appeals refused to overturn the WCAB finding that the claimant could physically perform the proffered employment and held, therefore, that his rejection of the work offer terminated his right to benefits. This Court reversed on an eviden-

But again, the instant case differs in a significant manner, in that Mr. Bower, acting in good faith during the long interval before Whitehall finally offered favored work, obtained suitable substitute employment on his own. This difference becomes critical when viewed in the light of the overriding policies and purposes of the Worker's Disability Compensation Act.

## IV

The Worker's 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. *Niekro v The Brick Tavern,* 66 Mich App 53; 238 NW2d 537 (1975). See *McAvoy v H B Sherman Co,* 401 Mich 419; 258 NW2d 414 (1977).

However, as also reflected in the favored-work doctrine, the act is not designed merely to require compensation:

> "The purpose of the law is not only to compensate the employee while he is incapacitated, but also to encourage him to rehabilitate himself. * * * It is in the interest of the employer, the employee, and the public to have the employee return to gainful employment as soon as possible." *DeTroyer v Ernst Kern Co,* 282 Mich 689, 694; 277 NW 199 (1937).

It is difficult to imagine how this spirit of the

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tiary issue, and remanded to the WCAB for further proceedings. *Morris v General Motors Corp,* 394 Mich 453; 231 NW2d 646 (1975).

See also *McKinney v Uniroyal, Inc,* 82 Mich App 348; 266 NW2d 820 (1978), and *Brown v Premier Manufacturing Co,* 77 Mich App 573; 259 NW2d 143 (1977), where the Court of Appeals did not deny benefits, but stated the general rule and remanded for a finding of whether claimant was physically capable of performing the proffered work.

law could have been reflected any better than it was in Mr. Bower's actions. He did not use his disability as an excuse to remain idle. As evidenced by the fact that he was already working some six months before Whitehall offered him a job, he did not leave his locality to avoid work, but rather, in part, to find it. By exercising his initiative and obtaining substitute work, he rehabilitated himself to become a productive member of society. Further, by working, he benefited not only himself and society, but also his employer; his wages may be set off against Whitehall's compensation liability, thus mitigating the employer's damages.

Such acts, showing initiative and industriousness, should be encouraged. To deny benefits in the instant circumstances not only would punish this employee for finding and holding substitute work, but also would severely undercut the rehabilitative and mitigative purposes of the act. Denial would encourage an injured 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[10] 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

[10] At the hearing on the instant claim, a Whitehall representative stated that he did not know whether the employer would pay the costs of Mr. and Mrs. Bower's relocation and transportation back to Michigan.

employer.[11] Just as injured workers should not be penalized for their attempts at rehabilitation, employers who hire them should not be punished for their part in making that rehabilitation possible.[12]

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.

Similarly, the employer cannot have it both ways. Whitehall cannot claim the benefit of Mr. Bower's actions in reducing its compensation liability, yet later rely on those actions to deny compensation when it offers him a job, some nine months after the employee moved to Florida.[13]

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[11] Because of this consequence, we would be reluctant to deny benefits even if claimant did not have to assume relocation costs to accept his original employer's offer, *i.e.,* where he found another job in the same city or where the former employer is willing to cover the relocation costs.

[12] Whitehall contends that this Court should "favor the employer who makes his best effort to provide meaningful productive employment to a disabled worker". But defendant fails to acknowledge that the rule it advocates would accomplish the opposite result in that it would penalize the department store in Florida, the employer who did, in fact, timely "provide meaningful productive employment to a disabled worker".

[13] The employer argues that granting benefits to Mr. Bower will encourage other employees to relocate in order to avoid working while continuing to receive benefits. The record indicates that this was not the motive in the instant case. Further, relocation, with its attendant financial and emotional costs, is an extreme measure and we do not believe that many workers would resort to this tactic simply to avoid work. The rare employee who does so likely would be

We hesitate to approve a blanket rule that would give an employer the power to force an employee, using the threat of forfeiture of benefits, to return to Michigan in these particular circumstances. The physical upheaval and the emotional costs of relocation may be different in each case, as may the justifications for the refusal of an offer of favored work. We do not believe that an employer should be able to exert such control over an individual without an assessment of the unique factors in each case.

Therefore, application of an absolute rule that an employee must accept favored work which he is physically capable of performing or forfeit benefits would lead to a harsh and unjust result in the instant case. We decline to ratify such a rule and hold that the Court of Appeals erred in applying it below. Confronted by Mr. Bower's exemplary rehabilitative and mitigative actions during the lengthy interim, we also hold that in certain circumstances the WCAB may take non-physical factors into account in determining the reasonableness of the employee's refusal of a good-faith offer of favored work. We conclude that the WCAB properly did so in this case.

Faced with a situation which was factually closer to the instant case than were any of the controversies presented to Michigan courts,[14] the

found to have acted in bad faith by the WCAB and will thus forfeit benefits in any event.

[14] In *Frammolino v Richmond Products Co,* 79 Mich App 18; 260 NW2d 908 (1977), the Court of Appeals faced, but did not decide a similar issue. Claimant, finding herself allergic to the fiberglass products produced by her employer, sought job training through the Michigan Department of Education. Through the department, she enrolled in a two-year program in college. Her studies, and her acceptance of a part-time job, precluded her acceptance of a job offer by her former employer.

The WCAB found that the job offered was not within plaintiff's physical limitations. It also held that even if the proffered employ-

Minnesota Supreme Court reached a similar conclusion. In *Morrison v Merrick's Super Market, Inc,* 300 Minn 535; 220 NW2d 344 (1974), the employee refused an offer of favored work made while he was engaged in a retraining program. The Court held that the employee's refusal was justified and, noting that its decision was consistent with the remedial nature of the act and the more specific statutory purpose of "encouraging injured workers to increase their employability

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ment had been within her physical capabilities, her refusal was justified since she was following a course of rehabilitation recommended by the Department of Education. Partial disability benefits were awarded.

The Court of Appeals found the WCAB determination of physical incapacity controlling. However, it remanded on the issue of the amount of compensation granted, holding that claimant's reduction in availability for employment due to her studies could not be taken into account in determining wage-earning capacity unless her former employer was financially responsible for such retraining. The Court did not address the issue of whether plaintiff's pursuit of a course of study could justify her refusal of favored work she could physically perform.

The Workers' Compensation Appeal Board has awarded benefits in a number of cases which are factually similar to the instant one. See *Wilson v General Motors Corp,* 1976 WCABO 4573, where the injured claimant lost his home in Michigan and moved to Pennsylvania where he could obtain housing for himself and his family at substantially lower cost. The WCAB held that he did not forfeit his right to compensation when he refused to uproot his family and return to Michigan to accept favored work subsequently offered by his employer.

See also *Rae v Dow Chemical Co,* 1975 WCABO 1088, where claimant refused an offer of favored work made not only one day after the compensation hearing but also just as the employee, pursuant to a long-standing plan of rehabilitation, was about to begin classes at Lansing Community College. The WCAB found the refusal reasonable in these circumstances.

In a case similar to the instant one in the sense that non-physical factors were considered, the WCAB found that plaintiff was justified in rejecting favored work that would have required him to work on Saturday, contrary to his religious beliefs. *Marsh v Kalamazoo,* 1974 WCABO 3786.

Apparently none of these cases have reached the appellate courts in Michigan.

through retraining", upheld an award of compensation.[15]

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.[16]

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[15] Referring to the decision in a subsequent opinion, the Minnesota Supreme Court explained that, in effect, the retraining course rendered the employee unavailable for the work offered by the employer. Thus, there existed no justification for denying compensation. *Adams v Nadave,* 309 Minn 536; 245 NW2d 227 (1976).

[16] Our decision in this case is consistent with this Court's interpretation of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.;* MSA 17.501 *et seq.*

In *Bingham v American Screw Products Co,* 398 Mich 546; 248 NW2d 537 (1976), we held that claimant, who left his job and moved to Kentucky because he could not find housing in Michigan that he and his family could afford, was not disqualified from receiving unemployment compensation when he rejected his employer's subsequent offer to return to Michigan to his former job. Under the statute, a worker loses his right to compensation if he refuses an offer of suitable work without good cause. MCL 421.29(1)(e); MSA 17.531(1)(e). We concluded that Bingham had "good cause" to reject the proffered employment because, in view of the unreasonable distance between his home in Kentucky and the job in Michigan, the offer did not constitute an offer of "suitable work". Thus, in that context we also declined to use the threat of forfeiture of benefits to force the claimant to return to Michigan to work, finding that, under certain circumstances, a refusal may be reasonable or with good cause.

Admittedly, the language of the MESA arguably dictates the *Bingham* result. The statute specifically provides that distance of the proffered employment from the claimant's residence is a factor to be considered in determining the suitability of the work. MCL 421.29(6); MSA 17.531(6).

However, the absence of such statutory language in the Worker's Disability Compensation Act (WDCA) does not preclude the application of the principles underlying *Bingham* and other decisions contruing the MESA to the instant case. Though directed at different social and economic evils, the WDCA and the MESA embody a similar remedial spirit and advance the same rehabilitative and mitigative purposes. Further, even in interpreting the MESA, we have not regarded the non-existence of statutory language as compelling a

## V

Since we have determined that the Workers' Compensation Appeal Board applied the correct legal test in concluding that (1) whether a claimant's refusal of an offer of work terminates his right to benefits must be evaluated in terms of reasonableness and (2) factors 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. *Pigue, supra;* MCL 418.861; MSA 17.237(861).

In the instant case, the WCAB found that the offered work was within plaintiff's physical capacity, and that the offer was timely made and in

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result. For example, we have approved a definition of good cause which incorporates personal considerations not specified in the act itself. See *Dueweke v Morang Drive Greenhouses, Inc,* 411 Mich 670; 311 NW2d 712 (1981), adopting the rationale and standard of good cause described in the dissenting opinion of Judge LEVIN in *Keith v Chrysler Corp,* 41 Mich App 708, 709; 200 NW2d 764 (1972). *Keith* had been affirmed by an equally divided Court. 390 Mich 458; 213 NW2d 147 (1973).

A respected commentator has also noted the similarity in analysis between refusal of proffered work in unemployment compensation and workers' compensation cases:

"Whenever claimant's case depends in part on a showing that he was unable to get work because of his physical condition, it naturally follows that, as in unemployment compensation cases, the employer may defend on the ground that claimant has refused suitable work. While there are not as many workmen's compensation cases on this issue, they seem to resemble in general effect the more numerous unemployment cases on the same point.

* * *

"Of course, there is no [denial of benefits] if the refusal is based on reasonable grounds." 2 Larson, Workmen's Compensation Law, § 57.66, pp 10-161—10-162.

good faith.[17] Finally, a unanimous WCAB found that, in light of all the circumstances, Mr. Bower's refusal of the offered work was reasonable and did not require a forfeiture of benefits:

"He is not simply absenting himself from the state and asking that a check be mailed to him weekly. He actively sought and obtained other employment, the proceeds of which act to mitigate the otherwise payable compensation due from defendant. His wife is also employed, and obviously a permanent new residency has been established. Instead of asserting a right to offer plaintiff a job back in Michigan at favored work (and plaintiff's testimony asserts some qualms regarding such work clouding his counsel's concession of ability), defendant should be grateful that a one-time good supervisory employee is acting as it might have expected he would—working long hours to minimize its loss. His refusal of the offered work was reasonable."[18]

Our review of the record reveals that these findings are amply supported.

Accordingly, we reverse the Court of Appeals decision denying claimant's request for workers' disability benefits, and reinstate the appeal board's award of compensation on a continuing basis. We remand this case to the board for proceedings not inconsistent with this opinion.

KAVANAGH, WILLIAMS, LEVIN, and FITZGERALD, JJ., concurred with BLAIR MOODY, JR., J.

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[17] We strongly disapprove of late offers such as this one, even if they are made in good faith, because of the insecurity they may create in a claimant's life. Instead of deciding in the instant case that plaintiff's refusal was reasonable, the same result could be reached by determining that the delay in the offer made it an unreasonable one. Because the WCAB's finding of good faith is supported by the record, we do not so hold.

[18] The author of the opinion, Chairman Gillman, found the instant case a particularly compelling one for an award of benefits. His conclusions are noteworthy in view of the fact that he disagreed with a grant of compensation in a factually similar case. See *Wilson v General Motors Corp, supra,* discussed in footnote 14.

COLEMAN, C.J., and RYAN, J. We concur in the result the Court has reached solely for the reasons stated in Part V of Justice MOODY's opinion. We do not subscribe, however, to the analysis in Parts II, III, and IV.

PEOPLE v INGRAM

Docket No. 66159. Decided November 23, 1981. On application by the people for delayed leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and remanded the case to the Recorder's Court of Detroit for further proceedings.

Roscoe Ingram was arrested for carrying a concealed weapon by Detroit police officers who had been writing a parking citation for his automobile. The defendant came up to the vehicle, which was double-parked in front of his house, unlocked it and started to get inside. One of the officers approached the defendant and asked if it was his car, and when the defendant replied that it was, the officer asked to see his driver's license. As the defendant was reaching for his driver's license, the officer saw a large bulge in his clothing, and asked the defendant if he had a gun. The defendant admitted that he did and that he did not have a permit to carry it. The officer then seized the pistol and arrested him. The Recorder's Court of Detroit, George W. Crockett, III, J., granted the defendant's pretrial motion to suppress the evidence of the pistol on several alternate grounds, and dismissed the charges. The Court of Appeals, T. M. Burns, P.J., and R. M. Maher and Clements, JJ., affirmed on the ground that there was no justification for the request to see the defendant's driver's license and that he was, therefore, illegally stopped and questioned by the police (Docket No. 78-1920). The people apply for delayed leave to appeal. *Held:*

There was nothing improper about the police conduct that led to discovery of the weapon.

1. After the police officer had ascertained that the defendant was the owner of the car, the officer requested his driver's license so that the parking citation could be issued to him. Given the compliance with the request, and the responses to the officer's questions, the seizure of the weapon and the arrest of the defendant were not constitutionally impermissible. It is neither appropriate nor necessary to enter into a detailed analysis of the balancing of the intrusiveness of investigatory

searches and seizures against the law enforcement interests to be served in this case.

2. The Court of Appeals did not reach the issue of the failure to warn the defendant of his constitutional rights, but it is unnecessary to return the case to the Court of Appeals for consideration of the issue. While the observation of the bulge under the defendant's clothing certainly justified further inquiry by the officer, it was not until after the further investigation revealed that the defendant had a gun that the officer had sufficient reason to believe that a crime had been committed to necessitate warning the defendant of his constitutional rights.

The judgment of the Court of Appeals is reversed and the case is remanded to the Recorder's Court of Detroit for further proceedings.

99 Mich App 410; 297 NW2d 684 (1980) reversed.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman* and *Janice M. Joyce,* Assistants Prosecuting Attorney, for the people.

*Angela R. Sims* for defendant.

PER CURIAM. The defendant was arrested with a pistol in his possession and was charged with carrying a concealed weapon. However, on his motion the trial judge suppressed the evidence of the pistol, and the case was dismissed. The Court of Appeals affirmed. The prosecutor has filed a delayed application for leave to appeal, claiming that there was nothing improper about the police conduct that led to the discovery of the weapon. We agree and reverse.

I

Detroit police officers came upon an unoccupied automobile illegally double-parked. While a park-

ing citation was being prepared, the defendant appeared, unlocked the car, and started to get in. One of the officers approached him and asked if it was his car. The defendant replied that it was. The officer then asked to see the defendant's driver's license. He testified as follows:

"A. As he was reaching for his driver's license I saw a large bulge underneath the front of his waist area. I asked him if he had a gun and he said, 'Yes'. I asked him if he had a permit to carry it; he said, 'No'. I then seized the gun and arrested him."

The defendant was bound over for trial following a preliminary examination. He filed a motion to dismiss, which the Recorder's Court judge treated as a motion to suppress the gun. After an evidentiary hearing, the judge ruled that the evidence of the gun should be suppressed for several reasons. First, the defendant was on his own property.[1] Second, the defendant's reaching for his driver's license was the result of the police request, which was improper either because it was made in reliance on a City of Detroit ordinance that had been ruled unconstitutional,[2] or because there was no

[1] MCL 750.227; MSA 28.424 excepts from its prohibition against carrying a concealed weapon a person who does so, "in his dwelling house or place of business or on other land possessed by him". At the hearing on the defendant's motion, the prosecutor stipulated that Mr. Ingram was the owner of the house in front of which he was arrested.

[2] The ordinance provided:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person." Detroit City Code, § 39-1-52.3.

It was held unconstitutional in *People v DeFillippo,* 80 Mich App 197; 262 NW2d 921 (1977). However, as the Court of Appeals noted in the present case, the United States Supreme Court held that before the ordinance was declared unconstitutional an arrest based on it could be valid. *Michigan v DeFillippo,* 443 US 31; 99 S Ct 2627; 61 L Ed 2d 343 (1979). The Court of Appeals decision in *DeFillippo* was issued a few days before the trial court's ruling in this case, but after the defendant's arrest.

"rational basis for inquiry" under the circumstances. Third, the judge said that at the point when the officer formed a definite and specific suspicion that the defendant had a weapon, it was necessary to advise the defendant of his constitutional rights before asking him whether he had a weapon.

## II

The Court of Appeals affirmed. 99 Mich App 410; 297 NW2d 684 (1980). The Court rejected the argument based on the defendant's interest in the property adjacent to the scene of his arrest, and concluded that the subsequent declaration that the city ordinance was unconstitutional would not deprive an officer of probable cause while acting under it if the statute was applicable.[3] However, the Court sustained the suppression of the weapon based on the trial judge's conclusion that there was no justification for the request to see his driver's license:

"[T]here was no 'reasonable cause' nor even a 'mere inkling' to believe that a criminal activity had been, or was about to be, committed by the defendant. At the time of his arrest, defendant had merely walked up to, and had unlocked, an illegally parked vehicle. These facts do not justify an investigative stop. See, *Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), *People v Tebedo,* 81 Mich App 535; 265 NW2d 406 (1978). A parking citation is issued to the owner of a vehicle, not to the driver. Defendant was not driving the car and had merely attempted to enter it when stopped by the officer. Thus, there was no reason to require him to show his driver's license.

"We find, therefore, that the illegal stop by Officer

[3] Neither of these conclusions is challenged by the defendant on this appeal.

Wood tainted his subsequent search and arrest, since the officer would not have been in a position to observe the suspicious bulge if defendant had not been reaching for his wallet." 99 Mich App 418-419.

In view of this result, the Court did not reach the necessity for warning the defendant of his constitutional rights before questioning him.

## III

It is neither appropriate nor necessary for us to enter into a detailed analysis of the balancing of the intrusiveness of investigatory searches and seizures against the law enforcement interests to be served.[4] It is sufficient to note that this simply is not a close case. Having ascertained that the defendant was the owner of the car, the officer requested his driver's license so that the parking citation could be issued to him.[5] Given the compliance with this request, and the response to the officer's questions, the seizure of the weapon and the arrest of the defendant were not constitutionally impermissible.

## IV

Although the Court of Appeals did not reach the final alternate basis for the trial judge's decision—the failure to warn the defendant of his constitu-

[4] See, *e.g., Michigan v Summers,* 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981); *Pennsylvania v Mimms,* 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977).

[5] The Court of Appeals opinion asserts that a parking citation is issued to the owner of a vehicle, rather than its driver. We note that the state parking statute in effect at the time is directed at the person who parks the vehicle. MCL 257.674; MSA 9.2374. It is true that if the police do not know who parked the car illegally, the owner is presumed to have done so. MCL 257.675a; MSA 9.2375(1). However, the Court of Appeals analysis ignores the fact that the defendant had told the officer that the car was his.

tional rights—it is unnecessary to return the case to the Court of Appeals for treatment of that issue. While the observation of the bulge under the defendant's clothing certainly justified further inquiry by the officer, it was not until after the further investigation revealed that the defendant had a gun that the officer had sufficient reason to believe that a crime had been committed to necessitate warning the defendant of his constitutional rights. *Cf. People v Ridley,* 396 Mich 603; 242 NW2d 402 (1976).

Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand the case to the Recorder's Court for the City of Detroit for further proceedings.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

RICE v JASKOLSKI

Docket No. 64660. Argued May 6, 1981 (Calendar No. 10).—Decided December 21, 1981.

Petrina Rice and Lawrence Rice brought a complaint for medical malpractice against Edmund J. Jaskolski, an oral surgeon, and Dr. Edmund Jaskolski and Associates, P.C., alleging negligence in performing oral surgery on Petrina Rice for the removal of four molars, resulting in a permanent injury to the mandibular nerve, and failure to warn that the surgical removal of the molars could result in facial paralysis. The defendant dentist was called for cross-examination under the statute by the plaintiffs and he testified as to his practice of advising patients of the possibility of numbness and his knowledge of the standard of care of oral surgeons in explaining the possibility to patients. The Wayne Circuit Court, Roman S. Gribbs, J., after the presentation of the plaintiffs' proofs, granted a directed verdict for the defendants because of failure to establish the prevailing professional standard of conduct for obtaining informed consent and for performing the surgery by independent expert testimony. The Court of Appeals, Bashara, P.J., and J. H. Gillis and Van Valkenberg, JJ., affirmed in an unpublished per curiam opinion (Docket No. 78-2527). The plaintiffs apply for leave to appeal.

In a unanimous per curiam opinion, the Supreme Court *held:*

Whether a surgeon should advise the patient of the possible result before an operation ordinarily requires expert testimony about the standard of care for the jury to evaluate. However, the defendant may provide the necessary expert testimony on cross-examination by the plaintiffs as an adverse witness under the statute. In this case Dr. Jaskolski testified that if the general standard of care for his specialty were different than his own, he would know it, and he explained what his standard of care was. He also affirmed his deposition on the standard of practice of oral surgeons as to warning of numbness. His testimony was sufficient to withstand in part the directed verdict he sought at the close of the plaintiffs' case.

The judgment of the Court of Appeals is reversed, and the case is remanded for trial on the claim of failure to warn.

*Joseph G. Aprea* for plaintiffs.

*Lee H. Wulfmeier* and *Stephen A. Schaefer* for defendants.

Amicus Curiae:

*Kerr, Russell & Weber* (by *A. Stewart Kerr, Curtis J. DeRoo,* and *Daniel G. Beyer)* for Michigan State Medical Society.

PER CURIAM. The trial judge granted a directed verdict in this malpractice action, because the plaintiffs had failed to establish the prevailing professional standard of conduct. We find the testimony of the defendant dentist[1] supplied evidence on this point sufficient to withstand a directed verdict as to one count of the plaintiffs' complaint, and we reverse.

I

Edmund J. Jaskolski, D.D.S., is a specialist in oral surgery. Petrina Rice first sought his services on April 28, 1972. Dr. Jaskolski found pericoronitis of her left mandibular third molar and a similar condition on the right which was not yet in active infection. For preventive reasons, he recommended surgical removal of four mandibular and maxillary molars.

Dr. Jaskolski removed the teeth on May 2, 1972. Mrs. Rice subsequently complained that the effect of the novocaine remained, and portions of her face remained numb. Mrs. Rice consulted a neurologist. He diagnosed a neuropathy involving the

[1] Dr. Jaskolski was called as a witness by the plaintiffs, during their case, for cross-examination under MCL 600.2161; MSA 27A.2161.

mentalis position of the mandibular nerve, and he concluded the nerve injury was permanent.

Mrs. Rice filed a complaint in Wayne Circuit Court which alleged Dr. Jaskolski's malpractice in carrying out the surgical procedure and in failing to warn Mrs. Rice "that such proffered surgery would or could possibly result in facial paralysis or paresthesia".[2] At trial, Mrs. Rice testified about the manner in which the local surgery was performed. She said also that Dr. Jaskolski gave her no warning of the possibility of numbness on April 28 when she consented to the oral surgery or on May 2 when the surgery occurred. Dr. Jaskolski explained the procedure he used on Mrs. Rice. As to the warning of possible numbness, he acknowledged that he did not explain that potential complication to her on April 28 when she gave her consent, but claimed that he did so advise on May 2 before he began the surgical procedure and his notes reflected that numbness had been explained.

Asked about whether the warning on May 2 was given before or after surgery, Dr. Jaskolski stated: "The doctor is obligated to explain these conditions before not after." Despite protestations that he did not know what other oral surgeons did in like circumstances, the record discloses the following colloquy with Mrs. Rice's counsel:

"*Q.* But under the conditions that obtain, to your patient then, Mrs. Rice, my client, wouldn't the general standard have been for the possible numbness result to be explained?

"*A.* I can't speak for other offices.

"*Q.* You would have no knowledge?

"*A.* No.

"*Q.* Would your teachings have taught you such during your residency?

[2] Count I, ¶ 5 of the plaintiffs' complaint.

"*A.* Teachings with regard to this is usually the practitioner's discretion. If he feels it's serious enough, he should explain it. My standard of care with these conditions, I always explain it.

"*Q.* Your standard of care would be different than that of a general dentist practitioner?

"*A.* Absolutely.

"*Q.* If the general standard of care was any different, would you have known of it?

"*A.* Would you repeat that please?

"*Q.* If the general standard of care for your specialty at that time was any different, would you have known of it?

"*A.* I'm sure it would be published in our literature.

"*Q.* You do read current literature, do you not?

"*A.* Yes.

"*Q.* So if there were any new developments in the standard of care relative to the warning of patients about numbness after a mandibular extraction, you would have been made aware of it?

"*A.* Yes.

"*Q.* If, in fact, your standard was any different than the general standard, you would have been aware of it?

"*A.* Sure."

In conclusion, counsel asked about Dr. Jaskolski's deposition testimony:

"*Q.* Doctor, on page 61, the question beginning at the bottom, I asked, 'Doctor, I ask you this question with reference to the warning you testified you gave the patient regarding the possibility of numbness, would, and I ask you this from a general standpoint not a personal one, I'm asking relative to that standard any dentist would employ in a surgical removal procedure.' There was an objection. 'You mean any dentist' by [defendants' counsel]. [Plaintiffs' counsel], continuing: 'We'll limit it to any oral surgeon.' 'You want to know my standard of practice', your response, 'Do you want to know my standard of practice? My standard of practice of conditions that are possibly caused or com-

plications or problems the then existing condition is explained, numbness is explained, statistics are given and whether or not the patients are hearing this and listening to this or not, I don't know. I do know that the existing condition is explained.' 'Would that be a standard of practice as you as a professional with your experience would aptly apply to oral surgery?' Answer: 'Yes.' There is an objection. The question was repeated. 'Is the answer, yes?' The answer, again by you, 'Yes.' Question: 'Would that standard of care differ, or would it apply to a D.D.S. engaged in the practice of general dentistry in a surgical removal?' Answer: 'I would say this would be the standard of practice. There are many levels of training.' Were those then your responses to those questions?

"*A.* Yes.

"*Q.* Were they then true?

"*A.* Yes."

The trial judge treated the issues raised by Dr. Jaskolski's motion for directed verdict separately. He found that no evidence had been presented on the standard of care for the surgical procedure so that the jury could measure the alleged deviation from the standard. As to the informed consent issue, he said:

"This record is silent as to anything other than the defendant's practice or his personal standard.

* * *

"In my view the jury would have to speculate as to what the standard of care was for oral surgeons following the dictates of the Michigan Supreme Court and the Court of Appeals for the reason that they could not apply the standard jury instruction dealing with what a reasonable person would have construed or understood given the question of informed consent, because that charge would be inappropriate and there is no criteria against which the jury could evaluate the plaintiff's statement vis-à-vis the defendant's statement since there is no evidence on this record establishing the

standard of care for either the medical treatment given, nor is there a standard of care in the profession for the kind of information that must be exchanged before the plaintiff or any patient is said to have received or given informed consent."

He granted the directed verdict. The Court of Appeals affirmed. We granted leave to appeal and asked the parties to address whether the record contained sufficient evidence to warrant jury consideration and whether we should adopt the rule developed by the Maryland Court of Appeals in *Sard v Hardy,* 281 Md 432; 379 A2d 1014 (1977).[3] Because we find the first issue dispositive, we do not address the second.

II

In *Roberts v Young,* 369 Mich 133, 140; 119 NW2d 627 (1963), we said that there are some types of conduct of a medical practitioner which do not require expert testimony for a layperson to evaluate, but that is ordinarily not the case:

"The question presented is in substance whether a physician and surgeon before operating should advise the patient of all *possible* results. Whether such should be done would seem to be a matter to be determined with reference to the general practice customarily followed by the medical profession in the locality. *Twombly v Leach,* 65 Mass 397 [1853]; *Rosenberg v Feigin,* 119 Cal App 2d 783; 260 P2d 143 [1953]. The case of *Bang v Charles T Miller Hospital,* 251 Minn 427; 88 NW2d 186 [1958], is not in point for the reason that there a result, serious in nature, was certain to happen, whereas in the case at bar there was a mere possibility. As before indicated, whether such possibility should have been discussed with the patient is a matter to be determined in accordance with the general practice

[3] 409 Mich 897 (1980).

customarily observed by practitioners in good standing of defendant Young's school of treatment."

The Court of Appeals has held, however, that the defendant himself may provide the necessary expert testimony. It first addressed the point in *Giacobazzi v Fetzer,* 6 Mich App 308; 149 NW2d 222 (1967):

"The question presented is whether in a malpractice action expert testimony may be elicited from a defendant physician called for cross-examination under the Michigan adverse party statute."

The Court concluded that the plaintiff should have been allowed to "establish her case in chief through defendants' expert testimony". 6 Mich App 313. Both in *Mitz v Stern,* 27 Mich App 459; 183 NW2d 608 (1970), and in *McPhee v Bay City Samaritan Hospital,* 10 Mich App 567; 159 NW2d 880 (1968), the Court accepted a defendant's testimony to establish the standard of care.[4]

We agree that the defendant may supply the necessary expert testimony.[5] The question here therefore is whether Dr. Jaskolski's testimony provided the jury with evidence it would need to evaluate Mrs. Rice's claim. We conclude that it did. He testified that if the general standard of care for his specialty were different than his own, he would know it and he explained what his standard of care was. He affirmed deposition testimony on the standard of practice of oral surgeons

[4] In *McPhee, e.g.,* the Court said:

"Without belaboring the point, we hold that the appellee's own testimony was, for the purpose of this case, sufficient evidence tending to show the standard of care to be exercised and that the plaintiff could rely on this testimony in attempting to establish a prima facie case." 10 Mich App 570.

[5] See also *Siirila v Barrios,* 398 Mich 576; 248 NW2d 171 (1976).

as to warning of numbness. This testimony was sufficient to withstand in part the directed verdict he sought at the close of the plaintiffs' case.

We reverse the judgment of the Court of Appeals and remand the case for trial on the first count of the plaintiffs' complaint. Costs to the plaintiffs.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

PEOPLE v CARTER

Docket No. 66273. Decided December 21, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Wayne Circuit Court for an evidentiary hearing. Rehearing denied *post,* 1119.

Edward J. Carter was convicted in the Wayne Circuit Court, Joseph G. Rashid, J., of malicious destruction of personal property valued at more than $100. On appeal the defendant claimed that the failure of the Thirty-Fifth District Court, Dunbar Davis, J., to advise him of his right to have a lawyer appointed at public expense for the preliminary examination was reversible error. The Court of Appeals, D. C. Riley, P.J., and MacKenzie, J. (N. J. Kaufman, J., dissenting), affirmed on the ground that the error was harmless (Docket No. 45158). The defendant applies for leave to appeal. In a unanimous opinion per curiam, the Supreme Court *held:*

The right to counsel is one of constitutional dimension. The standard to be applied is whether failure to advise the defendant of the right was harmless beyond a reasonable doubt, not merely harmless. A preliminary examination is a critical stage of the proceedings and an indigent accused is entitled to the assistance of an appointed lawyer. Failure to comply with the court rule requiring that the record show that the defendant was informed of his right to have counsel appointed at public expense and that he waived the right was error. The remedy is remand for an evidentiary hearing to determine whether there was prejudice to the defendant caused by the absence of a lawyer at the preliminary examination.

Reversed and remanded to the Wayne Circuit Court for further proceedings.

101 Mich App 529; 300 NW2d 624 (1980) reversed.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Derrick A. Carter,* Assistant Defender) for defendant.

PER CURIAM. The question before us is what remedy should be employed after a finding that a defendant was denied his right to counsel at the preliminary examination. We follow the lead of the United States Supreme Court in *Coleman v Alabama,* 399 US 1; 90 S Ct 1999; 26 L Ed 2d 387 (1970).

I

The defendant was charged with malicious destruction of property valued at more than $100. MCL 750.377a; MSA 28.609(1). He appeared at the preliminary examination without a lawyer, and the judge made the following inquiries:

"*The Court:* You talked with William Anderson in the National Bank Building, is that right?

"*Mr. Carter:* Yes, sir.

"*The Court:* And you don't have a lawyer for this hearing, but you want to go ahead and tell your story?

"*Mr. Carter:* Yes, sir.

"*The Court:* So, you are ready to go ahead. Okay, let's proceed, Mr. Collins [assistant prosecutor].

"You can have a seat, what I mean is there at the defendant's table.

"*Mr. Collins:* If the court would like to make certain on the record that he is waiving an attorney, that he has consulted an attorney—for the purpose of a possible remand on it.

"*The Court:* Well, I will go over some of the things again: Mr. Carter, you have consulted an attorney as you have already said?

"*Mr. Carter:* Is this the last one, or is there a hearing, I come back for sentencing?

"*The Court:* No. This is a felony charge and the matter before this court is a preliminary examination,

where the prosecution has to show that the crime charged was committed and probable cause to believe that you are guilty. If that is shown, the case is bound over to circuit court in Detroit for trial and further proceedings. If this is not made by the prosecution, the case is dismissed. You understand the procedure?

"*Mr. Carter:* Yes, sir.

"*The Court:* Now, as you have already said, you have consulted an attorney?

"*Mr. Carter:* I have talked to him.

"*The Court:* And he has given you the benefit of his advice, and as a result of your talking with Bill Anderson, it was decided you would represent yourself in the proceedings today, is that right?

"*Mr. Carter:* Yes, sir.

"*The Court:* You do not wish to have an attorney here; you want to represent yourself?

"*Mr. Carter:* Yes, sir.

"*The Court:* You waive at this hearing—

"*Mr. Carter:* I understand.

"*The Court:* You may proceed, Mr. Collins."

The preliminary examination then proceeded without defendant being represented by a lawyer. After the bindover to circuit court, the defendant was found indigent; a lawyer was appointed for the circuit court proceedings. When he was convicted, a lawyer was appointed to assist him on appeal. In that appeal, he claimed that the failure of the magistrate to advise him of his right to a court-appointed lawyer at the preliminary examination was reversible error. The Court of Appeals affirmed. 101 Mich App 529; 300 NW2d 624 (1980).

## II

GCR 1963, 785.4(2), in effect at the time of the preliminary examination in this case,[1] provided:

[1] It is now part of GCR 1963, 785.4(3).

"If the defendant is not represented by a lawyer the record must affirmatively show on each occasion that the advice of the right to a lawyer at public expense was given and that defendant waived that right."

There was clear noncompliance with this rule. The Court of Appeals agreed that the magistrate had erred. The majority concluded, however, that the error was harmless. Judge KAUFMAN, in dissent, said:

"I find it impossible to say with certainty that defendant suffered no prejudice by the absence of counsel at the preliminary examination. It is not evident to me that effective cross-examination might not have revealed sufficient deficiencies in complainant's story to have precluded a binding over. Although defendant's attorney did have an opportunity to cross-examine the witness at trial, there is no way of knowing whether vigorous cross-examination at the preliminary examination would have brought out evidence different from that which was presented at trial. Absent a knowing, intelligent and voluntary waiver of counsel by defendant, I am unable to say that the error in the instant case was harmless beyond a reasonable doubt."

The right to counsel is of constitutional dimension.[2] Consequently, the Court of Appeals majority erred in basing its decision on a finding of "harmless error" instead of the standard of "harmless [error] beyond a reasonable doubt" applicable to constitutional error. *Coleman, supra,* 399 US 11; *Chapman v California,* 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967).

In *Coleman,* the United States Supreme Court held that Alabama's preliminary hearing was a critical stage of that state's criminal process which entitled the accused to the assistance of an appointed lawyer:

[2] US Const, Am VI.

"Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the state's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the state's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the state has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." 399 US 9.

The Court did not conclude that the error mandated reversal, however; it remanded so that an inquiry could be made as to the prejudice to the defendant from the absence of a lawyer at the preliminary hearing. The *Chapman* test for harmless error was the standard to be applied. We adopt that remedy here.

In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand this case to Wayne Circuit Court for an evidentiary hearing on the prejudice to the defendant. We do not retain jurisdiction.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

PEOPLE v CHAPLIN

Docket No. 66156. Decided December 21, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the defendant's convictions and remanded the case for a new trial.

Howard B. Chaplin was charged with assault with intent to rob while armed and with larceny of more than $100. He was convicted by a jury in the Ingham Circuit Court, Robert Holmes Bell, J., of the assault charge, and convicted by the trial court of a supplemental charge of being a third-felony offender. Lindy Ellis, the defendant's girlfriend, testified to support the defense theory that the defendant lacked the specific intent necessary to support a conviction of assault with intent to rob while armed. She was cross-examined by the prosecutor about her activities as a prostitute, and the prosecutor argued to the jury that she could not be believed because of her bad moral character as a prostitute and because she would sell her body to raise money for the defendant. The Court of Appeals, T. M. Burns, P.J., and Beasley and Deneweth, JJ., affirmed (Docket No. 47218). The defendant applies for leave to appeal.

In a unanimous opinion per curiam, the Supreme Court *held:*

1. It is improper to impeach the credibility of a witness by demonstrating on cross-examination that the witness has a bad general moral character. Evidence of character offered to impeach or support a witness's credibility, other than evidence of prior conviction of a crime, must be limited to the particular trait of truthfulness.

2. To demonstrate that a witness is a prostitute is not to show that she has the character trait of untruthfulness. In this case it is apparent that the prosecutor was attempting to impeach the credibility of Lindy Ellis by establishing her bad moral character because of her prostitution and showing that she was biased in favor of the defendant for whom she would sell her body. If the prosecutor desired to show bias, it would have been sufficient to elicit an admission from the witness that she had posted the money to secure the defendant's release on bail. Instead, the prosecutor chose to emphasize her

prostitution and thereby necessarily suggested to the jury that the defendant was of bad character because he was closely associated with a prostitute and may have been her pimp. Permitting this line of cross-examination was error. The evidence was not admissible under the rules of evidence as impeachment of credibility because the conduct was not related to truthfulness, and insofar as it was relevant to show bias it should have been excluded because the danger of unfair prejudice substantially outweighed its probative value.

The defendant's convictions are reversed, and the case is remanded for a new trial.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, *Charles M. Sibert,* Chief Appellate Attorney, and *Janis L. Blough,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek,* Assistant Defender) for defendant.

PER CURIAM. The issue presented in this case is whether the prosecutor's cross-examination of a key defense witness with regard to her activities as a prostitute was improper and so prejudicial as to warrant a reversal of the defendant's convictions.

I

The defendant was charged with assault with intent to rob while armed[1] and with larceny of more than $100.[2] In addition, a supplemental information was filed charging that a conviction of either offense would be a third-felony conviction.[3]

The defendant was tried before a jury on the assault and larceny charges. The jury convicted

[1] MCL 750.89; MSA 28.284.

[2] MCL 750.356; MSA 28.588.

[3] MCL 769.11; MSA 28.1083.

him of assault but acquitted him of larceny. Thereafter he was bench-tried on the supplemental information and was found guilty of being a third-felony offender. He was sentenced to a prison term of 20 to 30 years.

The Court of Appeals affirmed. 102 Mich App 748; 302 NW2d 569 (1980).

## II

The evidence adduced at trial established that in the early morning hours of March 5, 1979 the defendant and his girlfriend, Lindy Ellis, were driven to the home of Lynelle Ellis, the grandmother of Lindy Ellis. The defendant went into the house while Lindy Ellis went to a store.

Tim Gordon, a youth who was residing at the home of Mrs. Ellis, responded to a knock on the door by the defendant. Tim knew the defendant and let him in. After a short conversation, Tim turned to walk to the kitchen to get the defendant something to drink. The defendant grabbed him from behind and began choking him. He demanded to know where the gun and valuables were. Tim told the defendant that there was no gun and that Mrs. Ellis kept her purse behind the door of her room. The defendant cut Tim on the neck with a knife. The defendant went upstairs and Tim fled. Over $1000 was subsequently missing from the purse of Mrs. Ellis.

Although the defendant did not testify, it was his theory of defense that he had involuntarily consumed LSD on the date in question and that this consumption had so disturbed his judgment that he lacked the specific intent necessary to support a conviction of assault with intent to rob while armed.

Lindy Ellis testified in support of the defense theory. She stated that shortly before the events in question occurred she was drinking beer with the defendant. Without the defendant's knowledge she put three LSD tablets in his drink in order to "turn him on".

III

During the cross-examination of Lindy Ellis by the prosecutor, the following colloquy took place:

"*Q.* You had occasion this year to post bail for Mr. Chaplin, didn't you?

"*A.* Yes.

"*Q.* And, where did you get the money from that you posted bail for him?

"*A.* From my clientele.

"*Q.* From your clientele. Well, what business are you in?

"*A.* Prostitution.

"*Q.* You are a prostitute?

"*A.* Yeah.

"*Q.* Is that right?

"*A.* That's right.

"*Q.* And, the money you got from what's called working the street, selling your body, that's where you got the money?

"*A.* That's right.

"*Q.* Did Chaplin ever get any of the money from you selling your body? I mean, from besides posting bail for him, did you ever give him any of the money that you earned from selling your body to—

"*[Defense Counsel] (Interposing):* Your Honor, I believe we are getting now into really an immaterial area.

"*The Court:* Would counsel approach the bench.

*(Bench conference.)*

"*Q. (By [Assistant Prosecuting Attorney]):* Have you ever given the defendant any of the money that you earned as a result of selling your body?

"*[Defense Counsel]:* Your Honor, I had an objection to that.

"*The Court:* Overruled. We'll take the answer.

"*Q. (By [Assistant Prosecuting Attorney]):* Have you?

"*A.* Sometimes.

"*Q.* Did you work for him? Was he your pimp? You know what a pimp is?

"*A.* No, that's out. That term is out or my idea is—there is no—no, he is not my pimp.

"*Q.* But you did, in fact, turn over so much of your earnings to him, correct?

"*A.* No.

"*Q.* You would sell your body on the street though to help out the defendant, right?

"*A.* (No response.)

"*Q.* Isn't that right?

"*A.* In need sometimes.

"*Q.* Pardon?

"*A.* Sometimes.

"*Q.* But, you would sell your body to help him, wouldn't you and didn't you?

"*A.* Help him get out of jail.

* * *

"*Q.* But, everything you have told the jury and the judge and everybody is the truth today, right?

"*A.* That's right.

"*Q.* You'd sell your body on the street for him but you won't lie for him, right?

"*A.* No need to lie."

The prosecutor further alluded to the activities of Lindy Ellis as a prostitute in his closing argument.[4]

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[4] For example:

"Now, because poor Mr. Chaplin took this LSD, are you going to believe her? Are you going to believe her at all? She stands—sits on the witness stand and says she'd sell her body for the man. 'I work the streets for him.' And, you think she won't, she won't sell her body? But, you think she won't come in here and lie about this incident?

* * *

## IV

The defendant contends, *inter alia,* that it was error for the prosecutor to cross-examine Lindy Ellis about her status as a prostitute. He argues that her actions in this regard had no bearing on her truthfulness as a witness and thus questions regarding those actions were not proper for impeachment purposes.

As we said in *People v Bouchee,* 400 Mich 253; 253 NW2d 626 (1977), it is improper to impeach the credibility of a witness by demonstrating on cross-examination that the witness has a bad general character in terms of morality. There we held improper the cross-examination of the defendant and his wife concerning the fact that their four children were all born prior to their marriage. We stated:

"We hold, therefore, that character evidence offered to impeach or support a witness's credibility, other than evidence of prior conviction for crime, must be limited to the particular trait of truthfulness or untruthfulness." 400 Mich 253, 268.

MRE 608 provides:

"(a) Reputation evidence of character. The credibility of a witness may be attacked or supported by evidence of reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or

"No, what we have is a very thinking cunning, despicable person right here, the wolf in sheep's clothing. That is what we have. We have got a guy who along with his girlfriend concedes not getting along too well with grandma. And, you will recall she certainly isn't independently wealthy, if she is selling her body on the streets for cash. But, she works at the store. She would like to go to California, could use all—a little bit of money.

"Who's got money? Grandma's got money. Grandma has money over the weekend. Bernie, how about if we rip off Grandma?"

untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

"(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

"The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility."

In the instant case, to demonstrate that Lindy Ellis is a prostitute is not to show that she has the character trait of untruthfulness. The cross-examination quoted makes it apparent that the prosecutor was attempting to impeach the credibility of Lindy Ellis by establishing her bad moral character because of her prostitution and that she was biased in favor of the defendant for whom she "would sell [her] body".

If the prosecutor desired to show bias, it would have been sufficient to elicit an admission from the witness that she had posted the money to secure the defendant's release on bail. Instead, however, the prosecutor chose to emphasize Miss Ellis's prostitution activities and thereby necessarily suggested to the jury that the defendant was a person of bad character because he was closely associated with a prostitute and may have been her pimp.

We find that permitting this line of cross-examination was reversible error. The evidence was not admissible under MRE 608(b) because the conduct involved was unrelated to truthfulness. Insofar as the evidence was relevant to show the bias of the witness, it should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. MRE 403. Since the defendant's conviction of assault with intent to rob while armed formed the basis for his conviction as a third-felony offender, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's conviction of assault with intent to rob while armed and his conviction of being a third-felony offender and we remand the case to the Ingham Circuit Court for a new trial. In light of our disposition of this matter we do not address defendant's other allegations of error.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

WRIGHT v FIELDS

Docket No. 64746. Decided December 21, 1981. On application by defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals, and remanded the case to Wayne Circuit Court for further proceedings.

Douglas A. Wright obtained a judgment against Jamie S. Fields in the Common Pleas Court of Detroit of $2,959.63 for conversion. The Wayne Circuit Court, Neal E. Fitzgerald, J., dismissed the defendant's claim of appeal for failure to file an appeal bond. The Court of Appeals, V. J. Brennan, P.J., and N. J. Kaufman and R. M. Maher, JJ., denied the defendant's delayed application for leave to appeal (Docket No. 45394). Defendant applies for leave to appeal.

In a unanimous opinion per curiam, the Supreme Court *held:*

A bond to secure payment of the judgment need be filed only if the appellant desires to secure a stay of proceedings to enforce the judgment pending appeal; it is not a condition of appeal. This has long been the procedure in appeals to the Court of Appeals, and no rationale can be constructed for giving different treatment to a litigant seeking to appeal the entry of a money judgment from a lower court to the circuit court than is afforded an otherwise identically situated litigant appealing a money judgment from the circuit court to the Court of Appeals. The purpose of a supersedeas or stay bond is to protect the appellee from losses that may result from the inability to enforce the judgment while it is stayed pending appeal. There is no harm to the interest of the appellee in making the appeal bond only a condition of a stay of proceedings. If the appellant does not file a bond, the appellee may proceed to enforce the judgment. GCR 1963, 701.8 is amended to clarify its intent.

Reversed and remanded to the Wayne Circuit Court for further proceedings.

*Dee Edwards* for plaintiff.

Jamie S. Fields, *in propria persona.*

PER CURIAM. The issue raised by this case is whether on an appeal to the circuit court under GCR 1963, 701 the appellant must file a bond in the amount of one and one-quarter times the amount of the judgment as a condition of appeal. We conclude that while such a bond is required to secure a stay of proceedings to enforce the judgment during the appeal, it is not a condition of the right to appeal.

I

The plaintiff brought this action in the Common Pleas Court of the City of Detroit alleging the defendant's liability for conversion as the result of an automobile accident. Eventually, a judgment was entered in favor of the plaintiff for $2,959.63. The defendant filed a claim of appeal in the circuit court. The plaintiff moved to dismiss the appeal on the grounds that the plaintiff had failed to post a bond as required by GCR 1963, 701.5(a)(1) and had failed to serve a statement regarding the bond under GCR 1963, 701.5(b)(2)(A) or a copy of the court reporter's certificate required by GCR 1963, 701.5(b)(3). The circuit judge granted the motion, and the Court of Appeals denied the defendant's delayed application for leave to appeal. The defendant now applies for leave to appeal to this Court.

II

The rule on which the plaintiff relied in contending that the appeal should be dismissed for failure to file a bond was GCR 1963, 701.5(a)(1):

".5 Bonds, Fees and Other Requirements; Cross Appeal.

"(a) Conditions Precedent. Within the time for taking

an appeal, the appellant, in addition to the acts required by subrule 701.3(a), shall

"(1) have the trial court set the bond required by subrule 701.8, post it in the trial court and have it approved, file it with the trial court clerk and file a copy with the circuit court clerk."

GCR 1963, 701.8, to which rule 701.5 refers, states in part:

".8 Stay of Proceedings.

"(a) Civil Cases.

* * *

"(2) Unless a bond is waived under GCR 1963, 120 or the appellant is exempted by law from filing a bond, the appellant shall file a bond with the claim of appeal, claim of cross appeal, or order granting leave to appeal. The appeal bond must:

"(A) be at least $200, and

"(i) except for an appeal from probate court, if the appeal is by a person against whom a money judgment has been entered, it must be not less than one and one-quarter times the amount of the judgment".

The Court of Appeals has interpreted the similar language of the previous version of the rule as requiring the posting of a bond in an amount of at least one and one-quarter times the judgment as a condition of appeal. *Samuel Reiter Painting Co v Bill Miedler Homes, Inc,* 87 Mich App 75; 273 NW2d 592 (1978).

The rule could be read as imposing such a requirement. However, in view of the placement of the provision in the section of rule 701 dealing with stays of proceedings, we reject that interpretation. The intent of the rule is not to require a bond to secure payment of the judgment as a condition of appeal, but only to require a bond if the appellant desires to secure a stay of proceed-

ings to enforce the judgment pending appeal. This has long been the procedure in appeals to the Court of Appeals, GCR 1963, 808, and this Court. GCR 1963, 853.3; *Beyerlein v Ashburn,* 334 Mich 13, 15-16; 53 NW2d 666 (1952); *Michigan Bean Co v Burrell Engineering & Construction Co,* 306 Mich 420, 426; 11 NW2d 12 (1943). We can construct no rationale for giving different treatment to a litigant seeking to appeal the entry of a money judgment from a lower court to the circuit court than is afforded an otherwise identically situated litigant appealing a money judgment from the circuit court to the Court of Appeals. The purpose of a supersedeas or stay bond is to protect the appellee from losses that may result from the inability to enforce the judgment while it is stayed pending appeal. See *Federal National Mortgage Ass'n v Wingate,* 404 Mich 661, 681-682; 273 NW2d 456 (1979). There is no harm to the interest of the appellee in making the appeal bond only a condition of a stay of proceedings. If the appellant does not file a bond, the appellee may proceed to enforce the judgment.

Thus, we hold that under GCR 1963, 701.8(a)(2)(A)(i) a bond is required only if the appellant seeks a stay of proceedings to enforce the lower court's judgment, and have today entered an order amending GCR 1963, 701.8 to clarify the intent of the rule. The amended rule is set forth as an appendix to this opinion. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to the Wayne Circuit Court for further proceedings consistent with this opinion. The defendant must comply with the remaining steps required by rule 701.5 within 30 days of the date of this opinion.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

## APPENDIX

RULE 701. APPEALS TO CIRCUIT COURT.

.1—.7 (Unchanged.)

.8 Stay of Proceedings.

(a) Civil Cases.

(1) (Unchanged.)

(2) Unless a bond is waived under GCR 1963, 120 or the appellant is exempted by law from filing a bond, the appellant shall file a bond with the claim of appeal, claim of cross appeal, or order granting leave to appeal. The appeal bond must:

(A) be at least $200, and

(i) except for an appeal from probate court, if the appellant seeks a stay of proceedings to enforce a money judgment, it must be not less than one and one-quarter times the amount of the judgment; or

(ii) (Unchanged.)

(B)-(D) (Unchanged.)

(3) (Unchanged.)

(b) (Unchanged.)

.9—.13 (Unchanged.)

KASPER v METROPOLITAN LIFE INSURANCE COMPANY

Docket No. 63624. Argued June 3, 1980 (Calendar No. 4).—Decided December 21, 1981.

Theodore Kasper, Jr., brought an action against Metropolitan Life Insurance Company as the named beneficiary in an insurance policy on the life of the plaintiff's deceased son, Steven Kasper. By the terms of a judgment of divorce, Steven Kasper was required to keep his minor child, Jason, as the beneficiary of the life insurance policy until the child reached the age of 18 years. Approximately four months after the divorce Steven Kasper named his father, the plaintiff, the beneficiary in place of his former wife, Norma J. Kasper. The defendant insurance company brought a complaint of interpleader against the plaintiff and Norma J. Kasper, as guardian of the minor child, admitting its liability and praying that the court determine who should receive the benefits. The Saginaw Circuit Court, Fred J. Borchard, J., granted the defendant a judgment discharging its liability and later granted summary judgment for the plaintiff for the proceeds. The Court of Appeals, Bashara, P.J., and J. H. Gillis and D. C. Riley, JJ., granted peremptory reversal for the defendant Norma J. Kasper on the ground that the trial court failed to follow a clear precedent of that Court in granting the plaintiff's motion for summary judgment (Docket No. 44475). Plaintiff appeals.

In separate opinions by Justices Moody, Ryan, and Fitzgerald, the Supreme Court *held:*

A property settlement agreed to by the parties to a divorce is enforceable even though the circuit court cannot order a party

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REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur 2d, Divorce and Separation § 906.
[2, 4-6, 12, 13] 24 Am Jur 2d, Divorce and Separation §§ 919, 920.
[3] 24 Am Jur 2d, Divorce and Separation § 481.
[5] 73 Am Jur 2d, Summary Judgment § 26.
[7] 24 Am Jur 2d, Divorce and Separation § 241.
[8] 24 Am Jur 2d, Divorce and Separation § 883.
[9] 24 Am Jur 2d, Divorce and Separation §§ 736-738.
[10] 24 Am Jur 2d, Divorce and Separation §§ 896, 897.
[11] 24 Am Jur 2d, Divorce and Separation §§ 907, 908.

to the divorce to convey property to a third party. In this case it is unclear whether the contested provision of the divorce judgment was the result of an agreement between the parties or was imposed by the trial court, and the matter is remanded for further proceedings.

Justice Moody, joined by Chief Justice Coleman and Justice Williams, wrote that a property settlement agreed to by the parties to a divorce may contain provisions which a court would not otherwise have the power to compel them to perform. If the contested provision of the judgment was the result of an agreement between the parties to the divorce, the obligation of Steven Kasper to maintain his minor son as a beneficiary would be enforceable. The judgment of divorce indicates that Norma J. Kasper may have bargained away other property interests in exchange for that obligation, and that Steven Kasper and his attorney had approved the judgment. Furthermore, it would be improper in this case to allow a collateral attack upon a judgment of divorce after all the benefits obtained under it were fully accepted. The manner by which the parties reach a property settlement and the form of the agreement should not determine its validity. However, the record in this case is not sufficient to decide, as a matter of law, that the parties agreed to include the clause which is at issue in the judgment. Therefore, the case is remanded to the trial court for determination whether the parties to the divorce agreed to the contested provision and to its inclusion in the judgment of divorce.

Justice Ryan, concurring in remanding the case, agreed that it is unclear whether the contested provision of the judgment was the result of an agreement between the parties. Because there is a genuine issue concerning that fact, summary judgment was improper, but he would set it aside without the essentially advisory explications of Justice Moody's opinion.

Justice Fitzgerald agreed with Justice Moody that the obligation undertaken by Steven Kasper is enforceable. The contested provision of the judgment of divorce reflects a valid agreement of the parties and the decision of the Court of Appeals should be affirmed.

1. Parties to a divorce may agree on a property settlement, and in the absence of fraud, duress or mutual mistake, they are bound by it. Divorce does not eliminate the continuing duty of parents to support their children during their minority. Although the circuit court cannot order a party to a divorce proceeding to convey property to a third party, to award the proceeds of the insurance policy to the plaintiff in this case

violates the intent of a validly drawn judgment of divorce to which the parties agreed. The provisions of the judgment show an intent to provide continued support for the child until his maturity by keeping him as a beneficiary of the life insurance policy until the age of 18. That he was not made an irrevocable beneficiary implies that the primary consideration was the desire of his parents to provide for his maintenance and support in the event of his father's death; it also weakens the argument of the plaintiff in this case that the contested provision of the judgment constitutes an impermissible award of marital property to a third party.

2. Norma Kasper may have bargained away other property interests in exchange for the agreement to maintain the child as the beneficiary of the life insurance policy, and to allow a collateral attack on a judgment of divorce after all the benefits obtained under it are fully accepted would be improper. To deny the child the insurance proceeds because the record reveals no proof of an independent agreement between Steven and Norma Kasper is to elevate form over substance and to impermissibly disregard a validly created and enforceable judgment.

Justice Kavanagh, joined by Justice Levin, dissenting, would hold that while the judgment of divorce required that the child be the beneficiary, the circuit court was without power to order such a distribution in the judgment of divorce and proof of an agreement to do so must be made aliunde the judgment. When marital property is to be distributed to a third party it must be done by an agreement independent of the divorce proceedings, which are limited to the statutory grant of authority.

1. A circuit court presiding over divorce matters does not wield general powers of equity but is limited to the powers specifically granted by statute. There is no statutory authority to distribute marital property to children or other third parties. However, a court cannot ignore or destroy valid encumbrances on marital property, nor can it distribute property which has been validly conveyed by the parties, or one of them, before the judgment of divorce.

2. Agreements between married persons to distribute property pending a divorce or legal separation are valid as long as they do not offend public policy by encouraging a breakdown of the marriage and are free from fraud and coercion. Property settlement agreements may be incorporated into a judgment of divorce to distribute marital property to a non-party in a manner which the court would not have the power to order on its own motion. However, a distribution of marital property to

third parties cannot depend on the judgment of divorce. The interest which inures to the benefit of the third party is not created by the judgment of divorce but by the agreement of the parties, and actions to enforce such provisions must be at law on the contract. In this case, the record shows no independent agreement between Steven and Norma Kasper requiring Steven to maintain their son as beneficiary of the life insurance policy.

OPINION BY BLAIR MOODY, JR., J.

1. DIVORCE — PROPERTY SETTLEMENT — JURISDICTION.

A property settlement in a judgment of divorce agreed to by the parties to it may contain provisions which a court would not otherwise have the power to compel them to perform.

2. DIVORCE — PROPERTY SETTLEMENT — THIRD PARTIES — LIFE INSURANCE.

A provision of a judgment of divorce requiring the husband to maintain the minor child of the parties as the beneficiary of a life insurance policy until the child is 18 years of age, if it was the result of an agreement between the parties to the divorce, is enforceable by the child.

3. DIVORCE — PROPERTY SETTLEMENT — JUDGMENT — COLLATERAL ATTACK.

A party to a divorce who has entered into a property settlement may not collaterally attack the judgment of divorce after all the benefits obtained under it have been fully accepted.

4. DIVORCE — PROPERTY SETTLEMENT — THIRD PARTIES — LIFE INSURANCE.

An action to determine whether a provision of a judgment of divorce requiring the husband to keep the child of the parties as named beneficiary of a life insurance policy until the age of 18 should be enforced must be remanded to the trial court to determine whether the parties agreed to the contested provision where that is unclear from the record.

CONCURRING OPINION BY RYAN, J.

5. DIVORCE — PROPERTY SETTLEMENT — LIFE INSURANCE — SUMMARY JUDGMENT.

*Summary judgment for a plaintiff named beneficiary in an action on an insurance policy on the life of the plaintiff's deceased son was improper where there was a genuine issue of material fact whether a provision of a judgment of divorce requiring the*

*decedent to maintain his minor child as the beneficiary of the policy until the child became 18 years of age was the result of an agreement between the parties to the divorce (GCR 1963, 117.2[3]).*

CONCURRING OPINION BY FITZGERALD, J.

See headnotes 1-3.

6. DIVORCE — PROPERTY SETTLEMENT — LIFE INSURANCE — PARENT AND CHILD.

*A provision of a judgment of divorce requiring the husband to maintain the minor child of the parties as the beneficiary of a life insurance policy is enforceable where the parties agreed to the provision and where the provisions of the judgment show an intent to provide continued support for the child by keeping him as beneficiary of the life insurance policy until the age of 18.*

DISSENTING OPINION BY KAVANAGH, J.

7. DIVORCE — JURISDICTION — STATUTES.

*A circuit court presiding over divorce matters does not wield general powers of equity but is limited to the powers specifically granted by statute.*

8. DIVORCE — PROPERTY SETTLEMENT — THIRD PARTIES — STATUTES.

*There is no statutory authority for the circuit court to award marital property to anyone but the parties to the divorce.*

9. DIVORCE — PROPERTY SETTLEMENT — THIRD PARTIES.

*A circuit court distributing marital property in a judgment of divorce cannot ignore or destroy valid encumbrances on the property which favor third parties, nor can it distribute property which has been validly conveyed by the parties, or one of them, before the judgment of divorce.*

10. DIVORCE — PROPERTY SETTLEMENT — MARITAL PROPERTY — HUSBAND AND WIFE.

*Agreements between married persons to distribute marital property pending a divorce or legal separation are valid as long as they do not offend public policy by encouraging a breakdown of the marriage and are free from fraud and coercion.*

11. DIVORCE — PROPERTY SETTLEMENT — THIRD PARTIES.

*Marital property may be distributed to third parties by a property settlement agreement which is incorporated into a judgment of divorce, but such incorporation renders that part of the*

*judgment a consent judgment, and the agreement between the parties speaks, not the court.*

12. DIVORCE — PROPERTY SETTLEMENT — THIRD PARTIES.

*A distribution of marital property to third parties cannot depend on the judgment of divorce; proof of an agreement creating the interest of the third party must be made independently of the judgment of divorce.*

13. DIVORCE — PROPERTY SETTLEMENT — THIRD PARTIES — LIFE INSURANCE.

*A provision of a judgment of divorce requiring the husband to maintain the minor child of the parties as the beneficiary of a life insurance policy on the husband's life until the child is 18 years of age is void and unenforceable by the child where there is no evidence in the record that the insurance provision was included in the judgment as a result of an independent agreement between the parties to the divorce.*

*Irwin F. Hauffe, II,* for Theodore Kasper, Jr.

*Trogan & Trogan, P.C.,* for Norma J. Kasper.

BLAIR MOODY, JR., J. *(for affirmance and remand).* This case involves the question of whether a provision in a judgment of divorce, which purportedly reflects an oral property settlement agreement that obligates one party to maintain a minor child as the beneficiary of a life insurance policy, may be enforced.

The trial court concluded that such a provision exceeded the statutory authority of the court and therefore declined to enforce it. The Court of Appeals reversed by peremptory order predicated upon the "clear precedent" of *Krueger v Krueger,* 88 Mich App 722; 278 NW2d 514 (1979), *lv den* 406 Mich 1003 (1979). This Court granted leave to appeal directing the parties to "include among the issues to be briefed: whether a term in a divorce judgment, voluntarily agreed to by the husband, requiring him to maintain his minor son as the

beneficiary of his life insurance policy, is enforceable by the son". 407 Mich 948 (1979).

It is undisputed that Steven and Norma Jean Kasper had a right to enter into a property settlement agreement to resolve their differences pending a divorce proceeding. This purported agreement was confirmed by the court as a part of the divorce judgment. It has been recognized that a court may not compel one party to a divorce proceeding, *i.e.,* Steven Kasper, to convey property to a third person, *i.e.,* his son. However, a property agreement may contain provisions which a court may not otherwise have the power to compel the parties to perform. We hold that predicated on an agreement, rather than the court's separate power to adjudicate, the obligation of Steven Kasper to maintain his minor son as a beneficiary on a life insurance policy would be enforceable. The judgment of divorce indicates that Norma Jean Kasper may have bargained away other property interests in exchange for that obligation. Furthermore, it would be improper in this case to allow a collateral attack upon a divorce judgment after all benefits obtained under it were fully accepted.

As it is unclear whether the contested provision of the judgment was the result of an agreement between the parties or was imposed by the trial court, the matter is remanded for further proceedings not inconsistent with this opinion.

## I

Steven and Norma Jean Kasper had one child, Jason Craig Kasper, during the course of their marriage. The marriage was dissolved by a judgment of divorce on November 26, 1976.

The pertinent sections of the judgment are as follows:

"JUDGMENT OF DIVORCE

* * *

"This cause came on to be heard upon the pleadings filed therein, *upon stipulation between the parties* by their respective attorneys, that the plaintiff may take her proofs on the complaint as filed and the proofs having been taken in open court, on reading the complaint and hearing proofs from which it satisfactorily appears to this court that the material allegations charged in such complaint are true; and the court having jurisdiction of the parties, and being advised in the premises. [Emphasis added.]

"Now, therefore, on motion of Nicholas R. Trogan, III, P.C., attorney for the plaintiff, the court does order and adjudge as follows:

* * *

"ALIMONY

"That no alimony, temporary or permanent be awarded to the plaintiff.

* * *

"SUPPORT AND MAINTENANCE PAYMENTS

"The defendant shall pay to the plaintiff, through the office of the Saginaw County Friend of the Court, for the support and maintenance of the minor child, Jason Craig Kasper, the sum of forty-five ($45.00) dollars per week, commencing on Monday, November 8, 1976, until he attains the age of eighteen (18) or graduates from high school, whichever is the later.

* * *

"PROPERTY SETTLEMENT

"It is further ordered and adjudged that the plaintiff shall receive the Magnavox stereo and that the defendant shall repair said Magnavox stereo or pay fifty ($50.00) dollars toward the repair of said Magnavox stereo, whichever is less.

"It is further ordered and adjudged that the defendant shall receive all right, title and interest in and to

the trailer owned by the parties located at 2821 E. Anita, Saginaw, Michigan, and the plaintiff shall forthwith assign and transfer all of her right, title and interest in and to said trailer. Defendant shall assume all indebtedness owing on said trailer.

"It is further ordered and adjudged between the parties that the defendant shall keep the minor child of the parties as the beneficiary on his presently existing insurance policy with Metropolitan Life until the minor child reaches the age of eighteen (18) years.

"It is further ordered and adjudged that the parties shall file their own separate income tax return for the year 1976.

"It is further ordered and adjudged that each of the parties shall receive absolutely all of their personal property now in their respective possession and shall thereafter hold the same free and clear from any claim on behalf of the other party.

"INSURANCE

"It is further ordered and adjudged between the parties that neither shall hereafter have any right, title or interest in or to the insurance upon the life of the other, except as herein previously indicated; and that in any and all other insurance policies, each of them shall be entitled to change the beneficiary to said insurance upon their respective lives, or other *[sic]* to deal with or dispose of the same without interference of the other of them."

Below the signature of the trial judge on the judgment appears the following:

"Approved:
"Friend of the Court
"*(s) Steven Craig Kasper,* Defendant
"*(s) Robert J. Moskal,* Attorney for Defendant".

In addition, a letter from the attorney for Steven Kasper dated November 17, 1976, was submitted by the appellant to the trial court. The letter states in part:

"Enclosed herewith is the proposed judgment of divorce in the above, which Mr. Kasper and I have approved. I trust that you will have the judgment approved by the Friend of the Court and signed by Judge McDonald at your earliest convenience."

After the judgment of divorce, Steven Kasper, contrary to that judgment, changed the beneficiary on his insurance policy with Metropolitan Life Insurance Company from Norma Kasper, his former wife, to his father, Theodore Kasper, Jr. On July 10, 1977, Steven Kasper died as a result of a motorcycle accident. Thereafter, Norma Kasper was appointed guardian of the estate of her son.

On February 21, 1978, Theodore Kasper, Jr., brought suit against Metropolitan Life Insurance Company seeking payment under the policy issued by Metropolitan Life. Metropolitan Life Insurance Company answered and filed a complaint of interpleader naming as defendants Norma Kasper, guardian of Jason Kasper, and Theodore Kasper, Jr. The insurance company admitted liability for ordinary and accidental death benefits arising out of the death of Steven Kasper and requested that the court determine the proper recipient of the policy funds. Metropolitan Life was discharged from liability.

Theodore Kasper, Jr., filed a motion for summary judgment based upon GCR 1963, 117.2(3), claiming that there was no genuine issue as to any material fact and that judgment in his favor as a matter of law was proper. Norma Kasper also filed a motion alleging that there was no genuine issue as to any material fact and that the claim of Theodore Kasper, Jr., was barred by the judgment of divorce. See GCR 1963, 117.2(3) and 116.1(5).

The trial court granted Theodore Kasper, Jr.'s motion and awarded the proceeds to him, the

designated beneficiary. Norma Kasper's motion was denied. The trial court determined that the provision in the judgment of divorce designating Jason Kasper as beneficiary exceeded the statutory authority of the court. The Court of Appeals reversed.

It is the position of the appellant, Theodore Kasper, Jr., that, except as otherwise indicated in the specific insurance provision of the judgment of divorce, either party could freely change the beneficiary on any insurance contract. He bases his argument on the statute regarding the disposition of insurance proceeds in divorce cases[1] and the insurance provisions contained in the judgment. Theodore Kasper, Jr., claims that jurisdiction in divorce proceedings is strictly statutory and that this Court has no authority to enter a judgment that allows an award of property to third parties including making a minor child of the parties a beneficiary of an insurance policy. He relies upon a string of cases, the most significant of which include: *Maslen v Anderson,* 163 Mich 477; 128 NW 723 (1910), overruled in part by *Newton v Security National Bank of Battle Creek,* 324 Mich 344; 37 NW2d 130 (1949), *Rex v Rex,* 331 Mich 399; 49 NW2d 348 (1951), *Flynn v Flynn,* 367 Mich 625; 116 NW2d 907 (1962), and *Yedinak v Yedinak,* 383 Mich 409; 175 NW2d 706 (1970).

The appellee, Norma Kasper, on behalf of her

[1] MCL 552.101; MSA 25.131 states in part:

"Hereafter every decree of divorce shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment or annuity upon the life of the husband in which she was named or designated as beneficiary, or to which she became entitled by assignment or change of beneficiary during the marriage or in anticipation thereof, whether such contract or policy was heretofore or shall hereafter be written or become effective, and *unless otherwise ordered in said decree* such policy or contract shall thereupon become and be payable to the estate of the husband or to such named beneficiary as he shall affirmatively designate." (Emphasis added.)

son, points to a different line of case law. It is her contention that the parties to a divorce proceeding have a right to make a property settlement agreement and be bound thereby. She urges that a court has jurisdiction and may confirm a judgment which includes provisions in the agreement which the court could not otherwise compel. She claims that the provision requiring Steven Kasper to designate their son as beneficiary resulted from an agreement covering all property interests. The agreement was specifically approved by Mr. Kasper as reflected by his stipulation that she proceed without opposition to take the divorce and by his signature on the judgment. She relies on *West v West,* 241 Mich 679; 217 NW 924 (1928), *Newton v Security National Bank of Battle Creek, supra, Flynn v Flynn,* 634 (BLACK, J., dissenting), *Ovaitt v Ovaitt,* 43 Mich App 628; 204 NW2d 753 (1972), and *Krueger v Krueger, supra.*

II

In order to place this controversy in proper perspective, it is necessary to trace the history of the pertinent appellate determinations of this jurisdiction. As it will unfold, there are two distinct lines of authority, which for the most part are reconcilable.

The first of these decisions is *Maslen.* The plaintiff, executor of the estate of Andrew Anderson, brought suit, attacking a divorce decree between Anderson and his ex-wife, for the purpose of sequestering additional assets of the estate. The Court found that Andrew Anderson had knowledge of and orally consented to the terms of the decree and that it was entered into with the consent of both parties. It was held that, regardless of Anderson's consent, the portion of the

decree providing for the payment of a stipulated sum to the wife's mother and certain lump sums to the children at their majority, and for the creation of a lien on certain real property to secure such payment, exceeded the jurisdiction of the court and were therefore void.

The *Maslen* Court stated:

"Our statutes give the court power to grant alimony to the wife for the support of herself and minor children, and to give a lien against the property of the husband to secure the payment of the same; but they do not give the court power to decree the payment of any sum to the children upon their reaching majority, or to create a lien to secure the payment thereof. * * *

"We are satisfied that in divorce proceedings our circuit courts in chancery are courts of limited and special jurisdiction; that they do not proceed according to the course of the common law, and are confined to the authority conferred upon them by statute.

* * *

"It is a recognized doctrine that parties cannot confer jurisdiction over a subject-matter by their consent, upon courts from which the law has withheld it.

* * *

"So we are constrained to hold that, notwithstanding the consent of Anderson, those portions of the decree above pointed out were void and of no effect for want of jurisdiction in the court to make the same. We cannot agree with counsel for appellees that those provisions of the decree alluded to can be sustained as 'family settlements'. There is nothing to show that the said provisions were intended to operate as 'family settlements', and that fact is negatived by the will of Andrew Anderson, which appears in this record, showing that he made subsequent provisions for these children. Neither can a family settlement, such as is here claimed, be made in a divorce proceeding." 163 Mich 481-482, 484.

The reasoning set forth in *Maslen* establishes

the foundation for the claim asserted by Theodore Kasper, Jr., in the instant case. Although certain principles were reiterated in intervening cases, it was not until this Court decided *Newton* that the effect of a property settlement agreement upon a court's jurisdiction to approve a divorce judgment was again specifically addressed.

In the meantime, this Court in *West,* apparently contrary to its determination in *Maslen,* clearly recognized that the parties to a divorce proceeding may enter into and be bound by a property settlement agreement:

> "In this State, husband and wife, during the pendency of a suit for divorce, may agree upon a property settlement, and, in the absence of fraud, duress, or mutual mistake, be bound thereby." *West,* 683.

At the same time the Court acknowledged that the parties cannot take from the court the power to decree maintenance of a child.

Then *Newton* was decided. This Court first distinguished and then expressly overruled salient parts of the *Maslen* opinion. The facts of *Newton* are somewhat involved but require full explication to grasp the import of the case.

Plaintiff William F. Newton married defendant Frances Newton in 1917. They had a son, William H. Newton. Frances Newton filed a bill for divorce. While the divorce suit was pending, the parties executed a stipulation and written property settlement agreement. The agreement provided that one-third of the husband's property should be retained by him, one-third transferred to the wife and the remaining one-third transferred to a trustee to be held for the son for his support until he reached 21. Thereafter, the income was to be paid directly to the son until he attained the age

of 30, at which time he would receive the principal. A default of the husband was entered in the divorce action and a decree was entered approving the property settlement agreement and incorporating it in the decree. Both parties signed a consent at the foot of the decree. By the terms of the agreement and the decree, Frances Newton gave up all her rights to the property of her former husband.

The *Newton* case commenced over 27 years later. The ex-husband, William F. Newton, challenged the validity of the provisions of the divorce decree providing a trust for his son. As stated in *Newton:*

" 'The plaintiff contends that the court sitting in the divorce case of *Newton v Newton* had no jurisdiction over the subject matter, so as to give it power to establish the so-called trust of plaintiff's property, distributable to his son after reaching the age of majority. That power and jurisdiction cannot be conferred by consent. That said portions of the decree, seeking to convey plaintiff's property to the son after the age of majority, are absolutely null and void and may be attacked collaterally.' " 324 Mich 349.

The plaintiff attempted to rely upon *Maslen.* However, the *Newton* Court disagreed. First, it distinguished the facts:

"Plaintiff claims that *[Maslen]* is on all fours with the case at bar and controls here. However, the situation in that case does not support the claim. The defendant did not enter an appearance, there was no property settlement or agreement entered into by the parties that was the basis of the decree, and the provisions of the decree had not been completely executed when the action was brought." 324 Mich 352.

Then the Court went on to overrule *Maslen* in pertinent part:

"To the extent that statements in the *Maslen Case* may be considered contrary to the conclusions herein expressed, we now decline to follow the same. Plaintiff seems to proceed upon the theory that the trust in this case was the result of the decree of divorce, and that as such it was in excess of the court's statutory powers. The trust was in reality the result of the property settlement between the parties, which they had a right to make, and which the court had a right to confirm." 324 Mich 353.

As further rationale for the conclusion reached in *Newton,* it was stated:

"William F. Newton retained one-third of his property, of a value of approximately $50,000. The property settlement relieved him of all further claims of Frances W. Newton arising out of the marital relation. He received and retains these benefits.

" 'One who accepts the benefits of a decree of divorce cannot be heard to question the jurisdiction of the court which rendered it.' *Jackson City Bank & Trust Co v Fredrick,* 271 Mich 538 [260 NW 908 (1935)].

"In the divorce case alimony was waived. The future care of the child was merged in an outright lump sum sufficient to provide support, education and a start in life; the court, having the child as a ward, approved the arrangement. The trust was created by the acts of the parties, not by the court. The decree provided additional administrative safeguards. These, however, were approved in writing by the parties at the foot of the decree. The transaction was one favored by the law, and the parties expressly adopted it. When said agreement was approved by the court it became binding unless modified by consent of all of the parties." 324 Mich 353-354.

Accordingly, the judgment of the trial court which dismissed the complaint was affirmed.

The principles established in *Newton,* as contrasted with *Maslen,* give the basis for the position of defendant Norma Kasper. She asserts that the parties may enter into a property settlement agreement which transfers property to a child, that the agreement may be confirmed by a court, that a person may not collaterally attack a divorce judgment after a party to the divorce has accepted all the benefits of that judgment, and that she relinquished property interests under the negotiated agreement which was set forth in the judgment.

Thus, the critical distinction between *Maslen* and *Newton* which is determinative in the instant case emerges. In *Maslen,* the focus of the opinion centered on the limited statutory authority conferred upon the courts. The statute gives no power to award property to any person other than one of the parties to the marriage. To this proposition was added the "doctrine that parties cannot confer jurisdiction over a subject-matter by their consent, upon courts from which the law has withheld it". *Maslen,* 482. It would follow, therefore, that any judgment which provides for an award of property to a child is void *ab initio.*

In contrast, the *Newton* Court focused on the agreement reached between the parties rather than the statute. In expressly overruling *Maslen,* the Court concluded, with respect to the issue of jurisdiction, that the trust to which the parties consented, like the purported agreement here to name Jason Kasper as beneficiary of an insurance policy, was "the result of the property settlement between the parties, which they had a right to make, and which the court had a right to con-

firm". *Newton,* 353; *Flynn,* 636 (BLACK, J., dissenting). Added to this holding was the estoppel-like doctrine that "[o]ne who accepts the benefits of a decree of divorce cannot be heard to question the jurisdiction of the court which rendered it". *Jackson City Bank & Trust Co,* 546; *Newton,* 353-354. See also *Norris v Norris,* 342 Mich 83, 87; 69 NW2d 208 (1955), *cert den* 350 US 903 (1955). It follows, therefore, that since the judgment is predicated upon an agreement which the court may confirm rather than the statutory power of the court to compel compliance, it may be enforced.

Several cases which followed *Newton* may be distinguished for the reason that the award of property to a third party was compelled by a court rather than based upon an agreement confirmed by a court. *Rex* is such an example.

The *Rex* Court, citing *Maslen,* held void a provision in a decree which required the husband to establish a trust to include corporate stock and life insurance policies for his three sons. The disposition of this property was mandated by the trial court, which did not possess the statutory authority to require such a distribution of property. "The court cannot decree payment direct to children upon their reaching majority, or even during minority, or create a lien for such payment." *Rex,* 409.

Unlike the instant case, however, the distribution and division of marital property was a contested issue at trial in the *Rex* case. There was no property settlement agreement covering the disputed provision. Furthermore, the husband did not accept the benefits of the judgment, but promptly objected to the court's ruling by appealing to this Court.

*Yedinak* involved a money award in a divorce

judgment to third parties secured by a lien on the marital home. It was urged that "by statements made in court during trial and questions put to witnesses" the subject of the award and lien to third parties became "one for the court's determination". *Yedinak,* 415. Both the award and related lien were held void. But, as in *Rex,* no property settlement was involved. The focus was placed on the lack of a statutory basis for the court to act in such fashion.

After *Newton,* only in *Flynn* was this Court faced with the question of whether to focus solely upon the absence of statutory authority in accordance with *Maslen,* or to recognize the separate force of a property settlement agreement as the foundation to confirm jurisdiction pursuant to *Newton.* The question was resolved in *Flynn* by a one-vote margin.

In *Flynn,* the parties placed on the record an oral stipulation to a proposed property settlement agreement. A portion of the settlement disposed of realty by creating life estates in the parties with remainders to the children. The oral agreement was confirmed by the court and was incorporated into the decree under the "property settlement" provision. Years later the husband challenged that portion of the judgment, claiming that the parties never consented to the provision and that the court exceeded its jurisdiction. The majority opinion, citing *Maslen* and *Rex,* affirmed the trial court finding that there was no authority for disposing of entireties property to persons other than the parties in a divorce case.

That opinion, although mentioning the result in *Newton,* failed to recognize or discuss the critical distinction between the court compelling the property division and the parties assenting to a prop-

erty agreement that is presented for ratification. Nor did the majority opinion acknowledge that *Maslen* was expressly overruled by *Newton.* The dissenting opinion of Justice BLACK in *Flynn* cogently noted that the question of jurisdiction was controlled by *Newton* and asserted that the majority "opinion ignores our settled rule that one who has partaken of the fruits of a divorce decree cannot be heard to question the jurisdiction of the court which rendered it". *Flynn,* 634.

Commentators found it difficult to reconcile *Flynn* with *Newton.* One suggested interpretation developed a logical but artificial distinction:

> "What all this means is that if the divorcing parties, however amicably, attempt a property settlement involving awards of property interests to their children, but set forth such agreement only in the stenographic record of the court proceedings and the finally entered judgment, the awards to the children are 'void'. The court is deemed to have 'exceeded its jurisdiction' by entering such a judgment.
>
> "However, the result is valid and enforceable if the same parties desiring the same result sign a written property settlement agreement containing the same provisions for the children, and 30 seconds later walk into the courtroom where the judge grants the divorce after hearing the same settlement placed on the record and incorporates the written agreement into a subsequently entered judgment." VanderKloot, *Divorce Judgment Property Awards to Children,* 54 Mich State Bar J 875, 880 (1975).[2]

Irrespective of this laudable attempt to draw a line, it is apparent that facial technicalities concerning the manner by which parties reach a

[2] Another commentator concludes that the property settlement agreement should not be incorporated in the judgment of divorce. Carroll, *Award of Life Insurance Proceeds to a Child in Divorce Actions,* 54 Mich State Bar J 707, 709 (1975).

property settlement agreement and the form of such an agreement should not determine its validity or enforceability.

Although several cases decided by the Court of Appeals have alluded to the instant matter,[3] a recent decision, *Krueger v Krueger, supra,* is squarely on point. The facts in *Krueger* are practically identical with those of the instant case.

The parties in *Krueger,* during the pendency of suit, reached an oral property settlement agreement which was dictated on the record, approved by the court and incorporated in the judgment of divorce. A provision of the agreement required the husband to change the beneficiary on an insurance policy from his wife to their son until he reached the age of 21 years or graduated from college. The agreed-to change was made, but Mr. Krueger subsequently altered the policy to name his mother as

[3] See, *e.g., Binben v Continental Casualty Co,* 9 Mich App 97; 155 NW2d 883 (1967) (awarded proceeds of insurance to minor children since purpose of insurance provision was to provide support in the event of death of father); *Snyder v Snyder,* 42 Mich App 573; 202 NW2d 504 (1972) (provision of judgment in a contested divorce case which awarded property directly to children held void); *Ovaitt v Ovaitt,* 43 Mich App 628; 204 NW2d 753 (1972) (property settlement concerning post-majority support incorporated into divorce judgment held enforceable); *White v Michigan Life Ins Co,* 43 Mich App 653; 204 NW2d 772 (1972) (award of proceeds, limited to amount of insurance in force at time of divorce, effectuated intent of parties to property settlement); *Gray v Independent Liberty Life Ins Co,* 57 Mich App 590; 226 NW2d 574 (1975) (judgment which required father to maintain insurance policies for benefit of children interpreted to mean he must maintain policies for so long as support obligation remained); *Smith v John Hancock Mutual Life Ins Co,* 65 Mich App 193; 237 NW2d 244 (1975) (insurance provision, which was not part of a property settlement, not enforceable after child reaches majority).

When faced with the question of enforceability, courts in other jurisdictions have imposed a constructive trust in order to grant relief. See, *e.g., Perry v Perry,* 484 SW2d 257 (Mo, 1972); *Richards v Richards,* 58 Wis 2d 290; 206 NW2d 134 (1973). See also *McKissick v McKissick,* 93 Nev 139; 560 P2d 1366 (1977); *Simonds v Simonds,* 45 NY2d 233; 408 NYS2d 359; 380 NE2d 189 (1978); *Ridgway v Prudential Ins Co of America,* 419 A2d 1030 (Me, 1980), *rev'd on other grounds sub nom Ridgway v Ridgway,* 454 US 46; 102 S Ct 49; 70 L Ed 2d 39 (1981).

beneficiary. When Krueger died, his mother was the named beneficiary. A petition was filed to enforce the right of the child to the proceeds. The question submitted was whether the judgment incorporating the oral agreement requiring the husband to maintain his son as the beneficiary was enforceable against the named beneficiary. The trial court concluded that it was and the Court of Appeals affirmed.

Recognizing the distinction between the power of a court to compel a property division and the right of a court to confirm a settlement of interests which it would otherwise not make if the case were contested, the *Krueger* Court stated:

"We have no quarrel with the proposition that the circuit court has no jurisdiction in a divorce case to compel a party to convey property or a property interest to a third person, even a child of the parties, or to adjudicate claims of third parties. The Supreme Court has so held on many occasions. See, *e.g., Yedinak v Yedinak,* 383 Mich 409; 175 NW2d 706; 63 ALR3d 360 (1970), *Rex v Rex,* 331 Mich 399; 49 NW2d 348 (1951). Were this an appeal or separate suit by the husband attacking the judgment after such a disposition had been forced on him, we would probably be required to hold in his favor. *Flynn v Flynn,* 367 Mich 625; 116 NW2d 907 (1962).

"But, neither of those propositions is applicable here. The Supreme Court has also recognized that the parties in a divorce case may make a settlement of their interests which the court could confirm even if it could not make such a disposition if the case were contested. *Newton v Security National Bank of Battle Creek,* 324 Mich 344; 37 NW2d 130 (1949). In our view, this is what occurred here. The wife took no alimony and the child support was in an amount less than that recommended by the Friend of the Court. She gave up something she was entitled to in exchange for a benefit to her child. Under these circumstances many courts have held that

the agreement embodied in the judgment will be enforced even if the court would have had no power to order the same disposition in a contested case. Anno: *Divorce: Provision in Decree That One Party Obtain or Maintain Life Insurance for Benefit of Other Party or Child,* 59 ALR3d 9, § 10, p 44. *Cf. Ovaitt v Ovaitt,* 43 Mich App 628; 204 NW2d 753 (1972) (dealing with post-majority support under an agreement).

"It is also important to note that the person challenging the divorce judgment and the underlying agreement was not a party to it. Under the circumstances it would be improper to allow this divorce settlement to be collaterally attacked after the husband has accepted all the benefits which he could obtain under it, but relieving him of his obligation." 88 Mich App 724-726.[4]

This case is nearly on all fours with *Krueger.* It is claimed that Steven and Norma Kasper voluntarily entered into a negotiated property settlement agreement during the pendency of their divorce proceeding. The agreement allegedly was incorporated in the proposed judgment of divorce. The court approved the judgment upon the stipulation by Steven and the presentation of proofs by Norma.

Assuming the existence of an oral property settlement agreement, we are convinced that based on this contract the court had the jurisdiction to confirm it. The provision requiring the husband to

[4] "A divorce court, if it is bound to abide by a valid separation agreement or property settlement, or if not so bound, desires to give effect to the agreement, has the power to incorporate it in the divorce decree or base the decree on its provisions, even though the court would not, in the absence of an agreement of the parties, have the power to make the decree that results from the incorporation of the agreement or the application of its provisions. It is similarly held that where the court disposes of the property of the parties by stipulation in a manner in which it could not have disposed of the property in an adversary proceeding, the general rule applies that a party who procures or consents to the entry of the decree is estopped to question its validity, especially where he has obtained a benefit from it." 24 Am Jur 2d, Divorce and Separation, § 907, p 1030.

name his son as beneficiary on a certain life insurance policy was created by the acts of the parties, not by the court. The court, having the child as a ward, approved the agreement. By incorporating this arrangement the judgment provided additional administrative safeguards. See *Newton,* 354.

The authority of the court to enforce such an arrangement is further predicated upon our settled rule that one who has partaken of the fruits of a divorce decree cannot be heard to question the jurisdiction of the court which rendered it. *Jackson City Bank & Trust Co,* 546. Norma Kasper apparently gave up any claim for alimony as well as any interest in a "residence-house trailer" owned by the parties as a result of the purported agreement.

The divorce judgment was apparently predicated upon an agreement. This was not a contested case where the court required the provision, or where the provision was promptly and directly contested, and the benefits of the settlement were not accepted.[5]

## III

Artificial lines of distinction as to the form, method or procedure utilized in order to effectuate

[5] Theodore Kasper, Jr., appellant, also argues that the judgment does not create a lien. Norma Kasper, appellee, has abandoned any "lien-for-support" argument in this Court. Therefore, we decline to reach the question of whether the judgment of divorce may be interpreted as creating a lien against the insurance policy. MCL 552.27; MSA 25.105 provides in part:

"In all cases where alimony or allowance for the support and education of minor children shall be awarded to either party, the amount thereof shall constitute a lien upon such of the real and personal estate of the adverse party as the court by its judgment shall direct."

For a discussion of this statute see Carroll, fn 2 *supra,* 708-709. *Cf. Binben, Gray,* and *Smith,* fn 3 *supra.*

a property settlement agreement as part of a judgment should be avoided. As long as a valid contractual arrangement is made, inserted in the judgment and confirmed by the court, it should be enforceable.

It is now universally recognized that property settlement agreements may be reached and reflected in several ways. The parties may negotiate over a lengthy period and prepare a detailed written contract prior to or pending a divorce proceeding. The written agreement may be attached to the judgment or incorporated by reference in the judgment in whole or in part. On other occasions property agreements are orally arranged on "the courthouse steps" just prior to or during trial. Often, in such cases, counsel and their clients state on the record what was orally settled. The agreement is then frequently confirmed by the court as set forth and presented in the judgment. Also, upon occasion, the parties orally agree to a property division, reflect their understanding in a proposed judgment and note their approval on the document. This last course was the procedure that Norma Kasper claims occurred in this case.

It is to be noted that Steven Kasper and his lawyer signed the last page of the divorce judgment under the term "approved". In addition, the judgment asserted that the cause was to be heard "upon stipulation between the parties by their respective attorneys, that the plaintiff may take her proofs on the complaint as filed". Furthermore, the file of this case contains a copy of correspondence from Steven Kasper's lawyer noting approval of the proposed judgment.

However, we hesitate to decide, as a matter of law, that the parties did in fact agree to the inserted property settlement provisions and that

the clause requiring the designation of the son as beneficiary was included in the judgment pursuant to an agreement.[6] A transcript of the divorce proceeding is not a part of this record. Additional information may be obtained by way of a hearing to clarify the basis for the inclusion of the contested provision in the judgment.

Accordingly, we affirm the order of the Court of Appeals which reversed the judgment of the trial court. We remand this case to the trial court for determination of whether the parties to the divorce agreed to the contested provision and to its inclusion in the divorce judgment and for further proceedings not inconsistent with this opinion.

COLEMAN, C.J., and WILLIAMS, J., concurred with BLAIR MOODY, JR., J.

RYAN, J. I agree with my brother MOODY that "it is unclear whether the contested provision of the judgment was the result of an agreement between the parties". Indeed, there is a genuine issue concerning that very material fact and for that reason the trial court erred in granting summary judgment in favor of the plaintiff. GCR 1963, 117.2(3).

I would set aside the summary judgment and remand the case to the trial court without the essentially advisory explications to which my colleagues have subscribed.

FITZGERALD, J. I agree with Justice MOODY's opinion that the obligation undertaken by Steven Kasper is enforceable. The provision of the judgment of divorce which requires that Steven Kasper

[6] The trial court was not directly presented with the question of whether the complained-of provision was inserted into the judgment by agreement of the parties.

keep his minor son Jason as beneficiary of a designated life insurance policy until his son reaches the age of majority reflects a valid agreement of the parties. I would affirm the decision of the Court of Appeals.

Parties to a divorce may agree upon a property settlement and, in the absence of fraud, duress or mutual mistake, be bound thereby. *West v West,* 241 Mich 679; 217 NW 924 (1928); *Kline v Kline,* 92 Mich App 62; 284 NW2d 488 (1979). Divorce does not eliminate the continuing duty of parents to support their children during their minority. This obligation is addressed by various statutory provisions. See MCL 552.16; MSA 25.96 (judgment awarding custody); MCL 552.17a; MSA 25.97(1) (that the court may order either parent to pay such allowance as is deemed proper to support the minor children); MCL 552.27; MSA 25.105 (support and education of minor children; award as lien); MCL 552.251 *et seq.;* MSA 25.171 *et seq.* (Friend of the Court). While acknowledging that the circuit court cannot order a party to a divorce proceeding to convey property to a third party, I believe that to award the insurance proceeds in the instant case to Jason Kasper's grandfather violates the intent of a validly drawn and agreed-upon divorce judgment.

The language of the divorce judgment recognizes the obligation to provide for the minor child until he reaches maturity: 1) support and maintenance payments to continue until age 18 or graduation from high school, whichever is *later,* 2) the requirements that medical insurance be maintained for Jason, and 3) that Steven Kasper keep Jason as beneficiary of the designated life insurance policy until he reaches the age of 18 years.

Several aspects of this arrangement must be

noted. A separate section of the judgment dealing with "insurance" granted the parties to the divorce the right to change beneficiaries and deal with or dispose of life insurance policies, while specifically referring to the Metropolitan Life policy on which Jason was to be kept as beneficiary.

Jason Kasper was very young when his parents were divorced. He was not made an irrevocable beneficiary of the Metropolitan Life policy. Rather, the language clearly states that he be kept as beneficiary only until reaching age 18. This termination date implies that the primary consideration was the parental desire to provide for Jason's maintenance and support in the event of his father's death. The inclusion of a termination date also severely weakens appellant's argument that the provision constitutes an impermissible award of property. See Carroll, *Award of Life Insurance Proceeds to a Child in Divorce Actions,* 54 Mich State Bar J 707 (1975).

I agree with Justice MOODY's conclusions that Norma Jean Kasper may have bargained away other property interests in exchange for Steven Kasper's agreement to maintain Jason as beneficiary, and that to allow a collateral attack upon a divorce judgment after all benefits obtained under it are fully accepted would be improper.

To deny Jason Kasper the insurance proceeds because the record reveals no proof of an independent agreement between Steven and Norma Jean Kasper is to elevate form over substance and to impermissibly disregard a validly created and enforceable judgment. I agree with the Court of Appeals decision in *Krueger v Krueger,* 88 Mich App 722; 278 NW2d 514 (1979).

KAVANAGH, J. In this case we are asked to

determine the legal significance of a property settlement provision in a divorce judgment which requires one party to keep a child of the parties as beneficiary of a life insurance policy.

On July 27, 1971, Steven Kasper designated his father Theodore Kasper, Jr., beneficiary of the insurance he had on his life pursuant to the group policy Metropolitan Life Insurance Company had issued to Steven's employer, General Motors Corporation.

Steven and Norma Jean Kasper were married on September 27, 1973 and their one son, Jason Craig Kasper, was born April 10, 1974. Steven changed the beneficiary of his life insurance policy from his father to his wife on October 8, 1973. The couple were divorced November 26, 1976 and the divorce judgment contained the following provisions:

"PROPERTY SETTLEMENT

* * *

"It is further ordered and adjudged between the parties that the defendant shall keep [1] the minor child of the parties as the beneficiary on his presently existing insurance policy with Metropolitan Life until the minor child reaches the age of eighteen (18) years.

* * *

"INSURANCE

"It is further ordered and adjudged between the parties that neither shall hereafter have any right, title or interest in or to the insurance upon the life of the other, except as herein previously indicated: and that in any and all other insurance policies, each of them shall be entitled to change the beneficiary to said insurance upon their respective lives, or other *[sic]* to deal with or

[1] It is worthy of note that the word "keep" is inappropriate since Steven Kasper's minor son was *never* a beneficiary of the life insurance policy in question.

dispose of the same without interference of the other of them."

Notwithstanding the above property settlement provision of the judgment, Steven changed the beneficiary of his life insurance policy from Norma Jean Kasper back to his father, Theodore Kasper, Jr., on March 16, 1977. Steven died July 10, 1977.

Theodore Kasper, Jr., as beneficiary, filed a claim with Metropolitan Life for the proceeds of the life insurance policy. Metropolitan Life filed a complaint of interpleader admitting liability on the policy and paid the proceeds to the court. The interpleader complaint admitted knowledge of the divorce judgment and named as defendants Theodore Kasper, Jr., and Norma Jean Kasper as guardian of Jason Craig Kasper. The trial court granted a summary judgment in favor of Theodore Kasper, Jr. The Court of Appeals granted Norma Jean Kasper's motion for peremptory reversal, relying on *Krueger v Krueger,* 88 Mich App 722; 278 NW2d 514 (1979).

Theodore Kasper, Jr., appealed to this Court, asserting that a property settlement provision in a divorce judgment requiring one spouse to maintain a child as beneficiary of a life insurance policy is void as exceeding the statutorily limited jurisdiction of a court to distribute marital property between the divorcing parties only. Norma Jean Kasper argues that while a court has no authority on its own to distribute marital property to anyone but the divorcing parties, they may independently agree to do so in a property settlement agreement and the court may incorporate such a property settlement agreement into its judgment. Norma Jean Kasper further argues that by approving the proposed judgment containing the above-quoted property settlement provision, Steven Craig Kas-

per in effect executed a property settlement agreement with her which the court incorporated into its decree. We disagree.

Divorce matters have historically been heard in equity. Because divorce is not a natural or common-law right, however, a court presiding over divorce matters does not wield general equity powers but is limited to those powers specifically granted by statute. *Baugh v Baugh,* 37 Mich 59; 26 Am Rep 495 (1877); *Perkins v Perkins,* 16 Mich 162 (1867); *Peltier v Peltier,* Harr Ch 19 (1836); 24 Am Jur 2d, Divorce & Separation, § 5, p 180. By statute a court is restricted in distributing marital property to the parties only. MCL 552.19; MSA 25.99. The only parties to a divorce suit are the husband and wife—children are not parties. *Baugh v Baugh.* Thus, a court has no authority to distribute marital property to children or other non-parties. *Swiney v Swiney,* 107 Mich 459; 65 NW 287 (1895). However, in distributing marital property a court cannot ignore or destroy valid encumbrances thereon which favor non-parties nor can it distribute property which has already been validly conveyed by the parties or one of them prior to the divorce judgment. *Title & Trust Co v Jaster,* 241 Mich 416; 217 NW 42 (1928).

Agreements between married persons to distribute property pending a divorce or legal separation are valid as long as they do not offend public policy by encouraging a breakdown of the marriage relationship and are free from fraud and coercion. *Owen v Yale,* 75 Mich 256; 42 NW 817 (1889); *Randall v Randall,* 37 Mich 563 (1877). Property settlement agreements may be incorporated into a divorce judgment. Such incorporation, however, renders that portion of the divorce judgment distributing property pursuant to the agree-

ment a consent judgment. *Owen v Yale.* It is only in this manner that a divorce judgment may distribute marital property to a non-party.

When marital property is distributed pursuant to a consent judgment in a manner which the court would not have the power to order on its own motion, neither party can be heard to object. As with any decree distributing property, contempt power may not be utilized to enforce compliance. *Shafer v Shafer,* 257 Mich 372; 241 NW 144 (1932); *Spence v Spence,* 290 Mich 98; 287 NW 393 (1939). Actions for violations of such property settlement provisions of a divorce judgment must be at law on the contract. See *Bartholomae v Stellwagen,* 277 Mich 618; 270 NW 159 (1936), and *Stellwagen v Stellwagen,* 277 Mich 412; 269 NW 216 (1936).

The legitimacy of divorcing parties executing a property settlement agreement and having the court incorporate the agreement into its divorce judgment has been recognized by a century of case law in this state. Several decisions of this Court, however, have held invalid property settlement provisions of a divorce judgment purporting to distribute property to non-parties pursuant to such agreements. *Flynn v Flynn,* 367 Mich 625; 116 NW2d 907 (1962); *Rex v Rex,* 331 Mich 399; 49 NW2d 348 (1951); *Maslen v Anderson,* 163 Mich 477; 128 NW 723 (1910). A close reading of these decisions reveals the divining principle that a distribution of marital property to non-parties cannot depend on the divorce judgment, but must be based on an independent agreement between the parties which may be incorporated into the divorce judgment. The interest which inures to the benefit of the non-party is not created by the divorce judgment, as that would exceed the court's statuto-

rily limited authority, but rather by the agreement between the parties. Thus, proof of such an agreement must be made aliunde the divorce judgment.

In *Maslen v Anderson,* Andrew Anderson orally consented to a property settlement agreement with his wife during the pendency of divorce proceedings between them. The wife was awarded a divorce *pro confesso* and the divorce decree contained the orally agreed upon property settlement provisions which included, *inter alia,* a distribution to their children upon reaching majority and a distribution for the maintenance of the wife's mother—both exceeding the court's statutorily limited distribution power. In an action by the executor of Andrew Anderson's estate to have the above-mentioned duties extinguished this Court held those property settlement provisions of the divorce decree void. The Court reasoned:

"So we are constrained to hold that, notwithstanding the consent of Anderson, those portions of the decree above pointed out were void and of no effect for want of jurisdiction in the court to make the same. We cannot agree with counsel for appellees that those provisions of the decree alluded to can be sustained as 'family settlements.' There is nothing to show that the said provisions were intended to operate as 'family settlements,' and that fact is negatived by the will of Andrew Anderson, which appears in this record, showing that he made subsequent provisions for these children. Neither can a family settlement, such as is here claimed, *be made in a divorce proceeding."* 163 Mich 477, 484 (emphasis added).

In *Newton v Security National Bank of Battle Creek,* 324 Mich 344; 37 NW2d 130 (1949), a husband and wife entered into a property settlement agreement, during the pendency of a divorce

suit, providing that one-third of the property be distributed to the wife, one-third to the husband and one-third in trust for their child who was to take the principal at age 30—the latter distribution being in excess of the court's statutory power. The written property settlement agreement was incorporated into the divorce decree entered in 1920 and accordingly the trust was created and operated for 28 years, when William F. Newton sought to prevent his son from receiving the trust principal by alleging that the trust was created pursuant to an invalid property settlement provision of a divorce decree, citing *Maslen v Anderson.* In upholding the property settlement of the divorce decree the Court reasoned as follows:

"Plaintiff claims that the above case *[Maslen]* is on all fours with the case at bar and controls here. However, the situation in that case does not support the claim. The defendant did not enter an appearance, there was no property settlement or agreement entered into by the parties that was the basis of the decree, and the provisions of the decree had not been completely executed when the action was brought. In the case at bar the defendant William F. Newton appeared in the divorce case and, while he filed no answer, he was represented by a competent attorney throughout the divorce proceedings, including the property settlement agreement. The parties settled their property rights by said agreement which was approved by the court. The provisions setting up a trust for the minor child were included in the property agreement and, after the signing of the decree, the property was turned over to the trustee in accordance with the terms of the agreement and decree. Said trust was set up and *the terms of the agreement as well as the decree entered in pursuance thereof were fully executed before this suit was begun,* with the single exception that the trustee had not turned over to him the minor's property when he became 30 years of age. The purpose of plaintiff's present suit is to prevent the occurrence of that final

event, inasmuch as William Hubbard Newton will become 30 years of age on August 10, 1949.

"In the *Maslen Case, supra,* p 484, it is stated:

" 'There is nothing to show that the said provisions (in the decree) were intended to operate as "family settlements." '

"Therein it differs from an agreement as entered into in the case at bar. To the extent that statements in the *Maslen Case* may be considered contrary to the conclusions herein expressed, we now decline to follow the same. Plaintiff seems to proceed upon the theory that the trust in this case was the result of the decree of divorce, and that as such it was in excess of the court's statutory powers. *The trust was in reality the result of the property settlement between the parties,* which they had a right to make, and which the court had a right to confirm.

* * *

"There might be more merit in plaintiff's suit if it depended solely on the decree. He makes no attempt to excuse his voluntary agreement for the settlement of all his property matters, in the agreement signed by him. He was of full age, and makes no assertion of mental incompetence or duress. He fails to set up any adequate claim of fraud or mistake. The decree as to property matters which he now seeks to repudiate is a consent decree." 324 Mich 344, 352-353, 357 (emphasis added).

In *Maslen v Anderson* there was no proof of a property settlement agreement independent of the divorce decree, nor were the terms of the asserted agreement ever carried out. Thus, there was no proof that the interest of the non-party was created aliunde the divorce decree and the Court correctly held: "Neither can a family settlement, such as is here claimed, *be made in a divorce proceeding."* 163 Mich 477, 484 (emphasis added).

In *Newton v Security National Bank of Battle Creek,* the Court recognized that "[t]he trust was

in reality the result of the property settlement between the parties". 324 Mich 344, 353. Thus, in *Newton* the property came before the court already encumbered by the agreement between the parties to create a trust in favor of a non-party. While the court could not have ordered that same distribution on its own authority it was likewise powerless to destroy the interest of the non-party created by the previously executed agreement between the parties. See *Title & Trust Co v Jaster,* 241 Mich 416; 217 NW 42 (1928). Indeed, the Court candidly admitted: "There might be more merit in plaintiff's suit if it depended solely on the decree." 324 Mich 344, 357.

In *Rex v Rex,* 331 Mich 399; 49 NW2d 348 (1951), the parties were divorced in 1933 and remarried in 1935 after executing an antenuptial agreement. In 1947 the wife was granted a divorce from bed and board and the divorce decree included a property settlement provision requiring the husband to place corporate stock in trust for their children. The decree was to operate as the trust instrument if the parties failed to execute one. We held that portion of the divorce decree ordering the creation of the trust void as exceeding the statutorily limited jurisdiction of the court and lacking any support independent thereof.

"Cross-plaintiff [wife] cannot go behind the instant decree and rely on the antenuptial agreement for support of the trust, there being no such support in the agreement itself. Conceding that the antenuptial agreement be considered as a property settlement, it does not even remotely provide that the stock in the corporations owned by the plaintiff be placed in a trust fund beyond his control." 331 Mich 399, 410.

*Flynn v Flynn,* 367 Mich 625; 116 NW2d 907

(1962), provides perhaps the most vivid example of the principle involved here. In *Flynn* the parties were divorced in 1951 and the divorce decree ordered that real property owned by them as tenants by the entireties be distributed to them as life tenants with remainders over to their children. In 1961 this provision of the divorce decree was declared invalid on the authority of *Maslen v Anderson.* In reviewing the decision of the trial court we recognized that the record of the 1951 divorce proceedings contained an extensive colloquy between counsel for both parties wherein they stipulated to a distribution of the real property which the court ultimately ordered in the decree. We held that provision of the divorce decree invalid. While there was no doubt as to the parties' intent, the Court recognized the crucial question to be "whether the judge had the authority to decree a life estate to the parties with remainders over to their children." 367 Mich 625, 630. When the divorce court first considered the property it was unencumbered by any interest in favor of the children. The agreement to grant the remainder interests to the children was made on the record during divorce proceedings with the court participating. The court lacked statutory authority to distribute property to the children and the parties could not give the court authority to do so by stipulation. See *Kirkwood v Hoxie,* 95 Mich 62; 54 NW 720 (1893). *Flynn* illustrates that the interest of the non-party must be created before the property is considered by the divorce court.

This Court is not unmindful of the peculiarity of property distribution between divorcing parties. Indeed, many property distribution agreements are literally made on the courthouse steps. Such an arrangement is legitimate as long as the distribution is limited to the parties only because the trial court has the authority to review and ap-

prove property distribution to parties. Today we are merely recognizing that when property is to be distributed to a non-party it must be done pursuant to an agreement independent of the divorce proceedings. When judicial proceedings are involved they are limited to the statutory grant of authority.

In the instant case the record reveals no independent agreement between Steven and Norma Kasper requiring Steven to maintain their son as beneficiary of his life insurance policy. The divorce judgment contains such a requirement in its property settlement provisions but as set forth herein the court was without power to order such a distribution and proof of agreement to do so must be made aliunde the divorce judgment.

In *Baugh v Baugh,* 37 Mich 59, 62 (1877), Justice CAMPBELL noted the following, which is equally cogent today:

> "It is expected of all divorce courts that they will be vigilant in examining the circumstances of all cases before them, and not allow any decree without a full scrutiny. The means furnished for this purpose are adequate for most cases. In the best circumstances justice will sometimes miscarry, but this is not peculiar to divorce cases, and it will not do to resort to unauthorized measures to redress legal misfortunes or wrongs. It would not be desirable, in order to get rid of some unjust judgments, to destroy the force of judgments generally, and allow them to be attacked by third parties where the legal rules which have been established to determine their effect have not permitted it."

The order of the Court of Appeals is reversed and the judgment of the trial court reinstated. We hereby expressly disapprove of *Krueger v Krueger,* 88 Mich App 722; 278 NW2d 514 (1979).

LEVIN, J., concurred with KAVANAGH, J.

GUSLER v FAIRVIEW TUBULAR PRODUCTS

Docket No. 63538. Argued May 6, 1980 (Calendar No. 1).—Decided December 30, 1981. Rehearing granted 414 Mich 1102.

Karen Gusler suffered a work-related back injury in 1977, and was voluntarily paid workers' compensation benefits of $64 per week, two-thirds of her average weekly wages, by her employer, Fairview Tubular Products, through its insurer, Farm Bureau Insurance Group. She petitioned the Bureau of Workers' Disability Compensation for a determination of the benefits payable, and was awarded $96 per week, the minimum rate for a claimant with two dependents as adjusted for 1977 by the Director of the Bureau of Workers' Disability Compensation in accordance with the increase in the average weekly wage in the covered employment. The Workers' Compensation Appeal Board affirmed. The Court of Appeals, R. B. Burns, P.J., and D. E. Holbrook, Jr., and Burdick, JJ., affirmed in a per curiam opinion (Docket No. 43105). Defendants appeal, arguing that the Worker's Disability Compensation Act provides for adjustments of the maximum rates of benefits but not of the minimum rates.

In an opinion by Justice Ryan, joined by Chief Justice Coleman and Justices Kavanagh, Levin, and Fitzgerald, the Supreme Court *held:*

The Legislature did not intend that the minimum rates

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REFERENCES FOR POINTS IN HEADNOTES

[1-11, 13-21] 81 Am Jur 2d, Workmen's Compensation §§ 27-29.
82 Am Jur 2d, Workmen's Compensation §§ 368, 369, 382, 592.
[3] 73 Am Jur 2d, Statutes §§ 194, 195.
[4, 20] 73 Am Jur 2d, Statutes §§ 131, 343.
[5] 73 Am Jur 2d, Statutes § 197.
[6, 7, 8, 11] 73 Am Jur 2d, Statutes § 254.
[9, 17] 82 Am Jur 2d, Workmen's Compensation § 347.
[12] 81 Am Jur 2d, Workmen's Compensation §§ 2, 27-29.
[13, 14] 73 Am Jur 2d, Statutes § 145.
82 Am Jur 2d, Workmen's Compensation §§ 358, 486.
[15] 82 Am Jur 2d, Workmen's Compensation § 358.
[16] 73 Am Jur 2d, Statutes §§ 145, 169.
[17] 82 Am Jur 2d, Workmen's Compensation § 486.
[18] 82 Am Jur 2d, Workmen's Compensation § 486.
[21] 73 Am Jur 2d, Statutes § 159.

should be adjusted by the Director of the Bureau of Workers' Disability Compensation.

1. The Legislature failed to make specific provision for adjustment of minimum rates while explicitly doing so for maximum rates.

2. The legislative intent may be discovered in the legislative history of the statute. Adjustments to both the maximum and minimum rates in each dependent classification were made expressly and by a separate legislative act in 1952, 1954, and 1956. In 1965, however, the Legislature amended the statute to provide for annual adjustment of the rates of maximum benefits according to a formula, and also set out specific increasing maximum rates between September 1, 1965 and January 1, 1969, with flat minimum rates to remain unchanged during that time. The provision for annual adjustment by the Director of the Bureau of Workers' Disability Compensation, by its own terms, was inoperative until January 1, 1969, when it was to carry on the progression of adjustments in the maximum rates only. There is no discernible reason for the Legislature to provide unambiguously that the minimum rates for workers' compensation would remain unchanged for 1965 to 1969 and then to have another statutory provision suddenly act to adjust the minimum rates for all subsequent years. That conclusion is fortified by the failure of the Legislature to refer in the adjustment provision to the minimum rates, while it refers to the maximum rates four times in the same provision. The basic provisions of the statute have remained intact even though the Legislature has reconsidered and re-enacted essentially the same scheme in the Worker's Disability Compensation Act of 1969.

3. The plain language of the adjustment provision, § 355, makes no reference to minimum rates. It would be unreasonable to conclude that "maximum rates" refers to anything more than the ceilings established in § 351 to which § 355 is cross-referenced. While such a reading of the statute makes the language "except as provided in section 355" after the clause establishing minimum rates in § 351 nugatory, it does not destroy any substantive provision in the statute. It merely renders the cross-reference surplusage and of the same significance it had when it was first enacted in 1965, before the adjustment provision became effective. To give the statute the interpretation advocated by the plaintiff would require that the Court write into the statute a substantive amendment, which would amount to an unconstitutional usurpation of the legislative power.

4. The Worker's Disability Compensation Act must be con-

strued as a whole so that its provisions harmonize, rather than conflict, with one another. There is no plausible reason for the Legislature to make the adjustment which the plaintiff claims in minimum rates for a disabled worker, while unambiguously providing no adjustment of the minimum rates for the surviving dependents of an employee killed in the course of his employment. Further, adjustment of the minimum rate would impair the operation of that section of the statute which provides for a yearly reduction of benefits after the age of 65 to a minimum of 50% of the benefits at the age of 65, because the adjusted minimum is already about 80% of the adjusted maximum and its percentage of the maximum will increase if both are adjusted upward dollar for dollar. It is also unlikely that the Legislature intended to maintain an arbitrary difference of $37 between the maximum and minimum rates, which would be the effect of matching each adjustment in the maximum rates with an equal one in the minimum rates. Such a scheme would render the primary calculation of the benefit, two-thirds of the average weekly wage, ineffective in many cases.

5. If the minimum rates are adjusted, all disabled workers would eventually be compensated at precisely the same rates. Such a result would not comport with the policy of the Worker's Disability Compensation Act to compensate workers for their loss of wage-earning capacity, unless one adopts the unwarranted fiction that all workers in a free society have the *same wage-earning capacity*. Rather, the Legislature, aware of the economic facts in this state, assumed that the upward pressures on wages would continue to adjust the rates of benefits for workers on the lower ends of the economic scale and that the annual adjustments to the maximum rates of compensation would create some parity between the prescribed two-thirds of the average weekly wage and maximum compensation benefits in an economy which is generally expanding.

6. The holding in this case, because it is contrary to the statutory interpretations of the Bureau of Workers' Disability Compensation, the Workers' Compensation Appeal Board, and the Court of Appeals, is not unlike the announcement of a new rule of law. In the interest of fairness, this case should not affect any workers' compensation payments already made under the erroneously adjusted minimum benefits. However, any benefits due and not yet paid, or benefits awarded after the date of the opinion in this case, shall be in conformity with the decision.

Reversed and remanded.

Justice Williams, joined by Justice Moody, dissented. He wrote:

1. Effect must be given, if possible, to every word of the statute; in cases of statutory interpretation, courts are bound to determine legislative intent. In this case interpretation is necessary because the identical phrase "except as provided in section 355" is used in § 351 after both the clause establishing maximum benefits and that establishing minimum benefits, but § 355 speaks only of adjustment of the maximum benefit without mentioning the minimum benefit. Unless both maximum and minimum are subject to the same adjustment, the phrase "except as provided in section 355" used in connection with the minimum benefit does nothing. It will not be presumed that the Legislature used words without a purpose. A reading which makes the adjustment apply to both maximum and minimum benefits gives effect to each word in the two provisions.

2. The Court always has construed the Worker's Disability Compensation Act in a manner which weighs its humanitarian objectives and beneficent purposes. The adjustment provision is the Legislature's attempt to provide some relief from the pervasive inflation which has particularly afflicted this state over the past 20 years. The goal of the statute is to provide, in an efficient and dignified form, certain financial and medical benefits for employees who suffer injuries at the workplace. The plaintiff was employed at the minimum wage. The rate of her benefits, at most $96 per week, will remain the same as determined at the time of her injury unless she establishes that she is totally and permanently disabled, although the minimum wage and the cost of living can be expected to rise. Benefits of $96 per week when the plaintiff's earnings at the minimum wage would now be $124 per week do not encourage malingering.

3. Between 1949 and 1965 the Legislature considerably increased the statutory minimum rates for workers' compensation benefits, clearly showing its concern with providing additional protection for persons who earn the minimum wage. In 1965, the statute was amended to require annual adjustment of the rates for claimants receiving maximum benefits. In 1969, by removing the statutory language which limited the adjustment to the maximum rates, the Legislature provided a clear signal of its intent to allow cost-of-living increments for both the maximum and minimum rates. The Court would indeed be arrogating the legislative power to itself if it were to read into the statute the precise limitation which the Legislature rejected over 11 years ago.

4. Since the statute was amended in 1969, the Director of the

Bureau of Workers' Disability Compensation has annually announced increases in both the maximum and minimum rates of compensation, and that interpretation of the statute has been applied, without exception, by the administrative law judges of the bureau, the Workers' Compensation Appeal Board, and the Court of Appeals. The Court must give appropriate deference and weight to the longstanding construction given to the statutory provisions by the agency designated by the Legislature to administer them. Furthermore, the Legislature has not spoken on the issue presented in this case since 1969 when it removed the language which limited the adjustments to only the maximum rates. Such silence in the face of an invariant interpretation by the administrative agency and the Court of Appeals, while not controlling, combines with the clear indication of the legislative intent to give some relief to persons receiving minimum wages, to provide overwhelming evidence that the adjustments are to apply to the minimum benefits.

5. The defendants argue that an employer cannot be required to pay workers' compensation benefits in excess of two-thirds of the employee's average weekly wage at the time of the injury. The Court has never adhered to the notion that substitution for lost wages is the sole purpose of the Worker's Disability Compensation Act. The legislative policy expressed in the statute can operate to compel one employer to pay an employee more in compensation than he would have paid in wages because it is the legislative intent to compensate loss of earning capacity, not merely lost wages. The Legislature clearly has not made the requirement that the benefits equal two-thirds of the employee's average weekly wage controlling in every case. The defendants argue that the present adjusted minimum rate exceeds the amount that a person would earn by working a 40-hour week at the minimum wage and that such a situation encourages fraud. Changes, if any, in this situation must be undertaken by the Legislature. Where the adjusted minimum benefits exceed two-thirds of the claimant's average weekly wage at the time of injury, the adjusted minimum rate for the claimant's classification controls.

Justice Moody, dissenting, signed the opinion of Justice Williams and also wrote separately to explain additional reasons for his conclusion.

1. The decision to overrule established precedent and practice requires the Court to erase a clear legislative command, to avoid segments of legislative history, and to usurp the legislative function. The plain language of the statute subjected both

the maximum and minimum rates to the adjustment provision by its cross-reference "except as provided in section 355".

2. The language of the adjustment provision does not specifically refer to minimum rates but says that the maximum weekly rate in each dependency classification shall be adjusted. The word "maximum" in that section refers to the highest amount which is payable in each classification rather than just to the rate which is payable where the employee's weekly wage exceeds the state's average weekly wage. When read together, the statutory provisions mean that the adjustments apply to all the dependency classifications listed. The plain language, including all the phrases and cross-references, suggests a legislative command which should not be judicially erased, particularly since it promotes the humanitarian and remedial aims of the Worker's Disability Compensation Act.

3. Between 1949 and 1965 the Legislature increased both the maximum and minimum rates of benefits on almost every occasion when it altered the rates of compensation to reflect changes in economic conditions. In 1965, the Legislature amended the statute by using language to allow for automatic adjustments beyond 1969, and in 1969 revised the statute and specifically retained the cross-reference which applies the adjustment provision to the minimum rates, thus endorsing the 1965 amendment.

4. Inconsistencies within the Worker's Disability Compensation Act lend little assistance to the reader in ascertaining the legislative intent. The Legislature may have had a reason for treating cases in which the worker was killed in the course of his employment differently than cases in which the worker was disabled. Further, it is equally plausible to suggest that the Legislature made a mistake by leaving out of the provision on survivors' benefits a cross-reference to the adjustment provision. The provision which requires a reduction of benefits each year after the worker reaches the age of 65 also specifically provides that the payments cannot be reduced below the weekly benefit provided in the act. Therefore, it may be concluded that the Legislature intended to temper the provision which reduces the benefits 50% over ten years so that in no event would the benefits fall below the adjusted minimum weekly benefits.

5. It is argued that the Legislature would not have intended the inequitable results of increasing adjustments to the minimum rates of benefits. However, it is the statute as amended by the Legislature which establishes the law before the Court. The statute specifically makes provision for increases in the maxi-

mum and minimum rates. It is for the Legislature to change its prior specific statutory commands, as it has done in 1980.

*Jolliff v American Advertising Distributors, Inc,* 49 Mich App 1; 211 NW2d 160 (1973), overruled.

—92 Mich App 164; 284 NW2d 487 (1979) reversed.

OPINION OF THE COURT

1. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

The Legislature did not intend that the minimum rates of weekly benefits should be adjusted each year by the Director of the Bureau of Workers' Disability Compensation in accordance with the increase in the average weekly wage in the covered employment (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).

2. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

The legislative history of the Worker's Disability Compensation Act does not show that the Legislature intended to provide for adjustment of the minimum rates of weekly benefits in accordance with the increase in the average weekly wage in the covered employment where it provided unambiguously that the minimum rates for workers' compensation would remain unchanged from 1965 to 1969 while the maximum rates would increase each year, and further provided for adjustment of the maximum by a formula from 1969 on without mentioning the minimum (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).

3. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

The plain language of the provision of the Worker's Disability Compensation Act for adjustment of the rates of compensation in accordance with the increase in the average weekly wage in the covered employment makes no reference to minimum rates; it would be unreasonable to conclude that "maximum rates" refers to anything more than the ceilings established in another provision of the statute to which the adjustment provision is cross-referenced (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).

4. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

To conclude that the Worker's Disability Compensation Act does not provide for adjustment of the minimum rates of benefits in accordance with the increase in the average weekly wage in the

covered employment does not destroy any substantive provision in the act, but merely renders the cross-reference "except as provided in section 355" after the clause establishing minimum rates surplusage and of the same significance it had when it was first enacted in 1965, before the adjustment provision became effective (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).

5. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

To interpret the Worker's Disability Compensation Act as providing that the minimum rates of weekly benefits should be adjusted in accordance with the increase in the average weekly wage would require that the Court write into the statute a substantive amendment, an unconstitutional usurpation of the legislative power (Const 1963, art 3, § 2; MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).

6. WORKERS' COMPENSATION — MINIMUM BENEFIT — STATUTES — CONSTRUCTION.

There is no plausible reason for the Legislature to make an adjustment in minimum rates of workers' compensation benefits for a disabled worker in accordance with the increase in the average weekly wage in the covered employment, while unambiguously providing no adjustment of the minimum rates for the surviving dependents of an employee killed in the course of his employment (MCL 418.321, 418.351, 418.355; MSA 17.237[321], 17.237[351], 17.237[355]).

7. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

The Worker's Disability Compensation Act should be construed, if possible, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error; one cannot ascribe to the Legislature an unexpressed intention that the minimum rates of compensation should be adjusted in accordance with the increase in the average weekly wage because it would impair the effectiveness of the provision for a yearly reduction of benefits after the age of 65 (MCL 418.351, 418.355, 418.357; MSA 17.237[351], 17.237[355], 17.237[357]).

8. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

It is unlikely that the Legislature intended to maintain an

arbitrary difference of $37 between the maximum and minimum rates of workers' compensation benefits, which would be the effect of matching each adjustment in the maximum rates with an equal one in the minimum rates, because such a scheme would render the primary calculation of the benefit, two-thirds of the average weekly wage, ineffective in many cases (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).

9. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

Adjustment of minimum weekly rates of workers' compensation benefits in accordance with the increase in the average weekly wage in the covered employment would not comport with the policy of the Worker's Disability Compensation Act to compensate workers for their loss of wage-earning capacity because it would eventually result in the compensation of all disabled workers at precisely the same rates whatever their loss of wage-earning capacity (MCL 418.351, 418.355, 418.371[1]; MSA 17.237[351], 17.237[355], 17.237[371][1]).

DISSENTING OPINION BY WILLIAMS, J.

10. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT.

*Minimum weekly rates of benefits established by the Worker's Disability Compensation Act are to be adjusted once each year by the Director of the Bureau of Workers' Disability Compensation in accordance with the increase or decrease in the average weekly wage in the covered employment as determined by the Employment Security Commission (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

11. WORKERS' COMPENSATION — MINIMUM BENEFIT — STATUTES — CONSTRUCTION.

*The Worker's Disability Compensation Act should be construed, if possible, so that no part will be inoperative or superfluous, void, or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error; it is not persuasive to argue that the Legislature inadvertently or deliberately inserted language in one provision of the statute explicitly referring to another provision, which becomes meaningless in applying the other provision (MCL 418.101 et seq.; MSA 17.237[101] et seq.).*

12. WORKERS' COMPENSATION — STATUTORY CONSTRUCTION — LEGISLATIVE PURPOSE.

*The goal of the Worker's Disability Compensation Act is to provide, in an efficient and dignified form, certain financial and*

*medical benefits for employees who suffer injuries at the workplace and to assure recovery of benefits, regardless of fault, in lieu of a tort recovery against the employer; the Court has construed the statute since its inception by weighing its humanitarian purposes and beneficent objectives (MCL 418.101 et seq.; MSA 17.237[101] et seq.).*

13. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — LEGISLATIVE INTENT.

*The provision of the Worker's Disability Compensation Act for adjustment of the rates of compensation in accordance with changes in the average weekly wage in the covered employment is the Legislature's attempt to provide some relief from the pervasive inflation which has particularly afflicted this state for over 20 years; the adjusted benefits are determined at the time of injury and remain static, although the minimum wage and the cost of living can be expected to rise, so that a claimant receiving the adjusted benefits would not be encouraged to malinger (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

14. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — LEGISLATIVE INTENT — STATUTORY CONSTRUCTION.

*The Legislature has provided a clear signal of its intent to allow adjustments to reflect changes in the cost of living for both minimum and maximum benefits established by the Worker's Disability Compensation Act by removing the statutory language which limited the adjustments to the maximum rates; the Court would be arrogating the legislative power to itself if it were to read into the statute the precise limitations which the Legislature rejected (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

15. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — ADMINISTRATIVE LAW — STATUTORY CONSTRUCTION.

*The Court must give appropriate deference and weight to the longstanding construction given by the Bureau of Workers' Disability Compensation to the statute by its annual announcements of adjustments to the minimum workers' compensation benefits established by the statute, as well as the maximum rates, to reflect changes in the cost of living (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

16. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — ADMINISTRATIVE LAW — STATUTORY CONSTRUCTION.

*Silence of the Legislature in the face of an invariant interpreta-*

*tion by the Bureau of Workers' Disability Compensation and the Court of Appeals that there must be an annual adjustment to the minimum rates of workers' compensation benefits as well as the maximum, while not controlling, combines with the clear indication of legislative intent to give some relief to persons receiving minimum wages, to provide overwhelming evidence that the adjustments are to apply to the minimum benefits (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

17. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — LEGISLATIVE INTENT.

*The legislative intent of the Worker's Disability Compensation Act is to compensate loss of earning capacity, not merely lost wages; the Legislature clearly has not made the requirement that the benefits equal two-thirds of the employee's average weekly wage at the time of injury controlling in every case, and the legislative policy expressed in the statute can operate to compel an employer to pay an employee more in compensation than he would have paid in wages (MCL 418.101 et seq.; MSA 17.237[101] et seq.).*

18. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT.

*The requirement of the Worker's Disability Compensation Act that the benefits equal two-thirds of the employee's average weekly wage at the time of injury is superseded by the minimum rates of compensation for the claimant's classification as adjusted by the Director of the Bureau of Workers' Disability Compensation in accordance with the increase or decrease in the average weekly wage in the covered employment as determined by the Employment Security Commission where the adjusted rates exceed two-thirds of the employee's wages (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

DISSENTING OPINION BY BLAIR MOODY, JR., J.

See headnotes 10-18.

19. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

*The decision to overrule established precedent and practice of adjusting the minimum rates of workers' compensation weekly benefits in accordance with the increase in the average weekly wage in the covered employment requires the Court to erase a clear legislative command, to avoid segments of legislative history, and to usurp the legislative function (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

20. WORKERS' COMPENSATION — MINIMUM BENEFIT — ADJUSTMENT — STATUTES — CONSTRUCTION.

*The plain language of the Worker's Disability Compensation Act subjected both the maximum and minimum rates of weekly benefits to the adjustment provision by its cross-reference "except as provided in section 355" (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

21. WORKERS' COMPENSATION — MINIMUM BENEFIT — STATUTES — CONSTRUCTION.

*The provisions of the Worker's Disability Compensation Act, when read together, mean that the adjustments of the rates of compensation in accordance with changes in the average weekly wage in the covered employment apply to all the dependency classifications listed; the plain language, including all the phrases and cross-references, suggests a legislative command which should not be judicially erased, particularly since it promotes the humanitarian and remedial aims of the Worker's Disability Compensation Act (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]).*

*Fred E. Foster* for plaintiff.

*Davidson, Breen & Doud, P.C.,* for defendants.

Amici Curiae:

*Kelman, Loria, Downing, Schneider & Simpson* (by *Robert W. Howes)* for Michigan Trial Lawyers Association.

*Conklin, Benham, McLeod, Ducey & Ottaway, P.C.* (by *Thomas P. Chuhran),* for Michigan Self-Insurers' Association.

RYAN, J. We granted leave to appeal in this case to consider whether the cost of living increases in workers' disability compensation benefits provided for in MCL 418.355; MSA 17.237(355) (hereinafter § 355) apply to the minimum as well as the maximum weekly rates for total disability as estab-

lished in MCL 418.351; MSA 17.237(351) (hereinafter § 351).

At the time of her injury in March of 1977, plaintiff was employed by the defendant Fairview Tubular Products. She was a full-time employee normally working 40 hours a week at the then-prevailing minimum wage of $2.40/hour for a weekly gross wage of $96. Deductions for federal and state taxes and social security reduced her weekly gross pay to $77.62.

Defendant voluntarily began paying plaintiff compensation benefits of $64 per week, a rate two-thirds of her gross wage of $96 per week, comporting with the general provision of § 351. Plaintiff petitioned for a determination whether she was receiving the proper rate of compensation under the formula prescribed in §§ 351 and 355 for a disabled employee with two dependents.

After consideration of the parties' claims, the hearing officer entered the following order:

> "It is ordered that the matter has been submitted on stipulated facts and briefs and the singular issue as to whether petitioner is being paid voluntarily the correct amount of weekly benefits. I find that the *Jolliff*[1] decision is applicable. The correct weekly benefit rate for petitioner with two dependents and an alleged injury date of 3-25-77 is the minimum of $96.00 per week pursuant to § 351 and the director's annual adjustment. I interpret the stipulation of the parties to be, and I so order, that the defendant shall pay the correct rate from date of injury to the date of this order with credit for payments already made." (Footnote added.)

The director's annual adjustment is of course a reference to the provisions of § 355. The practical effect of the order in this instance was to award to

[1] *Jolliff v American Advertising Distributors, Inc,* 49 Mich App 1; 211 NW2d 260 (1973), *lv den* 391 Mich 780 (1974).

the plaintiff compensation benefits which coincidentally matched her gross wages but which, in fact, paid her more weekly net income than she was receiving in her full-time employment, since the compensation award was not subject to tax.

Both the Workers' Compensation Appeal Board[2] and the Court of Appeals[3] subsequently affirmed the increased award on the basis of the *Jolliff* case in which the Court of Appeals, in 1973, approved an interpretation of §§ 351 and 355 which would adjust minimum as well as maximum rates. *Jolliff v American Advertising Distributors, Inc,* 49 Mich App 1; 211 NW2d 260 (1973).

## I

The heart of the dispute is whether the Legislature ever intended that the minimum benefit rates of § 351 were to be adjusted in accordance with § 355. We are convinced it did not.

Section 351(1), as applicable at the time of this injury, provided:

"(1) While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee, a weekly compensation of 2/3 of his average weekly wages, *but not more* than $64.00, if such injured employee has no dependents; $69.00 if 1 dependent; $75.00 if 2 dependents; $81.00 if 3 dependents; $87.00 if 4 dependents; and $93.00 if 5 or more dependents; *except as provided in section 355.* Compensation shall be paid for the duration of the disability. Weekly payments shall *not be less than* $27.00 if there are no dependents; $30.00 if 1 dependent; $33.00 if 2 dependents; $36.00 if 3 dependents; $39.00 if 4 dependents; and $42.00 if 5 or

[2] 1978 WCABO 3613.

[3] Court of Appeals per curiam opinion, 92 Mich App 164; 284 NW2d 487 (1979).

more dependents; *except as provided in section 355.* Compensation shall be paid for the duration of the disability. The conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury and thereafter the question of permanent and total disability shall be determined in accordance with the fact, as the fact may be at that time." (Emphasis added.)

As is evident, there are two references subjecting § 351 to the adjustment provisions of § 355; one following the maximum and another following the minimum rates established for each dependency classification.

At the time of the plaintiff's injury, § 355 provided:

"(1) The *maximum weekly rate* in each dependency classification in this act shall be adjusted once each year in accordance with the increase or decrease in the average weekly wage in covered employment, as determined by the employment security commission. The average weekly wage in covered employment determined by the employment security commission for the year ending June 30, 1967, shall be the base on which such adjustments are made.

"(2) A second adjustment, if any, shall be made on January 1, 1970 and shall reflect the change, if any, between the average weekly wage for June 30, 1969 and the average weekly wage for June 30, 1968 and the adjustment shall be made in like manner on each January 1 thereafter, utilizing the average weekly wage for the preceding June 30.

"(3) Adjustment for the statutory *maximum rate* shall be made only if there has been an increase or decrease in the average weekly wage of at least $1.50 during the preceding year, applied to the June 30, 1967, base and the director shall announce the adjustment each December 1, to become effective the following January 1. If in any year the change is less than $1.50, the director shall announce no change for the following

year but the amount of change in such year shall be carried forward and added to or subtracted from subsequent annual determinations until the total change shall be at least $1.50, in which year an adjustment shall be made. There shall be an adjustment made of $1.00 in the *maximum rates* for each $1.50 increase or decrease in the average weekly wage. The *maximum weekly rate* as so determined for the year in which the date of injury occurred shall remain fixed without further change as to the personal injury occurring within such year." (Emphasis added.)

In providing for the adjustment of benefits, the foregoing section makes reference solely to maximum rates on four separate occasions. Nevertheless, it is the plaintiff's claim, concurred in by the WCAB and the Court of Appeals and based on *Jolliff,* that the language following the minimum rates established in § 351 and subjecting them to § 355 should be interpreted as requiring an annual adjustment to minimum rates equal to any adjustment in the maximum rates.

We disagree with this interpretation and hold that no adjustment to the minimum rates prescribed in § 351 is authorized because none was intended by the Legislature. We reach that conclusion because of 1) the Legislature's failure to make specific provision for adjustment of minimum rates while explicitly doing so with respect to maximum rates, 2) an analysis of the history of the provision in question, and 3) the internal conflicts and plainly absurd results which plaintiff's construction of the statute would effect.

## II

In construing the Worker's Disability Compensation Act, we are bound to effectuate legislative intent. *Dyer v Sears, Roebuck & Co,* 350 Mich 92;

85 NW2d 152 (1957). Our effort to discover the apparent intent of the Legislature in this matter begins with an examination and analysis of the history of our present §§ 351 and 355, formerly MCL 412.9; MSA 17.159.

Prior to 1949 the general legislative scheme for workers' disability compensation provided for payments of two-thirds of average weekly wages and those payments could in no case exceed $21 per week or fall below $10 per week, without regard to the number of a claimant's dependents. Dependency classifications were added by 1949 PA 238 and both maximum and minimum rates were raised and provision was made for maximum and minimum rates in each classification. Subsequently, adjustments to both the maximum and minimum rates in each dependency classification were effected by 1952 PA 263; 1954 PA 175; and 1956 PA 195. Each time an adjustment to either the maximum or minimum rates was made, it was done expressly and by a separate legislative act.

In 1965, however, pursuant to 1965 PA 44, the Legislature amended MCL 412.9; MSA 17.159, in a fashion designed to eliminate the need to adjust the compensation levels by separate legislative act every few years. It undertook to make maximum levels "self" adjusting with the aid of the Michigan Employment Security Commission.

Specifically, the pertinent provisions of 1965 PA 44, codified at MCL 412.9(a); MSA 17.159(a) read:

"(a) While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee, a weekly compensation of 66-2/3% of his average weekly wages, but not more than $58.00 as of September 1, 1965, $61.00 as of September 1, 1966 and $64.00 as of September 1, 1967 if such injured employee has no

dependents; $63.00 as of September 1, 1965, $66.00 as of September 1, 1966 and $69.00 as of September 1, 1967 if 1 dependent; $70.00 as of September 1, 1965, $72.00 as of September 1, 1966 and $75.00 as of September 1, 1967 if 2 dependents; $77.00 as of September 1, 1965, $79.00 as of September 1, 1966 and $81.00 as of September 1, 1967 if 3 dependents; $84.00 as of September 1, 1965, $86.00 as of September 1, 1966 and $87.00 as of September 1, 1967 if 4 dependents and $91.00 as of September 1, 1965, $92.00 as of September 1, 1966 and $93.00 as of September 1, 1967 if 5 or more dependents, *except as provided in subsection (f).* Compensation shall be paid for the duration of the disability. Weekly payments shall in no event be less than $27.00 if there are no dependents; $30.00 if 1 dependent; $33.00 if 2 dependents; $36.00 if 3 dependents; $39.00 if 4 dependents; and $42.00 if 5 or more dependents; *except as provided in subsection (f).* Compensation shall be paid for the duration of the disability." (Emphasis added.)

The provision perpetuated the basic two-thirds of average weekly wages formula which was the historic basis for determining benefit amount, but set out maximum rates which increased annually and which covered the period from September 1, 1965 to January 1, 1969. At the same time, a flat minimum rate was established for each dependency classification which would remain unchanged.

The 1965 act also subjected both the maximum and minimum rates to the provisions of subsection (f), the antecedent of § 355 with which we are concerned today.

Subsection (f), first created in 1965 PA 44, read:

"The *maximum weekly rate* in each dependency classification shall be adjusted once each year in accordance with the increase or decrease in the average weekly wage in covered employment, as determined by the Michigan employment security commission. The aver-

age weekly wage in covered employment determined by the Michigan employment security commission for the year ending September 30, 1967, shall be the base on which such adjustments are made.

"The first adjustment, if any, shall be made on January 1, 1969, and shall reflect the change, if any, between the average weekly wage for September 30, 1968, and the average weekly wage for September 30, 1967, and the adjustments shall be made in like manner on each January 1 thereafter, utilizing the average weekly wage for the preceding September 30.

"Adjustment for the statutory *maximum rate* shall be made only if there has been an increase or decrease in the average weekly wage of at least $1.50 during the preceding year, applied to the September 30, 1967, base and the director shall announce the adjustment each December 1, to become effective the following January 1. If in any year the change is less than $1.50, the director of the department shall recommend no change for the following year but the amount of change in such year shall be carried forward and added to or subtracted from subsequent annual determinations until the total change shall be at least $1.50, in which year an adjustment shall be made. There shall be an adjustment made of $1.00 in the *maximum rates* for each $1.50 increase or decrease in the average weekly wage. The *maximum weekly rate* as so determined for the year in which the date of injury occurred shall remain fixed without further change as to the personal injury occurring within such year." (Emphasis added.)

The same ambiguity which plaintiff asserts now exists in § 351 had its genesis, therefore, in the 1965 act.

The 1965 act *expressly* provided upward adjustments for the years September 1, 1965-October 31, 1966; September 1, 1966-October 31, 1967; September 1, 1967 to December 31, 1968, but only for the maximum rates. It is indisputable that the act precluded any adjustment in minimum rates prior to 1969 and it follows therefore that the Legisla-

ture intended the minimum rates to remain unchanged for at least three years while the maximum rates were to be self-adjusted during that same period.

While it is true that there is language in the 1965 act, following the establishment of the flat minimum rates, making those rates subject to the provisions of subsection (f), at the time the act became effective (September 1, 1965) that language could have no effect since subsection (f), by its own terms, was inoperative, insofar as rate adjustment was concerned, until 1969. The "except as provided in subsection (f)" language following the statement of the maximum rates was similarly inoperative until January 1969. It was only in January 1969, that subsection (f) would become operative and then to carry on the adjustment progression for the *maximum* benefit rates only, as first begun by the Legislature's establishment in September, 1965, of annually increasing maximum rates.

We can see no reason why the Legislature would have unambiguously mandated that minimum compensation rates for all dependency classifications would remain unchanged for the years September 1965 to January 1969 and intend that subsection (f) should suddenly spring into action to adjust those minimum rates for all subsequent years. It would seem reasonable that if the Legislature intended annual adjustments to be made to the minimum rates through subsection (f), it would have made express adjustments for the years September 1965 to January 1969, just as it did for the maximum rates, and then provide for subsection (f) adjustments to carry on the automatic adjustment process for subsequent years. The Legislature's failure to make provision for adjusting the minimum rates from September 1965 to January

1969 is strong indication that there was no intention that subsection (f) have such effect after January of 1969. We are fortified in this view by the Legislature's failure to make any reference in subsection (f) to minimum compensation rates while, at the same time, making reference to maximum rates four times.

The basic provisions of MCL 412.9; MSA 17.159 have remained intact although that section has now been repealed and subsections (a) and (f) replaced by §§ 351 and 355 respectively,[4] to the result that what has been said heretofore applies with equal or greater force since the Legislature has reconsidered and re-enacted essentially the same legislative scheme.

## III

Our conviction that the Legislature never intended to adjust minimum rates rests not only on our judgment of legislative intent derived from the particular method utilized to free the Legislature from periodic express rate adjustments as embodied in MCL 412.9, subsections (a) and (f); MSA 17.159, subsections (a) and (f), but also on the precise language of present §§ 351 and 355 and the effect those provisions would have if given the plaintiff's interpretation.

As noted, the plain language of § 355 makes no reference to minimum rates. While there is no statutory definition of "maximum weekly rates" as used in that section, it would be unreasonable to

[4] In 1980, pursuant to 1980 PA 357 to be effective January 1, 1982, the Legislature once again modified §§ 351 and 355. As amended these sections, as well as the addition of MCL 418.356; MSA 17.237(356), make it unmistakably clear that § 351 will contain no minimum benefit for total disability.

conclude that "maximum rates" refers to anything more than the ceiling rates ("not more than") established in § 351 to which § 355 is cross-referenced. While such a reading would render the "except as provided in section 355" language following the minimum rates nugatory, it does not destroy any substantive provision in the act. It merely renders the cross-reference surplusage and of no more or less significance than that reference had when the provision was first enacted in 1965. To give § 351 the interpretation given it by *Jolliff* and advocated by the plaintiff would require that we write into the statute a substantive amendment; a legislative function we decline to undertake as it amounts to an unconstitutional usurpation of the powers of a co-equal branch of our government.

Further indication that the Legislature never intended that minimum rates be adjusted are the internal conflicts, unfairness and absurd results which such an interpretation would permit.

It must be remembered that in assessing legislative intent the act is to be construed as a whole and its provisions are to be construed so as to harmonize rather than conflict with one another. *Gerlesits v Lakey Foundry & Machine Co,* 319 Mich 229; 29 NW2d 856 (1947); *Kasarewski v Hupp Motor Car Corp,* 315 Mich 225; 23 NW2d 689 (1946).

A

MCL 418.321; MSA 17.237(321), formerly MCL 412.5; MSA 17.155, establishes death benefits for the dependents of an employee "wholly dependent upon [the deceased's] earnings for support at the time of the injury". The maximum and minimum compensation rates are virtually identical to those

provided for disabled persons by § 351.[5] However, the *only* reference in § 321 to § 355 is with respect to the language establishing the maximum rates. There is no language referring to the § 355 adjustment provision following the minimum rate schedule.

We can find no plausible reason why the Legislature would intend to adjust upward the minimum compensation rate for a totally disabled person and his dependents as the plaintiff claims while, at the same time, unambiguously not doing so for the surviving dependents of an employee killed during the course of employment.

B

Adjustment of the minimum compensation rates for disabled employees would also impair the effectiveness of MCL 418.357; MSA 17.237(357), which mandates an annual 5% reduction in benefits for each year after the age of 65 to a minimum of 50% of the benefits paid at age 65.[6] An example best demonstrates the manner in which that impairment would occur.

For the calendar year 1981, the adjusted maximum for a totally disabled worker with no dependents is $181 per week. The corresponding mini-

[5] Because the death of the employee without dependents would terminate the payment of benefits, § 321 establishes a benefit schedule which begins with one dependent as opposed to no dependents under § 351.

[6] MCL 418.357 states:

"(1) When an employee who is receiving weekly payments or is entitled to weekly payments reaches or has reached or passed the age of 65, the weekly payments for each year following his sixty-fifth birthday shall be reduced by 5% of the weekly payment paid or payable at age 65, but not to less than 50% of the weekly benefit paid or payable at age 65, so that on his seventy-fifth birthday the weekly payments shall have been reduced by 50%; after which there shall not be a further reduction for the duration of the employee's life. Weekly payments shall *not* be reduced below the minimum weekly benefit as provided in this act."

mum rate, if adjusted, is $144. If, because of adjustment of minimum rates, benefits cannot be reduced below $144 as an employee moves beyond age 65, then the maximum reduction could only be $37 or 20% of the $181 received at age 65 rather than the 50% maximum reduction which § 357 requires be accomplished by age 75.

At the time the reduction provisions of § 357 first appeared in the act,[7] the mathematical reality was that the maximum weekly rate of $58 for an injured employee with no dependents could be reduced by 50% pursuant to the above provision down to a weekly rate of $28 which would still be in excess of the then-prescribed minimum of $27. It appears evident that in 1965, when the Legislature first provided for an annual 5% reduction in benefits between the ages of 66 and 75 it had taken into consideration the minimum rates established and had ensured compatibility between the § 357 50% reduction provision and the difference between maximum and minimum rates. To adjust minimum rates as plaintiff suggests would make it impossible for the legislatively mandated 50% reduction to be effective.[8] Adjustment of the minimum rates would render a substantive provision in the act meaningless and would violate a fundamental canon of statutory construction:

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[7] These provisions first appeared pursuant to 1965 PA 44, formerly codified at MCL 412.9(g); MSA 17.159(g).

[8] This ineffectiveness of the 50% reduction requirement would obtain as long as average weekly wage rates in the state remain at or above those of 1970. Only the first adjustment to the minimum rates in 1969 would have done no violence to the 50% reduction provision of § 357.

The chart for weekly compensation rates adjusted both as to maximum and minimum rates and as available from the office of the Director of the Bureau of Workers' Disability Compensation looks like this:

" 'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect be given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A Sutherland, Statutory Construction (4th ed), § 46.06, p 63.

We cannot attribute to the Legislature an intent to destroy the act's internal compatibility by ascribing to it an unexpressed intention that the minimum compensation rates of § 351 be adjusted.

C

Still further indication that the Legislature did

| *Number of Dependents* | *From 1-1-69 to 12-31-69* | | *From 1-1-70 to 12-31-70* | | *From 1-1-71 to 12-31-71* | | *From 1-1-72 to 12-31-72* | | *From 1-1-73 to 12-31-73* | |
|---|---|---|---|---|---|---|---|---|---|---|
| | *Min.* | *Max.* | *Min.* | *Max.* | *Min.* | *Max.* | *Min.* | *Max.* | *Min.* | *Max.* |
| 0 | $32 | $69 | $38 | $75 | $42 | $79 | $47 | $84 | $57 | $94 |
| 1 | 35 | 74 | 41 | 80 | 45 | 84 | 50 | 89 | 60 | 99 |
| 2 | 38 | 80 | 44 | 86 | 48 | 90 | 53 | 95 | 63 | 105 |
| 3 | 41 | 86 | 47 | 92 | 51 | 96 | 56 | 101 | 66 | 111 |
| 4 | 44 | 92 | 50 | 98 | 54 | 102 | 59 | 107 | 69 | 117 |
| 5 or more | 47 | 98 | 53 | 104 | 57 | 108 | 62 | 113 | 72 | 123 |

| *Number of Dependents* | *From 1-1-74 to 12-31-74* | | *From 1-1-75 to 12-31-75* | | *From 1-1-76 to 12-31-76* | | *From 1-1-77 to 12-31-77* | | *From 1-1-78 to 12-31-78* | |
|---|---|---|---|---|---|---|---|---|---|---|
| | *Min.* | *Max.* | *Min.* | *Max.* | *Min.* | *Max.* | *Min.* | *Max* | *Min.* | *Max.* |
| 0 | $64 | $101 | $70 | $107 | $78 | $115 | $90 | $127 | $105 | $142 |
| 1 | 67 | 106 | 73 | 112 | 81 | 120 | 93 | 132 | 108 | 147 |
| 2 | 70 | 112 | 76 | 118 | 84 | 126 | 96 | 138 | 111 | 153 |
| 3 | 73 | 118 | 79 | 124 | 87 | 132 | 99 | 144 | 114 | 159 |
| 4 | 76 | 124 | 82 | 130 | 90 | 138 | 102 | 150 | 117 | 165 |
| 5 or more | 79 | 130 | 85 | 136 | 93 | 144 | 105 | 156 | 120 | 171 |

| *Number of Dependents* | *From 1-1-79 to 12-31-79* | | *From 1-1-80 to 12-31-80* | | *From 1-1-81 to 12-31-81* | |
|---|---|---|---|---|---|---|
| | *Min.* | *Max.* | *Min.* | *Max.* | *Min.* | *Max.* |
| 0 | $119 | $156 | $134 | $171 | $144 | $181 |
| 1 | 122 | 161 | 137 | 176 | 147 | 186 |
| 2 | 125 | 167 | 140 | 182 | 150 | 192 |
| 3 | 128 | 173 | 143 | 188 | 153 | 198 |
| 4 | 131 | 179 | 146 | 194 | 156 | 204 |
| 5 or more | 134 | 185 | 149 | 200 | 159 | 210 |

not intend that minimum rates be adjusted is the unlikelihood that it intended to maintain an arbitrary $37 difference between maximum and minimum rates.[9] That is the effect of matching each dollar adjustment in the maximum rate with an equal adjustment in the minimum rate. All such a scheme does is perpetuate a narrow range within which the two-thirds average weekly wage calculation must fall to be effective.[10] The primary two-thirds calculation loses much of its force if minimum rates are adjusted, since the adjustment would mandate a $37 window within which *all* disabled wage earners would be compensated.

It should be pointed out that the maintenance of an arbitrary constant difference in minimum and maximum benefit rates leads to considerable distortion in the percentage changes of the respective rates. If both rates are adjusted upward, the ratio of minimum rates to maximum rates becomes increasingly larger. If both rates were adjusted upward indefinitely, the ratio would approach 1 and the $37 difference would have little, if any, practical meaning.

Also, a comparison of the percentage increase of adjusted minimums and adjusted maximums from the rates effective September 1, 1967 to January 1, 1981 reveals that if adjusted, minimums would have risen from $27 to $144 or 433%, while maximums have risen from $64 to $181, or only 183%.

Certainly from the face of the act we can discern no rational reason why the Legislature would promote a scheme which, in comparative terms,

[9] The $37 difference applies to the no-dependents classification. The difference is constant in all other dependent classifications but varies from $39 to $51. See chart in fn 8.

[10] It is clear that the two-thirds calculation is the primary rate-setting formula. Even the adjustment provisions of § 355 adhere to the 2/3 average weekly wage approach, mandating a $1.00 adjustment for each $1.50 change in the average weekly wage.

would boost the minimum benefit rates at such a dramatically accelerated pace.

Moreover, if minimum rates are adjusted, over time, all disabled workers would eventually be compensated at precisely the same rate.[11] Such a result hardly comports with the declared policy of the Worker's Disability Compensation Act to compensate workers for their loss of wage-earning

[11] The accompanying graph best illustrates the overall "levelling" effect of adjusting minimum benefit rates.

The horizontal axis represents the passage of time. The vertical axis represents an increase in dollar amounts. We take notice that, given a growing and inflationary economy, as time passes wages increase and therefore any adjustment pursuant to § 355 will be upward. Plaintiff's assertion that the minimum rates ought to be adjusted would result in a graph in which the distance between the line representing adjusted maximum rates would remain at a constant distance from that representing the adjusted minimums. While the amount of adjustment need not necessarily remain constant from year to year, and in reality has not, for ease of illustration we will assume it has. Hence, the slope of the lines representing the adjusted levels is constant and the lines are straight.

Assume an injury occurred to each of three individuals at exactly the same time—point A. Assume also that X was earning so much in excess of the adjusted maximum rate that 2/3 of his average weekly wage (AWW) still fell at a point well above the adjusted maximum rate—here point X. His actual recovery would be at the maximum adjusted rate each year until he reached the level representing two-thirds of AWW. At that time he would collect benefits at that level (see *Wemmer v National Broach & Machine Co [After Remand]*, 89 Mich App 312; 280 NW2d 845 [1979]) presumably until that time when the adjusted minimum rate would equal two-thirds AWW. From that point on, if minimums are to be adjusted, he would collect at the increasing minimum level. If minimums were not adjusted, X would continue collecting benefits only at the rate of two-thirds AWW.

In a similar fashion, Y, whose wages were such that two-thirds AWW fell below the maximum adjusted level, would continue to collect at his two-thirds level until the minimum adjusted level would equal two-thirds AWW. Again, depending on whether the minimums are adjusted, Y's benefit rate would either increase accordingly or stay at the two-thirds AWW level.

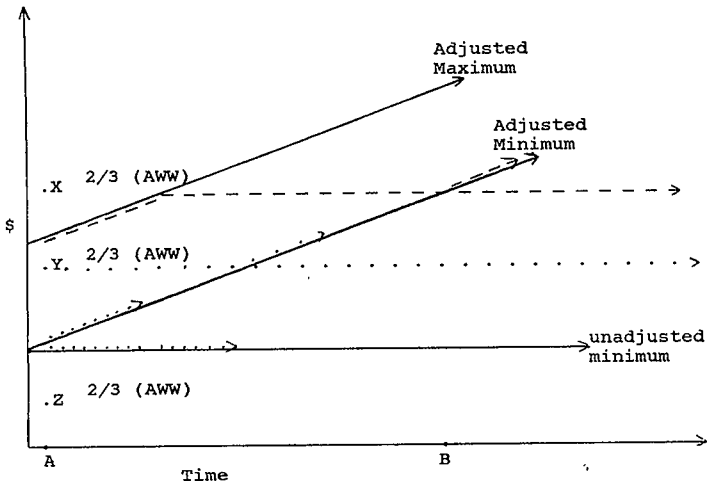
Finally, Z, whose wage is so low that two-thirds AWW leaves him below any minimum level, will begin collecting and continue to collect either at the unadjusted minimum level or at the minimum adjusted level.

The result, if minimums are adjusted, is obvious. At point B, all three wage earners, despite the disparity in wages at the time of injury, would be receiving the same compensation. On the other hand,

capacity, MCL 418.371(1); MSA 17.237(371)(1), unless we adopt the wholly unwarranted fiction that all workers in a free society have the same wage-earning capacity. We decline to follow that course and do not attribute such a philosophy to our Legislature. Rather, we conclude that the Legislature, aware of the economic realities in this state, assumed that the upward pressures on wages would assure that a two-thirds multiplier would continue to upwardly adjust the benefit rates for those individuals on the lower ends of the economic ladder. In addition, we believe it is evident

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if minimum rates are unadjusted, the difference in wage-earning capacity is reflected in the benefits each wage earner receives.




X - - - -

Y . . . .

Z .....

that the Legislature, in providing for annual adjustments to maximum rates only, intended some parity between the prescribed two-thirds of average weekly wages and maximum compensation benefits in an economy which is generally expanding.

Although our holding is based on what we perceive to have been the intent of the Legislature at the time of enactment of the provisions discussed, in practical effect, given the contrary interpretations of the law by the Director of the Bureau of Workers' Compensation and the bureau's subdivisions, the Workers' Compensation Appeal Board and its hearing referees, and the Court of Appeals, today's holding is not unlike the announcement of a new rule of law. Its application therefore should be treated accordingly. See *Whetro v Awkerman,* 383 Mich 235; 174 NW2d 783 (1970); *Parker v Port Huron Hospital,* 361 Mich 1; 105 NW2d 1 (1960); *Bricker v Green,* 313 Mich 218; 21 NW2d 105 (1946).

In the interest of fairness we do not believe our holding should affect any disability compensation payments already made. Consequently, no recipient will be obligated to repay sums already received by reason of the erroneous computation formula we have nullified today. However, any benefits due and not yet paid or to be awarded after the date of this opinion shall be in accord with this ruling.

Accordingly, *Jolliff* is overruled, the Court of Appeals is reversed, and the cause is remanded for recomputation of benefits in conformance with this opinion.

COLEMAN, C.J., and KAVANAGH, LEVIN, and FITZGERALD, JJ., concurred with RYAN, J.

WILLIAMS, J. This case involves an interpretation of the relation between §§ 351 and 355 of the Worker's Disability Compensation Act (WDCA). MCL 418.351, 418.355; MSA 17.237(351), 17.237(355). Particularly, the question is whether the identical reference "except as provided in section 355" appearing in § 351 after both "not more than $64.00 * * *" and "not less than $27.00 * * *" means that both maximum and minimum categories shall be increased "as provided in section 355".

The question arises because § 355 commences, "The maximum weekly rate in each dependency classification in this act shall be adjusted once each year". Although the administrators of the WDCA and the Court of Appeals have invariably interpreted the act to mean there is escalation in both maximum and minimum categories, defendants in this case claim the escalation of minimum benefits is not legislatively intended.

We hold that the phrase, "except as provided in section 355" activates weekly benefit increases for both the "not more than" and the "not less than" classifications for the following reasons. First, the Legislature placed the "except as provided in section 355" provision after both the "not more than" and the "not less than" classifications for a purpose. Unless both classifications are subject to the same escalation, then as to the classification not increased the legislative use of "except as provided in section 355" accomplishes nothing. It will not be presumed that the Legislature used words without a purpose. Second, "[s]tatutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injus-

tice".[1] Third, legislative history shows that the language in §§ 351 and 355 is a particular change from the former language in MCL 412.9(a); MSA 17.159(a) which provided escalation exclusively for the upper limits. Fourth, the invariant interpretation of §§ 351 and 355 since 1969 by the Bureau of Workers' Compensation has been to escalate across the board. The Court of Appeals is affirmed.

## I. FACTS

On March 25, 1977, plaintiff Karen Gusler injured her back in the course of her employment with defendant Fairview Tubular Products (Fairview). At that time, plaintiff was earning the minimum wage with no fringe benefits. Deductions for federal and state taxes and Social Security reduced her weekly gross pay of $96 to $77.62.

Following plaintiff's injury, defendant Fairview and its insurer, defendant Farm Bureau Insurance Group (Farm Bureau), voluntarily paid workers' compensation benefits of $64 per week, two-thirds of plaintiff's average weekly wages. Based upon these facts, stipulated to by the parties, plaintiff thereafter petitioned the Bureau of Workers' Disability Compensation for a determination of the correct weekly benefit rate. On June 5, 1978, an administrative law judge increased the weekly benefit to $96, the minimum rate for an employee injured during 1977 with two dependents.

The unanimous Workers' Compensation Appeal Board, like the hearing referee, relied upon *Jolliff v American Advertising Distributors, Inc,* 49 Mich App 1; 211 NW2d 260 (1973), *lv den* 391 Mich 780 (1974), in affirming the augmented award on De-

[1] 2 Sutherland, Statutory Construction (2d ed), § 490, p 913, quoted in *Boyer-Campbell Co v Fry,* 271 Mich 282, 297; 260 NW 165 (1935).

cember 27, 1978. The Court of Appeals affirmed by per curiam opinion.[2]

Leave to appeal was granted on November 20, 1979. 407 Mich 926 (1979). The parties were instructed to address the following issue:

"Whether the cost-of-living increases in workers' disability compensation benefits, provided for in MCL 418.355; MSA 17.237(355), apply to the *minimum* as well as the maximum weekly rates for total disability, as set forth in MCL 418.351; MSA 17.237(351)."

Oral argument was conducted on May 6, 1980.

## II. STATUTORY LANGUAGE INVOLVED

Two sections of the WDCA are involved in the instant case. The first establishes dependency classifications, setting compensation rates within each classification as follows:

"While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee, a weekly compensation of *2/3 of his average weekly wages, but not more than $64.00, if such injured employee has no dependents;* $69.00 if 1 dependent; $75.00 if 2 dependents; $81.00 if 3 dependents; $87.00 if 4 dependents; and $93.00 if 5 or more dependents; *except as provided in section 355.* Compensation shall be paid for the duration of the disability. *Weekly payments shall not be less than $27.00 if there are no dependents;* $30.00 if 1 dependent; $33.00 if 2 dependents; $36.00 if 3 dependents; $39.00 if 4 dependents; and $42.00 if 5 or more dependents; *except as provided in section 355.* Compensation shall be paid for the duration of the disability. The conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury and thereafter the question of

[2] 92 Mich App 164; 284 NW2d 487 (1979).

permanent and total disability shall be determined in accordance with the fact as the fact may be at that time." MCL 418.351; MSA 17.237(351). (Emphasis supplied.)

The second provision before us sets forth an adjustment mechanism for benefit rates on an annual basis as follows:

"(1) *The maximum weekly rate in each dependency classification in this act shall be adjusted once each year* in accordance with the increase or decrease in the average weekly wage in covered employment, as determined by the employment security commission. The average weekly wage in covered employment determined by the employment security commission for the year ending June 30, 1967, shall be the base on which such adjustments are made.

"(2) A second adjustment, if any, shall be made on January 1, 1970 and shall reflect the change, if any, between the average weekly wage for June 30, 1969 and the average weekly wage for June 30, 1968 and the adjustment shall be made in like manner on each January 1 thereafter, utilizing the average weekly wage for the preceding June 30.

"(3) Adjustment for the statutory maximum rate shall be made only if there has been an increase or decrease in the average weekly wage of at least $1.50 during the preceding year, applied to the June 30, 1967, base and the director shall announce the adjustment each December 1, to become effective the following January 1. If any year the change is less than $1.50, the director shall announce no change for the following year but the amount of change in such year shall be carried forward and added to or subtracted from subsequent annual determinations until the total change shall be at least $1.50, in which year an adjustment shall be made. There shall be an adjustment made of $1.00 in the maximum rates for each $1.50 increase or decrease in the average weekly wage. The maximum weekly rate as so determined for the year in which the date of injury occurred shall remain fixed without

further change as to the personal injury occurring within such year." MCL 418.355; MSA 17.237(355). (Emphasis supplied.)

## III. DISCUSSION

In each year succeeding 1969, the effective date of the present MCL 418.355, the Director of the Bureau of Workers' Disability Compensation increased both maximum and minimum rates. However, the facial conflict between the cited provisions did not receive judicial attention until the 1973 decision of the Court of Appeals in *Jolliff* which approved the administrative interpretation, escalating in all categories.

In the case at bar, increases in the minimum weekly rate for employees with two dependents resulted in plaintiff's receipt of compensation benefits equalling her gross pay at the time of the injury. Defendants argue strenuously that the Legislature never contemplated such a windfall to injured employees.

We begin our analysis by turning to the precise issue framed by our grant of leave to appeal: "Whether the cost-of-living increases in workers' disability compensation benefits, provided for in MCL 418.355; MSA 17.237(355), apply to the *minimum* as well as the maximum weekly rates for total disability, as set forth in MCL 418.351; MSA 17.237(351)."

### A

Defendants conclude that the clear language of modification in MCL 418.351, "except as provided in section 355", must be nugatory because it leads to facial conflict with the latter section. However, the first principle guiding our interpretive process was restated in 2A Sutherland, Statutory Construction (4th ed), § 46.06, p 63:

" 'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect be given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

In cases of statutory interpretation, we are bound to determine legislative intent. It does not impress us that the Legislature inadvertently or deliberately inserted language in MCL 418.351 which becomes meaningless on reference to MCL 418.355.

If MCL 418.355 was intended by the Legislature to be applied to each dependency classification, as is apparently the case from the referential language of MCL 418.351, our task under the first guiding principle of statutory construction is complete. Each word in these two provisions is given effect by such a reading.

B

However, our inquiry does not end at this point. The second principle to be applied to our analysis is found in 2 Sutherland, Statutory Construction (2d ed), § 490, p 913:

"Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience and to oppose all prejudice to public interests." Quoted in *Boyer-Campbell Co v Fry,* 271 Mich 282, 297; 260 NW 165 (1935).

This is essentially a call for the same sort of weighing of humanitarian purposes and beneficent objectives which has characterized this Court's

construction of the WDCA since its inception. *Sheppard v Michigan National Bank,* 348 Mich 577, 589; 83 NW2d 614 (1957) (opinion of SMITH, J.). Applying this second principle, we are persuaded that § 355 represents the Legislature's attempt to provide some relief from the pervasive inflation which has particularly afflicted our state over the past 20 years.

The goal of the WDCA is to provide in an efficient and dignified form certain financial and medical benefits for employees who suffer injuries at the workplace. The victims of such injuries are assured of a certain recovery of benefits, regardless of fault, in lieu of the nebulous prospect of a tort recovery against the employer.

As applied to plaintiff, an employee working at the minimum wage, this goal of efficient and dignified support is translated into weekly benefits for plaintiff and her two children of, at most, $96. This sum is determined for her at the time of her injury, and remains static for her unless she should meet the stringent requirements of "total and permanent disability", MCL 418.361(2); MSA 17.237(361)(2). Even the *Jolliff* incremental benefits have brought plaintiff only to parity with her gross wages at the time of her injury. Although both the minimum wage and the cost of living can be expected to rise in succeeding years, plaintiff's benefits have been frozen until she regains her health. Since the minimum hourly wage today is $3.10, her earnings for a 40-hour week would be $124. Consequently, her $96 a week benefits would not encourage her to malinger.

C

Material assistance in construing these statutes is provided by an examination of the historical

transmutations of the present § 351, formerly MCL 412.9; MSA 17.159.[3]

Until 1949, the formula for setting compensation benefits was circumscribed by a maximum rate of $21 and a minimum rate of $10 per week, without regard to the number of dependents. 1948 CL 412.9, amended by 1949 PA 238 to establish new minimum and maximum rates based on the number of the claimant's dependents. By 1952 PA 263, six dependency classifications were established, and the rates for both minimum and maximum benefits were increased. Similar increases for maximum and minimum rates were implemented by 1954 PA 175 and 1956 PA 195. Clearly, then, the Legislature during that period was concerned with providing additional protection for the minimum-wage earner.

This concern was again manifested in 1965, when minimum rates were increased by 50% across the board. However, 1965 PA 44 amended MCL 412.9 by adding annually augmented rates only for those already receiving maximum benefits. By removing

[3] "(a) While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee, a weekly compensation of 66-2/3% of his average weekly wages, but not more than $58.00 as of September 1, 1965, $61.00 as of September 1, 1966 and $64.00 as of September 1, 1967 if such injured employee has no dependents; $63.00 as of September 1, 1965, $66.00 as of September 1, 1966 and $69.00 as of September 1, 1967 if 1 dependent; $70.00 as of September 1, 1965, $72.00 as of September 1, 1966 and $75.00 as of September 1, 1967 if 2 dependents; $77.00 as of September 1, 1965, $79.00 as of September 1, 1966 and $81.00 as of September 1, 1967 if 3 dependents; $84.00 as of September 1, 1965, $86.00 as of September 1, 1966 and $87.00 as of September 1, 1967 if 4 dependents and $91.00 as of September 1, 1965, $92.00 as of September 1, 1966 and $93.00 as of September 1, 1967 if 5 or more dependents, except as provided in subsection (f). Compensation shall be paid for the duration of the disability. Weekly payments shall in no event be less than $27.00 if there are no dependents; $30.00 if 1 dependent; $33.00 if 2 dependents; $36.00 if 3 dependents; $39.00 if 4 dependents; and $42.00 if 5 or more dependents; except as provided in subsection (f). Compensation shall be paid for the duration of the disability." 1965 PA 44.

the language limiting increased benefits to the maximum rates, as it did by 1969 PA 317, the Legislature provided a clear signal of its intent to allow uniform cost-of-living increments. As the Court of Appeals noted in *Keyzer v Christian Rest Home,* 32 Mich App 286, 288; 188 NW2d 672 (1971):

"Had the Legislature desired to effect the interpretation now placed upon the act by defendant, it could easily have done so in simple language. It is not for this Court to add language to a clear and explicit statute."

The replacement for repealed MCL 412.9, MCL 418.351, explicitly provided cost-of-living adjustments for both maximum and minimum rates through reference to the new MCL 418.355. We would indeed be arrogating to ourselves the legislative power if we were now to read into § 351 the precise limitations which the Legislature found objectionable and inimical to the spirit of the WDCA over 11 years ago.

D

There remains one additional principle to be employed in settling the meaning of the escalator clause. This was early described by the United States Supreme Court in *United States v Moore,* 95 US 760, 763; 24 L Ed 588 (1877), as follows:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."

Defendants concede that the invariant interpretation of the instant WDCA provisions since 1969 is against them. In that year, the Director of the Bureau of Workers' Compensation first announced increases for both minimum and maximum rates,

following the Legislature's deletion of the limitational language in § 351. Without exception, the administrative law judges of the bureau, the Workers' Compensation Appeal Board, and the Court of Appeals have found the escalator clause applicable across the board. We acknowledged in *Magreta v Ambassador Steel Co,* 380 Mich 513, 519; 158 NW2d 473 (1968), the deference owed to the Bureau of Workers' Disability Compensation interpretation of the WDCA. It is fully in keeping with our *Magreta* holding that we now give appropriate weight to the longstanding construction given these provisions by the agency legislatively designated to administer them.

*Magreta* also speaks to the subject of legislative acquiescence. The Legislature's silence after the Court of Appeals issued its interpretation of certain statutory language "can only be construed as consent to the accuracy of that interpretation". See *In re Clayton Estate,* 343 Mich 101, 106-107; 72 NW2d 1 (1955). As *Magreta* notes, 380 Mich 520:

> "We would not be understood to hold that standing alone this principle [of legislative acquiescence] is controlling, yet we must assume that the Legislature was aware of the prior interpretation of the act. Session after session the act has been amended in some particular, but no specific amendment of the language here under consideration was made."

The Legislature has not spoken to the issue presented in this case since it removed language limiting cost-of-living increases to the maximum rates from MCL 418.351 in 1969.[4] While such

[4] Although presented with the opportunity to do so when it reenacted § 351 with certain additions in 1976 PA 393, the Legislature made no modifications in the pertinent language.

silence, standing alone, may not be controlling, it is combined with an invariant interpretation by the agency charged with administration of the WDCA. These factors, and the clear indications of legislative intent disclosed by the first two guiding principles, provide overwhelming evidence that the cost-of-living adjustments of MCL 418.355 are to apply uniformly to all dependency classifications.

*The Percentage-of-Wage Limitation*

The parties and amici briefed the issue whether, if *Jolliff* applies to minimum rates, an employer can be required to pay workers' compensation benefits in excess of the statutory two-thirds of the employee's average weekly wage. This issue is not squarely presented by the instant facts, since plaintiff is receiving exactly the same amount she would have earned working full time in 1977. However, we would be remiss if we did not now confront the issue defendants have raised.

This Court has never adhered to the notion that wage-loss substitution is the sole purpose of the WDCA. As early as 1932, we sustained an award of $7 per week to an injured volunteer fire chief whose annual salary was $25 per year. *Carothers v City of Stanton,* 257 Mich 107; 241 NW 178 (1932). Similarly, in *King v Second Injury Fund,* 382 Mich 480; 170 NW2d 1 (1969), we held the two-thirds average weekly wage limitation inapplicable to differential payments by the Second Injury Fund to totally and permanently disabled employees. We subsequently denied leave to appeal in *Keyzer v Christian Rest Home,* which held that a part-time employee with an average weekly wage of $30.40 was entitled to benefit payments of $27 and that the percentage weekly wage provision was modified by the specific minimum provision. The two-thirds average weekly wage limitation was then

considered in two 1976 cases. In *Lahay v Hastings Lodge No 1965 BPOE,* 398 Mich 467; 247 NW2d 817 (1976), we had occasion to consider the limitation as it applied to an employee injured on a part-time job who suffered no impairment of earning capacity in his regular full-time employment. Defendants rely heavily upon *Lahay* as indicative of this Court's rejection of benefit payments in excess of the two-thirds average weekly wage limitation, but defendants misconstrue our holding in the case. The decision simply disallows inclusion of separate, unrelated contemporaneous employment unaffected by a disability when applying MCL 418.371(1); MSA 17.237(371)(1), limiting compensation payable to average weekly earnings at the time of injury plus wage-earning capacity after the injury. Under such circumstances, since he continued without limitation his principal full-time employment, we found it legitimate to compensate plaintiff based on two-thirds of his average weekly wage in the part-time employment. This benefit for disability in his part-time employment was an amount which was less than the minimum rate for full-time employment where he continued to receive his full wages. Following *Lahay,* the Workers' Compensation Appeal Board held unanimously that the decision had no applicability to the type of factual situation presented in the instant case. *Hiltz v Phil's Quality Market,* 1977 WCABO 3692.

We next confronted the two-thirds average weekly wage limitation in *Gasparick v H C Price Construction Co,* 398 Mich 483, 491; 247 NW2d 824 (1976). After setting forth an illustration in fn 4, we state:

"This example illustrates how the legislative policy expressed in the statute can operate to compel one employer to pay an employee more in compensation

than he would have paid in wages. This result, however, is understandable if one remembers that it is the legislative intent to compensate loss of earning *capacity,* not merely lost wages."

*Gasparick* effectively refutes the defendants' contentions that this Court has refused, since *Lahay,* to countenance workers' compensation benefit payments equal to or in excess of an employee's actual gross wages.

However, amici also point to the language in *Higgins v Monroe Evening News,* 404 Mich 1, 15; 272 NW2d 537 (1978):

> "The statutory provisions dealing with computation of compensation use a sliding scale based upon weekly wage loss with minimum and maximum rates, the maximum rates to be adjusted on an annual basis. MCL 418.351; MSA 17.237(351) and MCL 418.355; MSA 17.237(355)."

*Higgins* involved a determination of compensability for injuries suffered by the assistant to a substitute newspaper carrier, and turned on the absence of an employment contract. It did not involve construction of § 351. Furthermore, the language quoted above does not purport to interpret the relationship between §§ 351 and 355. It is only a passing reference using an inexact and elliptical paraphrase of these two sections.

The most recent case to treat the two-thirds average weekly wage limitation is *Wemmer v National Broach & Machine Co (After Remand),* 89 Mich App 312; 280 NW2d 845 (1979), *lv den* 406 Mich 1002 (1979). *Wemmer* contains an interesting discussion of one of the WDCA provisions which the defendants have cited as an indication of legislative intent to limit benefit payments, MCL 418.357; MSA 17.237(357). Section 357 mandates

an annual 5% reduction in benefits being received by injured workers after age 65, until the total benefits received are reduced by 50%. Contrary to the proposition for which defendants have cited it, § 357 explicitly states in pertinent part: "Weekly payments *shall not be reduced below the minimum* weekly benefit as provided in this act". (Emphasis added.) *Wemmer* notes that whenever minimum weekly benefits are increased by the Director of the Bureau of Workers' Disability Compensation, those augmented amounts prevail where they exceed the two-thirds limitation. *Stein v Director, Bureau of Workmen's Compensation,* 77 Mich App 169; 258 NW2d 179 (1977). *Wemmer* concludes, 89 Mich App 329, "When the minimum rates exceed the two-thirds limitation, the minimums become the floor beneath which total payments may not fall."

From this litany of cases, it is clear that the Court has found that the Legislature has not made the two-thirds average weekly wage limitation controlling in every instance.

Defendants protest that the present minimum rate for a person with no dependents, $134, exceeds the amount that individual would earn working a 40-hour week at the minimum wage, $124. Defendants assert that such a situation encourages fraud. Whatever defendants, this Court or any one else thinks about this situation, the adjustments, if any, must be undertaken by the Legislature.

## IV. CONCLUSION

Our task of resolving the facial conflict between MCL 418.351 and MCL 418.355 has been assisted by the principles of effectuation of each word of each statute, ascertainment of legislative intent

with a view to furthering the humanitarian objectives of the WDCA, and construction of the salient provisions by the Bureau of Workers' Disability Compensation, as well as by recognition that the Legislature has failed to act in this area since removing the restraints on cost-of-living increments for minimum weekly benefits in 1969.

Having employed these tools of analysis, we hold that there is no conflict between MCL 418.351 and MCL 418.355. The provisions of the latter statute awarding cost-of-living benefits apply to both minimum and maximum rates. We further find that where such increases would result in benefit payments exceeding two-thirds of the claimant's average weekly wage at the time of the injury, the average weekly wage limitation is superseded by the rate newly established for the claimant's dependency classification.

The Court of Appeals is affirmed.

No costs, a public question being involved.

BLAIR MOODY, JR., J., concurred with WILLIAMS, J.

BLAIR MOODY, JR., J. *(dissenting).* I respectfully dissent from the majority opinion. I concur in general with the reasoning in the opinion written by Justice WILLIAMS and therefore have affixed my signature. The following explains additional reasons for my decision.

To overrule a decade of established precedent and practice requires this Court to judicially erase a clear legislative command, to avoid segments of legislative history, and to usurp the legislative function.

In an attempt to succinctly recapitulate the salient features of the statutory provisions applica-

ble to this case, it is noted that § 351(1) requires payment to a totally incapacitated employee of "not more than * * * $75.00 if 2 dependents; * * * except as provided in section 355 * * * not less than * * * $33.00 if 2 dependents; * * * except as provided in section 355." Thus, the plain language of the statute subjected both ceiling and base classifications to the adjustment provisions of § 355.

At the time of the plaintiff's injury § 355 provided: "(1) The maximum weekly rate in each dependency classification in this act shall be adjusted once each year in accordance with the increase or decrease in the average weekly wage." This provision also asserted: "(3) Adjustment for the statutory maximum rate shall be made only if there has been an increase or decrease in the average weekly wage of at least $1.50 during the preceding year." Section 355 referred to "maximum rates" and "maximum weekly rate" in two other sentences.

A

Several arguments are advanced to support the position of the defendants that no adjustment to the minimum rates prescribed in § 351 is authorized pursuant to § 355 because none was intended by the Legislature.

It is first urged that since the plain language of § 355 makes no specific reference to minimum rates, it would be unreasonable to conclude that "maximum rates" refers to anything more than ceiling rates established in § 351 to which § 355 is cross-referenced. Accordingly, it is posited that the cross-reference in § 351 following the base or minimum classifications is surplusage.

This very point was addressed by the WCAB in *Jolliff v American Advertising Distributors, Inc,* 49 Mich App 1; 211 NW2d 260 (1973), *lv den* 391 Mich 780 (1974). In that case, the board unanimously reasoned:

> "Sec. 9 of Part II as it was known in 1965, and which is now known as § 355 ([MCL] 418.355) provides: 'The maximum weekly rate *in each dependency classification in this act shall be adjusted* * * *'. (Emphasis supplied.) I submit that the word maximum as used in this section refers to the top amount which is payable in each dependency classification within the act, and is not to be construed just to refer to the maximum rate which is payable when the employee's weekly wage may exceed the state's average weekly wage so that the maximum which he receives is the top amount payable each week under the act. If there be those who would disagree, I refer such skeptics to the plain language of § 9, Part II which at the time of the employee's injury in 1970 provided * * *." 1972 WCABO 575, 579.

Given the statutory language, the WCAB analysis is a reasonable interpretation of legislative intent. Clearly all 12 of the statutory rates of payment of compensation provided in § 351, which include both ceiling and base categories, constitute dependency classifications. Certainly the Legislature must have intended some purpose for the cross-reference clause which follows the "minimum" classifications listed in § 351. To judicially discard this cross-reference phrase would also necessitate an absolute avoidance of the explanatory clause in the very first sentence in § 355.

Both clauses were inserted and approved by the Legislature. When read together, the two provisions blend together to mean that the adjustments in § 355 would apply to all dependency classifications listed in § 351. The plain language of these

two sections, including all phrases and cross-references, strongly suggests a legislative command that should not be judicially erased. This is particularly true when the humanitarian and remedial aims of the act are promoted.

B

It is claimed that the legislative history of these provisions reveals an error in the drafting of the statute. The original version of what is now § 355 was first introduced into the legislative tableau by 1965 PA 44, MCL 412.9(a); MSA 17.159(a). This act expressly provided upward adjustments for ceiling classification rates from September 1, 1965 to January 1, 1969. There were no specific adjustments made to the base classification rates covering this period.

However, both the ceiling and base rate classifications were subjected to the provisions of subsection (f), the antecedent of § 355. Under the provisions of the act, subsection (f) would become operative commencing January, 1969. It is urged that since the Legislature failed to make provision for adjusting the base classifications from September 1965 to January 1969, there was no intention, irrespective of the specific legislative mandate, to apply the automatic adjustment provision of subsection (f) to the minimum categories after January, 1969.

Reaching back further into legislative history, however, illuminates a different view. Prior to 1949, disability compensation payments were established at two-thirds of the average weekly wage. Payments could not exceed $21 nor fall below $10 per week. Pursuant to 1949 PA 238, dependency classifications were introduced and

*both* ceiling and base rates were raised. For instance, an employee with no dependents could be paid no more than $24 nor less than $11 per week, slight increases over the prior statutory maximum and minimum rates. In addition, specific amounts were established on a steadily increasing progression in all dependency classifications.

This pattern was maintained by 1952 PA 263. Upward adjustments in each dependency classification, including ceiling and base categories, were specifically enacted. As an example, an employee with no dependents could be paid not more than $28 nor less than $14. The Legislature apparently was reacting to the then-gradual increase in the average weekly wage of Michigan workers with accompanying inflation and accommodated the economic progression by a specific act that raised to some extent both the benefit ceiling and floor.

Following the same mold, 1954 PA 175 provided for additional increased payments in all dependency classifications. In 1956, the Legislature altered the pattern. Under 1956 PA 195 increases were extended to the ceiling rates, whereas base dependency classification rates were unchanged.

It was not until 1965 when, pursuant to 1965 PA 44, the Legislature once again increased all dependency classification payments. Apparently a need to increase minimum as well as maximum benefits was again recognized. Weekly payments for ceiling rates with no dependents were raised to not more than $58 as of September 1, 1965, nor less than $27. As previously related, the ceiling payments were adjusted upward from September 1, 1965 *seriatim* to January 1, 1969. The recently raised base rate remained steady until January 1, 1969. At that point, the provisions of subsection (f), the antecedent of § 355, pursuant to the plain lan-

guage of the act would automatically adjust both the ceiling and base rates.

Viewing a full recount of legislative history and in the face of a specific legislative command, one cannot readily conclude that the Legislature did not intend § 355 to apply to the base dependency classifications set forth in § 351. At one time the differential amount between the ceiling and the base payment was absolutely constant. There is a background of consistent increases to both ceiling and base classification payments on almost every legislative occasion. Furthermore, payment rates were consistently subject to legislative alteration to reflect necessary changes due to economic conditions.

There is also another noteworthy feature to legislative history. It is doubtful that the Legislature, in 1965, could anticipate what would be enacted in 1969. In the 1965 act, the Legislature utilized language to allow for automatic adjustments that would carry beyond 1969. In 1969, the Legislature revised the act and specifically retained the cross-reference clause in § 351 which applied to minimum rates. The Legislature endorsed its prior 1965 enactment.

If one were to accept as arguable the proposition that the Legislature in 1965 mistakenly applied subsection (f) to the base classification, it becomes doubly difficult to accept when the Legislature again applied the cross-reference clause to all classifications in the 1969 act. Section 355 having been applied twice to both categories of classification in § 351 lends strength to what was the intent of the Legislature.

C

Inconsistencies within the act lend little assis-

tance to ascertaining legislative intent. It is urged that comparing § 351 with the death benefit provision of MCL 418.321; MSA 17.237(321) indicates there is no plausible reason why the Legislature would intend to adjust the minimum rate upward in disability classifications, while not doing so for surviving dependents of an employee killed during the course of employment. However, the Legislature may have had a reason for treating death cases differently than cases involving a disabled worker. Furthermore, it is just as plausible to suggest that the Legislature made a mistake by leaving out of § 321 a cross-reference clause to § 355.

Also, it is argued that an adjustment of minimum compensation rates for disabled employees would impair the effectiveness of MCL 418.357; MSA 17.237(357), which requires an annual 5% reduction in benefits each year after the age of 65 for a period of 10 years to a minimum of 50% of the benefits paid at age 65. It is claimed that to adjust minimum rates upwards under § 355 would make the 50% reduction impossible to effect.

However, § 357 specifically provides in pertinent part:

> "Weekly payments shall not be reduced below the minimum weekly benefit as provided in this act."

It may therefore be discerned that the Legislature compassionately recognized the potentially serious impact that cost of living increases have on the elderly. The reduction down to 50% of the benefits paid at age 65 was to be tempered so that in no event would the benefits fall below the adjusted minimum weekly benefits under § 355.

D

Finally, it is urged that, in view of arguably inequitable results, it is likely that the Legislature did not intend to apply increasing adjustments to minimum classification benefits. In one regard this assertion would be answered by raising unfair hypothetical results had the base rates remained at the same level over the years.

More succinctly, this assertion was anticipated and answered nearly a decade ago by WCAB member Michael Gillman. In his separate concurrence with the unanimous *Jolliff* decision, Gillman stated:

"The impact of this decision is not simply to increase plaintiff's weekly compensation 67 cents (from $37.33 to $38), but to impose upon the insurers and self-insureds of this state a new compensation liability not previously considered—annually increasing minimums as well as maximums.

"There are practical problems and inequities that spring immediately to mind for service industry employers and others who hire part-time help.

"Seeing these, it will be easy to criticize the decision of this board as producing an inequitable result. Let us here submit that it is not this board's decision but the act as amended in 1965 that establishes the law before us. Section 9, Part II ([§ ] 351) specifically makes separate provision for increase in maximums and in the minimum dependency classifications. This writer is satisfied that such was the intent of that Legislature and would refer those who quarrel with such finding to the makers of the law." 1972 WCABO 582.

It is for the Legislature to change its prior specific statutory commands in the Worker's Disability Compensation Act. This has been done. In 1980, by 1980 PA 357, the Legislature, reacting to a battered Michigan economy, once again revised § 351 and § 355 to be effective January 1, 1982.

I would affirm the Court of Appeals.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v RUUSKA

Docket No. 63553. Argued June 3, 1980 (Calendar No. 3).—Decided January 8, 1982.

State Farm Mutual Automobile Insurance Company brought an action against Dale Ruuska, Gloria Carlson, Arvid Carlson, and Kenneth Kemp, the parties in an automobile negligence action, for a declaratory judgment that it was not liable to the parties for residual liability coverage on a no-fault policy of automobile insurance it had issued to Gloria Carlson. Gloria Carlson, who lived with her father, Arvid, was in an accident while driving Arvid's car. Dale Ruuska was seriously injured, and brought an action against the Carlsons and Kemp, the owner of a tavern. State Farm admitted liability under a policy issued to Arvid Carlson, but denied any liability under the policy issued to Gloria because the policy provided coverage while she was driving a non-owned automobile, but excluded from the definition of non-owned automobile one owned by a relative residing in the same household. The Marquette Circuit Court, Edward A. Quinnell, J., granted summary judgment for Ruuska, holding that the exclusion is contrary to the provisions of the no-fault act and therefore invalid. The Court of Apepals, D. E.

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 5, 11, 12, 14-16] 7 Am Jur 2d, Automobile Insurance §§ 238, 241, 242, 356.

Validity and construction of "no-fault" automobile insurance plans. 42 ALR3d 229.

Exclusion from "drive other cars" provision of automobile liability insurance policy of other automobile owned, hired, or regularly used by insured or member of his household. 86 ALR2d 937.

[2, 8] 7 Am Jur 2d, Automobile Insurance § 348.

[3, 5, 10, 14] 7 Am Jur 2d, Automobile Insurance § 351.

What is a "non-owned" automobile within the meaning of the coverage clause of an automobile liability policy. 83 ALR2d 926.

[4] 7 Am Jur 2d, Automobile Insurance §§ 34, 356.

[6-9] 7 Am Jur 2d, Automobile Insurance § 351.

[8] 7 Am Jur 2d, Automobile Insurance § 23.

[9] 7 Am Jur 2d, Automobile Insurance § 367.

[13] 7 Am Jur 2d, Automobile Insurance § 126.

Holbrook, Jr., and Cynar, JJ. (D. E. Holbrook, P.J., concurring in result), affirmed, but on the ground that while the exclusion is permissible it was not plainly set out in the policy and was therefore unenforceable (Docket No. 78-820). State Farm appeals.

In separate opinions by Justice Williams, by Justice Levin, and by Chief Justice Coleman, the Supreme Court *held:*

In this case, the insurer is liable to the parties under the residual liability coverage of Gloria Carlson's policy. However, the no-fault act does not require residual liability insurance covering all vehicles a person may drive.

Justice Williams, joined by Justices Fitzgerald and Moody, wrote that the no-fault act requires an insurer to provide its insured with residual liability coverage for certain losses caused by the *use* of a motor vehicle, and precludes an exclusion of liability coverage where the accident involves the insured's use of a vehicle owned by or registered in the name of a relative residing in the same household or a vehicle that was furnished or available for the frequent or regular use of the named insured.

1. The applicable sections of the no-fault act, when construed together, make it plain that the Legislature intended that a person using a motor vehicle that causes certain kinds of damages shall remain liable in tort, that an insurance policy in this state shall afford coverage for such liability, and that an owner or registrant of a motor vehicle shall purchase such a policy.

2. Gloria Carlson purchased a policy which specifically provided that she was covered when she used a "non-owned automobile", but excluded from the definition of non-owned automobile an automobile owned by a relative residing in the same household. Such an exclusion is repugnant to the clear directive of the no-fault act that a policy provide residual liability coverage for the *use* of a motor vehicle, and nowhere in the act is provision made for it.

3. Since the exclusionary clause in Gloria Carlson's policy is in conflict with the liability coverage required by the no-fault act, the statute must prevail and the policy must be read so as to provide the required coverage.

4. State Farm also alleged that coverage was precluded because the definition of a "non-owned automobile" excluded an automobile "furnished or available for the frequent or regular use of the named insured". Whether or not as a matter of fact Gloria Carlson's access to and use of her father's car

may be so characterized, as a matter of law this particular phrase of the exclusionary clause is repugnant to the no-fault act for the same reason that the "owned by a relative residing in the same household" phrase is repugnant, and is also invalid.

Justice Levin concurred in the result reached by Justice Williams, but not in the reason. The no-fault act does not require residual liability insurance covering all vehicles a person may drive. However, the exclusion in this case is unenforceable because it is unconscionable and contrary to the reasonable expectations of an insured where the insured, driving an automobile not owned or leased by him, has not been offered and has declined to purchase a rider deleting the exclusion or a specific exception from the exclusion or coverage for "frequent", "regular", or other atypical use of non-owned automobiles.

1. The obligation to obtain residual liability coverage is imposed by the no-fault act on an owner or registrant of a motor vehicle, but not on a licensed driver who does not own a vehicle. The no-fault act should be construed with deference to the policy judgment implicit in that legislative decision. Since the obligation to insure arises from the obligation to register rather than from the operation of a vehicle, it is reasonable to conclude that the obligation to insure does not extend to another vehicle for which the residual liability required by the no-fault act has been provided.

2. Residual liability coverage must be in force with respect to the vehicle for which it is purchased without regard to whether the owner or some other driver uses it. It does not follow that the act requires residual liability coverage when the owner uses a vehicle owned by someone else. The purpose in requiring residual liability coverage is to assure some minimum insurance for injuries for which there is residual tort liability. The legislative implementation of that purpose is limited to the requirement that there be a certain minimum coverage for each vehicle involved in an accident. To read the no-fault act as requiring an owner of one vehicle to carry residual liability coverage when operating another owner's vehicle, on which an independent obligation to carry residual liability coverage has been imposed, is to read the statute as requiring in that situation double the coverage it says is required. The no-fault act was amended retroactively to clarify that the required residual liability coverage is limited to the minimum residual liability coverage per vehicle. To read the statute nonetheless as requiring stacked coverage in the adventitious circumstance

of one owner driving another's vehicle is to read it in a manner contrary to the intent of the amendment and the purpose of the act to provide a minimum fund to pay for residual tort liability retained by the no-fault act.

3. The no-fault act has a policy of limiting the amount of required protection, except for medical care, to provide a minimum of coverage for all injured persons and their survivors at an affordable cost. The legislative purpose in this is not consistent with, and does not require, residual liability coverage varying in amount depending upon the circumstances of who is driving whose automobile and how many automobiles the driver owns. Many owners of motor vehicles choose to purchase non-owned automobile coverage in an amount they think they need and can afford. The issue here is the amount of residual liability insurance required by the no-fault act without regard to the insured's collectibility or ability to pay premiums. The Legislature did not require residual liability coverage varying in amount depending on chance.

4. Gloria Carlson's automobile insurance policy stated that it covered her when she drove a "non-owned automobile", which has the obvious and clear meaning of a vehicle not owned by the insured. The average consumer would rightfully assume that it referred to such instances as when he drove a rental car, or, perhaps more commonly, when he borrowed an automobile from a family member. The statement of exclusions does not mention the exclusion of this common instance but the apparently unambiguous term is given a definition which ascribes to it a special meaning. It cannot be assumed that the average consumer, coming upon a term in his policy which has an obvious and easily understood meaning, will nonetheless look up the definition, because it would not occur to the average person that the function of a definition is to change the meaning of a word so that it means something other than what it says. There is no evidence that Gloria Carlson knew of the exclusion, and it was embedded in the definition of a term which the average consumer would probably consider clear on its face without recourse to a separate definition.

5. Non-owned automobile liability insurance is purchased to protect against residual liability in tort when someone else's automobile is driven. The reasonable expectation of the purchaser is that there would be coverage regardless of whose car is being driven. The risks which lead to the purchase of residual liability insurance for non-owned automobiles are no less when the purchaser drives an automobile owned by a family member. Non-owned automobile liability protection pro-

vides the amount of liability coverage the purchaser considers appropriate for himself while he drives vehicles other than his own. A person does not expect that although the amount of liability coverage he considers appropriate for himself is in effect when he drives some non-owned vehicles, it will not be in effect when he drives a family member's automobile.

6. The exclusion from coverage is apparently designed to guard against a person having coverage on one vehicle and less coverage on another vehicle owned by him or regularly used by him. It seeks to protect the insurer against a policyholder failing to buy coverage on another vehicle he owns. To be effective, the provision must exclude an uninsured vehicle registered in the name of another that the insured regularly uses—a leased automobile. The exclusion is to this extent clearly reasonable and conscionable. It is written so broadly, however, that it encompasses situations beyond the evil it is designed to guard against. In seeking to protect itself against overreaching by the insured, the insurer has gone beyond reason and good conscience to exclude liability beyond the need for the exclusion. The power of the insurer to draft the policy is restricted by the doctrines of unconscionability and reasonable expectations.

7. Non-owned vehicle protection only needs to cover the risk above the amount of residual liability insured by the owner of virtually every automobile and is thus, in a sense, umbrella coverage. However, few consumers are aware that they may purchase a separate umbrella policy to protect themselves against the obscurant drafting of the no-fault insurance policy. This is not a case of a person owning two or more automobiles, buying insurance on one, and driving, or allowing another person to drive, an uninsured vehicle. Nor does it appear that Gloria Carlson frequently or regularly uses another person's automobile nor that she declined to purchase insurance for atypical use of non-owned automobiles.

The summary judgment of the trial court for Ruuska is affirmed, and the judgment of the Court of Appeals is affirmed.

Chief Justice Coleman, joined by Justices Kavanagh and Ryan, agreed with Justice Levin that the no-fault act does not require residual liability insurance covering all vehicles a person may drive, but did not agree that the exclusion in this case is unenforceable. It is inappropriate to guess what the reasonable expectations of Gloria Carlson may have been; she does not allege that she was uninformed of the exclusion or of the opportunity to purchase additional coverage. The Court of Appeals apparently reasoned that because some people do not

read the contracts they sign, even if the exclusions are unambiguous, the contracts are, in effect, void as to some parts. That reasoning is unpersuasive. The exclusion in this case is neither ambiguous nor contrary to the no-fault act.

90 Mich App 767; 282 NW2d 472 (1979) affirmed.

SEPARATE OPINION BY WILLIAMS, J.

1. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS.

*The no-fault act requires an insurer to provide its insured with residual liability coverage for certain losses caused by the use of a motor vehicle, and precludes an exclusion of coverage where an accident involves the insured's use of a vehicle owned by or registered in the name of a relative residing in the same household or a vehicle furnished or available for the frequent or regular use of the named insured.*

2. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — LEGISLATIVE INTENT.

*The relevant sections of the no-fault act, when construed together, make it plain that the Legislature intended that a person* using *a motor vehicle that causes certain kinds of damages shall remain liable in tort, that an insurance policy in this state shall afford coverage for such liability, and that an owner or registrant of a motor vehicle shall purchase such a policy (MCL 500.3101, 500.3131, 500.3135; MSA 24.13101, 24.13131, 24.13135).*

3. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS.

*Exclusion from the definition of "non-owned automobile" of an automobile owned by any relative residing in the same household in a no-fault insurance policy generally providing residual liability coverage while the insured is operating a non-owned automobile is repugnant to the clear directive of the no-fault act that a policy provide residual liability coverage for the* use *of a motor vehicle (MCL 500.3101, 500.3131, 500.3135; MSA 24.13101, 24.13131, 24.13135).*

4. AUTOMOBILES — INSURANCE — EXCLUSIONS — CONSTRUCTION OF POLICY.

*A no-fault insurance policy with an exclusionary clause which is invalid because it conflicts with the requirement of liability coverage of the no-fault act must be read so as to provide the required coverage.*

5. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS.

*Exclusion from the definition of "non-owned automobile" of an*

*automobile furnished or available for the frequent and regular use of the named insured in a no-fault insurance policy generally providing residual liability coverage while the insured is operating a non-owned automobile is repugnant to the requirement of the no-fault act that a policy provide residual liability coverage for the* use *of a motor vehicle (MCL 500.3101, 500.3131, 500.3135; MSA 24.13101, 24.13131, 24.13135).*

SEPARATE OPINION BY LEVIN, J.

6. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — NO-FAULT INSURANCE.

The obligation to obtain residual liability coverage is imposed by the no-fault act on an owner or registrant of a motor vehicle, but not on a licensed driver who does not own a vehicle (MCL 500.3101; MSA 24.13101).

7. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — NO-FAULT INSURANCE.

The obligation to obtain residual liability coverage does not extend to one driving the vehicle of another for which the residual liability required by the no-fault act has been provided (MCL 500.3101; MSA 24.13101).

8. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — NO-FAULT INSURANCE — LEGISLATIVE INTENT.

It is contrary to the legislative intent of the no-fault act, to provide a minimum insurance fund at low cost for residual tort liability retained by the act, to construe the act as requiring an owner of one vehicle to carry residual liability coverage when operating another owner's vehicle, on which an independent obligation to provide the coverage has been imposed (MCL 500.3131; MSA 24.13131).

9. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — NO-FAULT INSURANCE.

The policy of the no-fault act of providing fixed limits on the amount of required coverage, except for medical care, for all injured persons and their survivors at an affordable cost does not require residual liability coverage varying in amount depending upon the circumstances of who is driving whose automobiles and how many automobiles the driver owns.

10. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS.

*Definition of "non-owned automobile" in a no-fault insurance policy providing residual liability coverage so as to exclude an automobile furnished or available for the frequent and regular*

*use of the named insured ascribes a special meaning to a term which has an obvious and easily understood meaning, and is unenforceable where there is no evidence that the insured knew of the exclusion and where it was embedded in a separate definition of the apparently unambiguous term, rather than mentioned in the statement of exclusions (MCL 500.3101, 500.3135; MSA 24.13101, 24.13135).*

11. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS.
*The reasonable expectation of the purchaser of non-owned automobile liability insurance is that there would be coverage regardless of whose car the purchaser is driving, and not that although it is in effect when he drives some non-owned vehicles, it will not be in effect when he drives a family member's automobile.*

12. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS.
*Exclusion of an automobile furnished or available for the frequent and regular use of the named insured in a no-fault insurance policy providing residual liability coverage goes beyond reason and good conscience to exclude liability beyond the need for the exclusion, which is to protect the insurer against a policyholder failing to buy coverage on another vehicle he owns or a regularly used leased automobile (MCL 500.3101, 500.3135; MSA 24.13101, 24.13135).*

13. INSURANCE — EXCLUSIONS — UNCONSCIONABILITY — REASONABLE EXPECTATIONS.
*The power of the insurer to draft the policy is restricted by the doctrines of unconscionability and reasonable expectations.*

14. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS.
*Definition of "non-owned automobile" in a no-fault insurance policy providing residual liability coverage so as to exclude an automobile furnished or available for the frequent and regular use of the named insured is unenforceable, because it is unconscionable and contrary to the reasonable expectations of an insured where the insured, driving a family member's automobile not owned or leased by him, has not been offered, and has not declined to purchase, coverage for "frequent", "regular", or other atypical use of non-owned automobiles (MCL 500.3101, 500.3135; MSA 24.13101, 24.13135).*

See headnotes 6-9.

15. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS — CONSTRUCTION — REASONABLE EXPECTATIONS.

*An unambiguous exclusion in a no-fault insurance policy providing residual liability coverage is not unenforceable as contrary to the reasonable expectations of the insured where there is no allegation that the insured was uninformed of the exclusion or of the opportunity to purchase additional coverage.*

16. AUTOMOBILES — INSURANCE — RESIDUAL LIABILITY — EXCLUSIONS.

*Exclusion from the definition of "non-owned automobile" of an automobile furnished or available for the frequent and regular use of the named insured in a no-fault insurance policy providing residual liability coverage is neither ambiguous nor contrary to the no-fault act (MCL 500.3101, 500.3135; MSA 24.13101, 24.13135).*

*Fraser, Trebilcock, Davis & Foster, P.C.,* for State Farm Mutual Automobile Insurance Company.

*Robins, Davis & Lyons,* by *Terry L. Wade (William R. Smith,* of counsel), for Dale Ruuska.

Amicus Curiae:

*William H. Morman* for Detroit Automobile Inter-Insurance Exchange.

WILLIAMS, J. This case tests the validity of an "owned vehicle" exclusion[1] to residual liability coverage required under the no-fault act.[2] The automobile insurance policy in question provides coverage for the named insured while driving a "non-owned" vehicle; however, a subsequent definition of the term "non-owned automobile", as rele-

[1] Although in our order of December 21, 1979, granting leave to appeal in this case, 407 Mich 948, we referred to the particular exclusion as a "non-owned automobile" exclusion, such exclusion is for all relevant purposes identical in form and purport to that which we refer to here, as well as in our order of the same date granting leave to appeal in *Raska v Farm Bureau Mutual Ins Co of Michigan,* 407 Mich 946, as an "owned automobile" exclusion.

[2] 1972 PA 294; MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.*

vant to the facts of this case, provides that a car owned by or registered in the name of a relative residing in the same household as the named insured or a car furnished or available for the frequent or regular use of the named insured is excluded from the category of a "non-owned automobile".

The appellant insurer sold insurance policies on the cars of both a father and a daughter living in the same household. The daughter drove the father's car with his permission and got into an accident. The insurer admits liability under the father's policy since it was being driven with his permission, but seeks a declaratory judgment to establish that the so-called "owned vehicle" exclusion lawfully precludes coverage under the daughter's policy.

Michigan's no-fault act requires an insurer to provide its insured with residual liability coverage for certain losses caused by "the use of a motor vehicle". Therefore, we interpret the no-fault act to preclude an insurer from denying liability coverage to its insured on the basis that the accident involved the insured's use of a vehicle owned by or registered in the name of a relative residing in the same household or on the basis that the vehicle was furnished or available for the frequent or regular use of the named insured.

We affirm the Court of Appeals but for different reasons and the circuit court for similar reasons.

## I. FACTS

On June 19, 1975, Gloria Carlson, while driving an automobile owned by her father, Arvid Carlson, with whom she then resided, collided with a motorcycle being driven by appellee Dale Ruuska,

which resulted in serious injury to him. Appellee Ruuska later filed a negligence suit against Gloria Carlson, her father, Arvid, who had given his consent to Gloria's use of the car, and a bar owner at whose establishment Gloria Carlson had allegedly become intoxicated earlier.

Arvid Carlson and Gloria Carlson each owned automobiles covered by separate policies of insurance with State Farm Mutual Automobile Insurance Company ("State Farm"). Each policy contained a liability limit of $25,000 respecting the bodily injury claims of any one person. State Farm does not dispute coverage of Gloria Carlson under her father's policy, as she was driving his car with his consent at the time of the accident. Rather, the present controversy centers on the question of the applicability to this accident of the added coverage of Gloria Carlson's separate policy of insurance with State Farm covering her own non-involved automobile.

Appellee Ruuska bases his contention that Gloria Carlson's own automobile insurance policy is applicable on a provision in that policy extending liability coverage to the use of a "non-owned automobile". Specifically, the policy provides:

> "Use of Non-Owned Automobiles:
>
> "* * * [S]uch insurance as is afforded by this policy with respect to the *owned motor vehicle* under:
>
> "(1) Coverages A [bodily injury liability] and B [property damage liability] applies to the use of a *non-owned automobile* by:
>
> "(a) the first *person* named in the declarations" (emphasis in original).

Thus since Gloria Carlson was the named insured, liability coverage would seem to be indicated.

Appellant State Farm, on the other hand, points

to the policy's definition of a "non-owned automobile" as the premise for its denial of coverage under Gloria Carlson's policy with respect to her use of her father's car. This definition provides as follows:

"Non-Owned Automobile—means an *automobile, trailer,* or detachable living quarters unit, not (1) owned by, (2) registered in the name of, or (3) furnished or available for the frequent or regular use of the named insured, his spouse, or any relative of either *residing* in the same household, other than a *temporary substitute automobile,*"[3] (emphasis in original).

"Reside", when used with reference to the named insured's household, is defined in the policy to mean bodily presence in such household and an intention to continue to dwell therein. Thus since it is undisputed that Gloria Carlson, at the time of the accident, was driving an automobile owned by her father, with whom she had lived all her life, the exclusionary clause in Gloria Carlson's policy would ostensibly seem to deny coverage in this instance.

Due to this dispute and because it appeared that any judgment for Ruuska in the negligence suit might exceed the limits of Arvid Carlson's policy, State Farm sought a declaratory judgment to determine its liability for any residual amount under the policy issued to Gloria Carlson.

The circuit court granted appellee Ruuska's motion for summary judgment holding that while the

[3] A "temporary substitute automobile" is defined in the policy as an automobile "not owned by the named insured or his spouse while temporarily used with the permission of the owner as a substitute for the described motor vehicle when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction". The situation envisaged by this definition is inapplicable to the case at bar since Gloria Carlson stated in her deposition that on the date of the accident her car was used by her father and mother.

definition of a "non-owned automobile" was not ambiguous, it did contravene the provisions of the no-fault act and was therefore void and of no effect.

The Court of Appeals[4] unanimously affirmed the trial court's result, but it did so on different and divided reasoning. The majority of that panel determined that based on Michigan's financial responsibility act, MCL 257.501 *et seq.;* MSA 9.2201 *et seq.,* an exclusion to liability coverage of the type provided was theoretically valid. It found, however, that while the language creating the exclusion was not ambiguous, the limitation on the otherwise applicable coverage of "non-owned automobiles" was not designated explicitly enough—indeed the majority felt it was hidden among the policy provisions—and was therefore unenforceable as written.

The other member of the panel agreed with the rationale of the trial court, as well as opining that the instant exclusion was void because unauthorized by MCL 500.3009(2); MSA 24.13009(2)[5] which provides for only one exclusion from liability coverage not here applicable.

We granted leave to appeal in both this case and *Raska v Farm Bureau Mutual Ins Co of Michigan* (Docket No. 63507), ordering that they be argued

[4] 90 Mich App 767; 282 NW2d 472 (1979).

[5] This section provides in full as follows:

"When authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance referred to in subsection (3) of section 4 of Act No. 198 of the Public Acts of 1965, as amended, being section 257.1104 of the Compiled Laws of 1948: Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable."

and submitted together, one immediately following the other.

## II. DISCUSSION

The no-fault act states that the *owner* or *registrant* of a motor vehicle required to be registered in this state

"*shall maintain security for payment of benefits under* personal protection insurance, property protection insurance, and *residual liability insurance.*" (Emphasis supplied.) MCL 500.3101(1); MSA 24.13101(1).

Under the terms of § 3131 such residual liability insurance

"shall cover bodily injury and property damage which occurs within the United States, its territories and possessions, or in Canada. * * * *In this state this insurance shall afford coverage for automobile liability retained by section 3135.*" (Emphasis supplied.) MCL 500.3131; MSA 24.13131.

Subsections 3135(1) and (2) of the no-fault act, which concern the circumstances under which a person remains subject to tort liability, provided as follows at the time of the accident:

"*A person remains subject to tort liability* for noneconomic loss *caused by his* ownership, maintenance, or *use of a motor vehicle* only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement" (emphasis supplied);

and that

"[n]otwithstanding any other provision of law, *tort liability arising from the* ownership, maintenance or *use within this state of a motor vehicle* with respect to

which the security required by subsections (3) and (4) of section 3101 was in effect is abolished except as to:

"(a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his act or omission, he does not cause or suffer such harm intentionally if he acts or refrains from acting for the purpose of averting injury to any person, including himself, or for the purpose of averting damage to tangible property.

"(b) Damages for noneconomic loss as provided and limited in subsection (1).

"(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3 year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his liability by the amount of taxes that would have been payable on account of income the injured person would have received if he had not been injured." (Emphasis supplied.) MCL 500.3135(1), (2); MSA 24.13135(1), (2).[6]

Sections 3101, 3131 and 3135 of the no-fault act, when construed together, make it plain that at the time of the accident the Legislature intended that

1. A person *using a motor vehicle* that causes certain types of damages shall remain liable in tort (§ 3135);

2. An insurance policy in this state shall afford coverage for such liability (§ 3131);

3. An owner or registrant of a motor vehicle shall purchase such a policy (§ 3101).

In this case, Gloria Carlson purchased an insurance policy which specifically provided that she was covered when she used a "non-owned automobile", which, of course, she did. However, in its motion for summary judgment in the trial court,

[6] A fourth instance of retained tort liability pertaining to damages of up to $400 to motor vehicles was added to § 3135 in 1979 and made effective July 1, 1980. MCL 500.3135(2)(d), (6); MSA 24.13135(2)(d), (6).

appellant State Farm contended solely that since her policy defined "non-owned automobile" to exclude "an *automobile* owned by any relative * * * residing in the same household", which exclusion her father's car unquestionably met, Gloria Carlson could not recover under her own insurance policy (emphasis in original).

We find such an exclusion repugnant to the clear directive of the no-fault act requiring that a policy purchased pursuant to that act provide residual liability coverage for the *use of a motor vehicle*. Nowhere in the no-fault act is provision made for the exclusion sought to be enforced by appellant State Farm in its motion for summary judgment. Section 3131 provides that liability insurance "shall afford coverage for automobile liability retained in section 3135", to wit, tort liability for certain enumerated types of loss caused by or arising from the "use of a motor vehicle". In a word, the Legislature has by section 3101(1) required the maintenance of insurance covering the type of liability here incurred, whereas the insurer has specifically sought by policy exclusion to thwart the Legislature's prescription. This it cannot lawfully do.[7] Therefore, since the exclusionary clause in Gloria Carlson's policy is in conflict with the liability coverage required by the no-fault act, the language of the statute must prevail with the result that the attempted exclusion is invalidated and the policy must be read so as to provide the

[7] Had the Legislature wanted to limit the portability of liability coverage it could easily have done so by less broad language, as it did, for example, in § 520(b) of the financial responsibility act. MCL 257.520(b); MSA 9.2220(b). There, in discussing the requisites for an automobile liability policy issued as proof of future financial responsibility, the Legislature, after requiring an owner's policy to designate by explicit description or appropriate reference all covered motor vehicles, limited the liability coverage to only those automobiles listed in the policy by speaking in terms of the use of "such" vehicle(s).

required coverage. See MCL 500.3101(3); MSA 24.13101(3); *cf. Boettner v State Farm Mutual Ins Co,* 388 Mich 482, 487; 201 NW2d 795 (1972); *Allstate Ins Co v DeFrain,* 81 Mich App 503, 506; 265 NW2d 392 (1978).

Appellant State Farm also alleged in its complaint that coverage was precluded in this instance due to the additional fact that the exclusionary clause eliminated from the definition of a "non-owned automobile" an automobile "furnished or available for the frequent or regular use of the named insured". Although as a factual matter Gloria Carlson's access to and use of her father's car may or may not have been sufficient to be characterized as "furnished or available for [her] frequent or regular use", we find that as a matter of law this particular phrase of the exclusionary clause is repugnant to the no-fault act and that summary judgment was properly granted to appellee Ruuska. The same reasoning that served to invalidate the "owned by a relative residing in the same household" phrase of the exclusionary clause also compels us to render the "frequent or regular use" phrase invalid. The Legislature chose to speak in broad language when it enunciated the circumstances under which a person remained subject to tort liability. It said simply, as here relevant, that the *use of a motor vehicle,* not either the infrequent or irregular use, or the frequent or regular use of a motor vehicle, could subject a person to tort liability under certain circumstances which would require a policy of insurance meeting certain standards. See § 3131. Thus this part of the exclusionary clause must also fall because it seeks to raise limitations on automobile use not sanctioned by the statute.[8]

[8] Although we have not explicitly considered subpart two of the

Our decision today is limited to the facts of this case. We do not consider, for example, whether an insurer, consistent with the terms of the no-fault act, may exclude the owner of an insured automobile from liability coverage during his or her use of an *uninsured* automobile he or she also owns. *Cf.* §§ 3101, 3113(b). Additionally, because we have invalidated the exclusionary clause as contrary to the public policy of the no-fault act, we need not reach the issues of whether the clause was ambiguous or hidden within the policy.

## III. CONCLUSION

Gloria Carlson paid a premium on her own automobile for statutorily required residual liability coverage. Her insurer State Farm has attempted to circumscribe this liability coverage as to her use of non-owned automobiles through a restrictive definition of the term "non-owned automobile". This definitional limitation, however, is contrary to the plain meaning of the no-fault act that requires residual liability coverage as to certain damages stemming from "use of a motor vehicle" and must be voided. Accordingly, we affirm the trial court's grant of summary judgment to appellee Ruuska. The Court of Appeals is also affirmed, but for different reasons.

FITZGERALD and BLAIR MOODY, JR., JJ., concurred with WILLIAMS, J.

LEVIN, J. *(concurring).* The question presented

"non-owned automobile" definition, *supra,* which would purport to limit liability coverage in this case because the non-owned automobile was "registered in the name of * * * any relative * * * residing in the same household", *i.e.,* it was registered to Gloria Carlson's father, such a limitation is so close in purpose and effect to the "owned by * * * any relative * * * residing in the same household" language that it too must be invalidated.

concerns the validity of an exclusion from residual liability insurance coverage. Residual liability insurance coverage protects against "residual" tort liability not eliminated under the no-fault act.

The no-fault act requires the owner or registrant of a motor vehicle to purchase an automobile insurance policy providing, among other coverages, "residual liability insurance".[1] Section 3131 of the no-fault act describes the residual liability coverage required under the act.[2] A 1978 amendment clarified the meaning of § 3131 as requiring only the minimum liability coverage described in § 3009(1).[3] Section 3009(1) states that a policy of

[1] "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and *residual liability insurance*. Security shall be in effect continuously during the period of registration of the motor vehicle." MCL 500.3101(1); MSA 24.13101(1) (emphasis supplied).

[2] "(1) Residual liability insurance shall cover bodily injury and property damage which occurs within the United States, its territories and possessions, or in Canada. This insurance shall afford coverage equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs. In this state this insurance shall afford coverage for automobile liability retained by section 3135.

"(2) This section shall not require coverage in this state other than that required by section 3009(1). This section shall apply to all insurance contracts in force as of October 1, 1973, or entered into after that date." MCL 500.3131; MSA 24.13131.

[3] Section 3009 provides:

"(1) An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless such liability coverage as is provided therein is subject to a limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any one accident, and, subject to said limit for 1 person, to a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any one accident, and to a limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.

"(2) When authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated

residual liability insurance shall provide "such liability coverage as is provided therein" for not less than $20,000 for injury or death of one person, $40,000 for injury or death of two or more persons ("20/40 coverage"), and $10,000 for damage to property of others.[4] The amendment, retroactive to the effective date of the no-fault act, was apparently added in response to a concern that § 3131 might be read as requiring residual liability coverage beyond that required by § 3009(1).

Gloria Carlson owned an automobile and had obtained the insurance required by the no-fault act with respect to her vehicle. The residual liability coverage, $25,000 per person, $50,000 per accident and $10,000 for property damage, was somewhat greater than the minimum limits required by §§ 3131 and 3009(1). Her father, in whose household she was living, also owned an automobile covered by a separate insurance policy providing at least the coverage required by the no-fault act.[5]

The accident occurred while Gloria Carlson was driving her father's automobile. Her own automobile was not involved. Since the liability arising from the accident may exceed the coverage limits

by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance, referred to in subsection (3) of section 4 of Act No. 198 of the Public Acts of 1965, as amended, being section 257.1104 of the Compiled Laws of 1948: Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable." MCL 500.3009; MSA 24.13009.

[4] 1978 PA 460. Subsection (2), added to § 3131 of the no-fault act by this amendment, was made retroactively applicable to all insurance contracts in force as of October 1, 1973, or subsequently entered into; see fn 2 for text. Before the 1978 amendment, § 3131 consisted solely of what is now subsection (1) of § 3131.

[5] The record does not disclose the amount of liability coverage purchased by Gloria Carlson's father for the automobile involved in the accident.

of her father's policy, the question arises whether Gloria Carlson's policy is also applicable.

State Farm Mutual Automobile Insurance Company, the insurer under both policies, brought this action seeking a declaratory judgment that the coverage provided by Gloria Carlson's policy was not applicable. It concedes that the coverage of her father's policy applies.

State Farm contends that, although Gloria Carlson's policy states without pertinent qualification that "such insurance as is afforded by this policy with respect to the *owned motor vehicle* under * * * coverages [for liability] applies to the use of a *non-owned automobile* by * * * the first *person* named in the declarations [Gloria Carlson]" (italics in original), by reason of the definition of "non-owned automobile" coverage lapsed while she was driving her father's automobile.

The policy definition relied on by State Farm states that an automobile owned by any relative residing in the same household is not a "non-owned automobile":

> "Non-Owned Automobile—means an *automobile, trailer* or detachable living quarters unit, not
>
> "(1) owned by,
>
> "(2) registered in the name of, or
>
> "(3) furnished or available for the frequent or regular use of
>
> the named insured, his spouse, or any relative of either *residing* in the same household, other than a *temporary substitute automobile.*" (Italics in original.)

The signers of the lead opinion conclude that the exclusion is "repugnant to the clear directive of the no-fault act requiring that a policy purchased pursuant to that act provide residual liability coverage for the *use of a motor vehicle*" (italics in

original),[6] and thus do not reach the question whether the exclusion is invalid as unconscionable or contrary to the reasonable expectations of an insured. They reason that, since § 3135 retains tort liability for above-threshold injury and such liability attaches for the "use" as well as the "ownership" of a motor vehicle (loss caused by the "ownership, maintenance, or use" of a motor vehicle), and since § 3131 requires coverage for tort liability retained by § 3135, the exclusion from coverage for tort liability arising from a driver's use of the owner's vehicle is invalid.

Although the signers of the lead opinion state that their decision would be limited to the facts of this case, it is difficult to discern a rationale that could limit the principles announced as the basis for their conclusion. If § 3131 requires coverage for whatever tort liability is retained by § 3135, how may an insurer exclude coverage when its insured drives another vehicle owned by him which he has chosen not to insure? Since § 3131 incorporates only the limitation in required coverage contained in *subsection (1)* of § 3009 (see fn 2), under what rationale would the Court qualify the construction, in the lead opinion, of § 3131 to allow an insurer to incorporate into its policies the "named person" exclusion provided for in *subsection (2)* of § 3009?[7]

I concur with the result of the lead opinion, but not with its rationale.

The no-fault act does not require residual liability insurance covering all vehicles a person may drive. Residual liability insurance is required for residual tort liability arising out of the ownership, maintenance or *use* of the vehicle in respect to

[6] *Ante,* p 336.

[7] There has been no change in § 3009 since the 1978 amendment of § 3131.

which a policy is required to be maintained and in effect. An insurer is not required by the no-fault act to provide portable coverage when the owner drives another insured vehicle.[8]

The instant exclusion is, however, unenforceable, because it is unconscionable and contrary to the reasonable expectations of an insured, where the insured, driving an automobile not owned or leased by him, has not been offered by the insurer (or his agent) and has declined to purchase a rider deleting or a specific exception from the exclusion or coverage for "frequent" or "regular" or other atypical use of non-owned automobiles.

## I

The obligation to obtain residual liability coverage is imposed by the no-fault act on an "owner or registrant of a motor vehicle required to be registered in this state". MCL 500.3101; MSA 24.13101. A licensed driver who does not own a vehicle is not required to obtain residual liability coverage. This Court should construe the no-fault act with deference to the policy judgment implicit in the legislative decision not to require a driver to obtain residual liability protection.[9]

Since the obligation to obtain residual liability insurance is triggered by the obligation to register, rather than by the operation of a vehicle, it is reasonable to conclude that the obligation to so insure does not extend to another vehicle for which the residual liability protection required by the no-fault act has been provided.

[8] Other provisions and policies of the act are implicated where a person insured or covered by a no-fault policy drives an uninsured vehicle. No opinion is intimated in that regard.

[9] Such an obligation could have been enforced by requiring proof of no-fault insurance as a condition to obtaining a driver's license.

Residual liability coverage, to be sure, must be in force with respect to the vehicle for which it is purchased without regard to whether the owner or some other driver *uses* it. It does not follow that the act requires residual liability coverage when the owner uses a vehicle owned by someone else.

The purpose in requiring residual liability coverage is to assure that a person injured by use of a motor vehicle will have some minimum insurance fund available to compensate for injuries for which there is residual tort liability. This purpose is achieved by requiring each owner or registrant of a motor vehicle to obtain at least 20/40 coverage with respect to his vehicle. The legislative implementation of this purpose is limited to requiring that there be in effect at least 20/40 coverage *for each vehicle involved in an accident.*

To read the no-fault act as requiring an owner of one vehicle to carry 20/40 coverage when operating another's vehicle, with respect to which other vehicle an independent obligation to carry 20/40 coverage has been imposed, is to read § 3131 as requiring, in that situation, double the coverage it says it requires. When an owner operates his vehicle, single 20/40 coverage is required. Again, when a person who does not himself own an automobile operates another's vehicle, single 20/40 coverage is required. However, if the no-fault act is construed to require portable coverage, when an owner of one vehicle operates a vehicle owned by another, double 20/40 coverage is required. And if the operator of an insured vehicle owned by another owns more than one vehicle, say two or more, then, if the no-fault act is construed to require portable coverage, the insurer of each vehicle owned by the operator is presumably required to provide 20/40 coverage while its insured

is driving the other vehicle; so construed the act requires in such a case treble or greater 20/40 coverage.

Section 3131 was amended in 1978 to clarify that the residual tort liability coverage required by that section was limited to a minimum of 20/40 coverage per vehicle. To nonetheless read § 3131 as requiring stacked coverage in the adventitious circumstance of one owner driving another's vehicle is to read it in a manner contrary to the intent of the amendment and to the purpose of the act, which is simply to provide a minimum fund of $20,000/$40,000 to pay for residual tort liability retained by the act.

The no-fault act, in contrast with the tort law, provides limits on the extent of liability. For work loss and survivor's loss the initial limit was $1,000 in a single 30-day period not exceeding 3 years.[10] (The act provides for adjustment of that amount to reflect changes in the cost of living.)[11] Expenses incurred in obtaining ordinary and necessary services in lieu of those that an injured person would have performed is limited to $20 per day not exceeding three years.[12] Funeral and burial expenses are limited to $1,000.[13] Property protection benefits are limited to $1,000,000.[14] Residual liability is limited to $20,000/$40,000/$10,000.[15] The only exception to this policy of limiting the amount of required protection relates to medical care; the insurer is responsible for all reasonable charges for reasonable care without a fixed limit.[16]

[10] MCL 500.3107; MSA 24.13107 and MCL 500.3108; MSA 24.13108.

[11] *Id.* The currently applicable amount is $2049.

[12] *Id.*

[13] MCL 500.3107; MSA 24.13107.

[14] MCL 500.3121; MSA 24.13121.

[15] MCL 500.3131; MSA 24.13131 and MCL 500.3009; MSA 24.13009.

[16] MCL 500.3107; MSA 24.13107.

It is not consistent with the policy of the no-fault act of providing fixed limits on required coverage, with the one exception noted, to require in effect one 20/40 residual liability coverage when the owner drives his automobile or when a person who does not own an automobile drives another person's automobile, two 20/40 coverages when an owner drives his wife's automobile and three 20/40 coverages if an owner who owns two automobiles drives his wife's automobile. However great the amount of the work loss or survivor's loss or indeed medical loss, and however many automobiles in the family, there is only one work-loss, survivor's-loss and medical-loss recovery pursuant to the mandatory no-fault coverage. The same principle, designed to provide a minimum of coverage for all injured persons and their survivors at an affordable cost, is persuasive that the Legislature did not intend to require single or multiple residual liability coverage depending on the chance circumstance of who is driving whose automobile and how many automobiles, if any, the driver owns.

Many, perhaps most, owners choose to purchase non-owned automobile coverage. Such coverage will often provide an additional source of recovery for residual tort liability without regard to how this case is decided. That is entirely consistent with the residual tort liability insured against. Owners buy the residual liability coverage they think they need, having in mind their collectibility absent insurance. Since individual wealth varies, so too does the amount of coverage people think they need, as does their ability to pay premiums therefor.

The issue here is the amount of the residual liability coverage required by the no-fault act, the

amount which everyone must provide and pay for without regard to collectibility (or need therefor in those terms) and ability to pay. The Legislature did not, I am persuaded, require residual liability coverage varying in amount depending on chance.

## II

The exclusion from coverage while driving non-owned automobiles is, however, unenforceable.

### A

Gloria Carlson's automobile insurance policy stated that it covered her when she drove a "non-owned automobile". The term "non-owned automobile" has an obvious and clear meaning. To the average person buying insurance and, indeed, to many lawyers, it means simply a vehicle not owned by the insured. The average consumer, if he were to read this provision in his policy, would rightfully assume that it referred to such instances as when he drove a rental car or, perhaps more commonly, when he borrowed a car belonging to a member of his family. That is precisely what Gloria Carlson did: she borrowed her father's car. Certainly, as the Court of Appeals said, "To the layperson 'non-owned vehicle' would naturally include a vehicle owned by one's father".[17] However, what is probably the most common of instances when one would be driving a non-owned automobile is excluded from non-owned automobile coverage.

Even had Gloria Carlson read with care the list of exclusions in her policy, she would not have discovered this exclusion. The statement of exclusions from the non-owned automobile coverage

[17] *State Farm Mutual Automobile Ins Co v Ruuska,* 90 Mich App 767, 778; 282 NW2d 472 (1979).

describes two instances when such coverage is not provided,[18] but does not mention the instant exclusion. The listing of two, and only two, exclusions from the non-owned automobile coverage would create the impression that such exclusions are the only exclusions. One would expect that an exclusion of coverage for what would probably be the most common use of another's automobile—the borrowing of a family member's car—would be listed among the other exclusions.

To have been informed of the exclusion, Gloria Carlson would have had to turn to the section of her policy where this apparently unambiguous term is given a definition. It cannot be assumed that the average consumer, coming upon a term in his policy which has an obvious and easily understood meaning, will nonetheless look up the definition.[19]

Most people are unfamiliar with the lawyer's drafting technique of ascribing a special meaning to a word which has a commonly and readily understood meaning. It would not occur to the average person that the function of a definition is to change the meaning of a word so that it means something other than what it says.

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[18] The policy provided:

"This insurance does not apply under:

"(a) Coverages A, B, C and M, to a *non-owned automobile*

"(1) while maintained or used by any *person* while such *person* is employed or otherwise engaged in an *automobile business* of the insured or of any other *person* or organization, or

"(2) while used in any other business or occupation, except a *private passenger automobile* operated or occupied by the first *person* named in the declarations or, if *residents* of the same household, his spouse or any relative of either." (Italics in original.)

[19] Although the words "non-owned automobile" in the statement of coverage were in bold face italic type and the policy states "(NOTE: The words in *bold face italic* type are defined under Definitions within each Section.)", most persons understand that the purpose of a definition is to clarify the meaning of the term defined. The meaning of this term appeared to be clear on its face.

There is no evidence that Gloria Carlson knew of the exclusion. The exclusion not only was not on the face page or the certificate or in the declarations of her policy,[20] it 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 without recourse to a separate definition.

B

Apart from the language of the automobile insurance policy which would have led Gloria Carlson to believe that she was covered regardless of whose car she was driving, that perception would have been the reasonable expectation of one purchasing non-owned automobile liability insurance. One purchases non-owned automobile liability insurance to provide protection against residual liability in tort when one drives someone else's automobile. The potential for liability and the potential for an accident—the risks which lead one to purchase insurance—are no less, nor do they cease to exist altogether, simply because one drives an automobile owned by a family member.

[20] It is informative to compare the notice, or lack of notice, provided Gloria Carlson to what has been determined by the Legislature to be appropriate notice to an insurance consumer of an exclusion from general coverage which would otherwise appear to include what was excluded. Section 3009(2) allows an exclusion from liability coverage "when a vehicle is operated by a named person". Such exclusion of a named person from coverage that would otherwise be applicable to that person, which is analogous to the instant exclusion of certain automobiles from coverage which would otherwise be applicable to those automobiles, must first be "authorized by the insured". Second, such "named person" exclusion is expressly made invalid unless the following notice appears both on the face of the policy, the declaration page, or the certificate of the policy *and* on the certificate of insurance carried by Michigan drivers as the evidence of insurance required by the Michigan Vehicle Code, MCL 257.328; MSA 9.2028:

"Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable." MCL 500.3009; MSA 24.13009.

An owner of an automobile purchases non-owned automobile liability protection to provide the amount of liability coverage he considers appropriate for himself while he drives vehicles other than his own. Even if he expects that the owner of the borrowed automobile has purchased insurance, he generally has no idea of the amount of the coverage.

A person does not expect that, while the amount of liability coverage he considers appropriate for himself is in effect when he drives some non-owned vehicles, it will not be in effect when he drives a family member's automobile with the result that the amount of his liability coverage will be limited to whatever amount of liability coverage the family member chose to purchase.[21]

Suppose Gloria Carlson had chosen to purchase 100,000/200,000 of public liability insurance, her father had coverage of 250,000/500,000 and her brother, also living at home, had purchased only the minimum 20/40 coverage. Assume further that all three are acting in good faith and not in an effort to obtain higher coverage without paying the requisite premiums, each family member simply having purchased the coverage he or she thought appropriate for his or her financial circumstances. If the exclusion is enforceable, then if Gloria or her father drive the brother's automobile, say even no more than to move it out of the driveway onto the street so as to gain access to her or his own automobile, their non-owned automobile coverage would lapse during the time they were driving his automobile, even if they had never driven the brother's automobile before.

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[21] See *Raska v Farm Bureau Mutual Ins Co of Michigan,* 412 Mich 355; 314 NW2d 440 (1982), decided today, where the exclusion for borrowed vehicles owned by a "relative" is not limited to relatives with whom one resides. By its terms it applies if one borrows, perhaps for the first time, an automobile belonging to a cousin or an in-law.

C

The exclusion from coverage is apparently designed to guard against a person having coverage on one vehicle and no coverage, or less coverage, on another vehicle owned by him or regularly used by him. The exclusion seeks to protect the insurer against a policyholder failing to buy coverage on another vehicle *he owns.* To be effective, the provision must exclude an uninsured vehicle registered in the name of another that the insured regularly uses—*a leased automobile.* The exclusion is to this extent clearly reasonable and conscionable.

The exclusion is written so broadly, however, that it encompasses situations beyond the evil it is designed to guard against. In seeking to protect itself against overreaching by the insured, the insurer has overwritten the exclusion and failed to protect the insured who acts in good faith. The exclusion is aimed at a particular evil; it goes beyond reason and good conscience to exclude liability beyond the need for the exclusion.

When a court limits such an exclusion, it is subject to the charge that it is rewriting the policy. Implicit in the charge is the assumption that the insurer can draft the policy as it sees fit. Its power to do so is, however, restricted by the doctrines of unconscionability and reasonable expectations.[22]

Since virtually every automobile is covered by residual liability insurance in some amount and every automobile is required to be so covered, non-owned automobile insurance is in a sense umbrella coverage. Because the primary risk is carried by the insurer of the owner, all that needs to be

[22] See Keeton, Basic Text on Insurance Law, §§ 6.2, 6.3, pp 348-361; See also Atiyah, The Rise and Fall of Freedom of Contract (Oxford University Press, 1979), pp 731, 734.

covered is the excess risk above and beyond the risk insured by the owner.

But non-owned residual liability insurance is not written or sold as umbrella coverage. A consumer who wishes umbrella protection must buy a separate umbrella policy. Few consumers are aware that in that manner they may protect themselves against the "obscurant drafting" of the automobile insurance policy. Moreover, carriers generally will not write umbrella coverage unless the primary or underlying insurance is for at least 100,000/300,000.

Other alternatives do not appear to be feasible. An insured cannot purchase a rider deleting or a specific exception from the exclusion unless the insurer is willing to and offers to delete or make a specific exception upon payment of an additional premium. Nor can the insured reasonably be expected to purchase insurance on each automobile belonging to a relative or employer that he might potentially drive and on the automobiles of each neighbor or co-worker which a jury might decide he "frequently" or "regularly" uses.

This is not a case of a person owning two or more automobiles, buying insurance on one and himself driving or allowing another person insured under his policy to drive an uninsured vehicle. Nor does this appear to be a case of a person who frequently or regularly uses another person's automobile. In such a case the insurer would be justified in charging an additional premium because of the atypical use of non-owned automobiles although it may also be the insurer of the non-owned automobile.[23] Nor is this a case of a person who declined to purchase a rider deleting or a

[23] State Farm was, as earlier noted, the insurer of both Gloria Carlson's and her father's automobiles.

specific exception from the exclusion or to pay an additional premium for atypical use of non-owned automobiles.

I would affirm the Court of Appeals and remand to the trial court for entry of a declaratory judgment consistent with this opinion.

COLEMAN, C.J. *(to reverse).* I agree with Part I of Justice LEVIN'S opinion, but not with Part II, and would reverse the Court of Appeals.

It is presumptuous to guess what the reasonable expectations of Gloria Carlson may have been. She does not allege that she was uninformed of the exclusion or of her choice to purchase additional coverage through another endorsement or policy, although the opinions of Justice LEVIN and the Court of Appeals leap to that conclusion.

The Court of Appeals found that, pursuant to Michigan's financial responsibility act, MCL 257.501 *et seq.;* MSA 9.2201 *et seq.,* such an exclusion to liability coverage as is the subject of this controversy is theoretically valid. Although the exclusionary language was not ambiguous, the Court 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.

I find the reasoning of the Court of Appeals unpersuasive and I am also unpersuaded by the argument of my colleagues that, despite the unambiguous wording of the contract and a failure by defendant Gloria Carlson to allege lack of information of the exclusion or of the possibility of obtaining additional coverage, the exclusion must fall. Nor am I persuaded by the "reasonable expecta-

tion" argument. I would neither find the policy ambiguous nor contrary to the "no-fault" act.

Therefore, I would reverse the Court of Appeals and remand to the trial court for proceedings consistent with this opinion.

KAVANAGH and RYAN, JJ., concurred with COLEMAN, C.J.

RASKA v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN

Docket No. 63507. Argued June 3, 1980 (Calendar No. 2).—Decided January 8, 1982. Rehearing denied *post,* 1119.

Robert F. Raska and Mary L. Raska, husband and wife, claimed compensation for medical bills, disability income, and lost wages against Farm Bureau Mutual Insurance Company of Michigan for injuries Mary Raska suffered in a motor vehicle accident on March 24, 1973 (before the no-fault insurance act took effect), while she was driving a dump truck owned by Robert F. Raska Trucking, a sole proprietorship. Farm Bureau insured the trucks of Robert F. Raska Trucking under a "combination" business automobile liability policy which provided some medical benefits but no disability-income or wage-loss benefits, and insured the Raskas' three family cars under a "family" automobile policy, which included an endorsement for disability income coverage. The insurer denied liability under the family policy because of the exclusion under that policy of coverage of a named insured occupying an automobile owned by or furnished for the regular use of the named insured, other than one defined in the policy as an "owned automobile". The trucks did not come within the definition. The Raskas brought

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REFERENCES FOR POINTS IN HEADNOTES

[1] 43 Am Jur 2d, Insurance §§ 237, 241, 259.

Doctrine of unconscionability as applied to insurance contracts. 86 ALR3d 862.

[2, 3, 6] 43 Am Jur 2d, Insurance § 259.

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.

[4] 43 Am Jur 2d, Insurance §§ 257, 264.

[5, 8, 10-12] 7 Am Jur 2d, Automobile Insurance §§ 238, 241-244.

Exclusion from "drive other cars" provision of automobile liability insurance policy of other automobile owned, hired, or regularly used by insured or member of his household. 86 ALR2d 937.

[7, 9] 43 Am Jur 2d, Insurance § 276.

[9] 43 Am Jur 2d, Insurance §§ 263, 264.

[10, 11] 43 Am Jur 2d, Insurance §§ 263, 264.

an action for breach of the insurance policy and for a declaratory judgment, arguing that the exclusion is void as contrary to public policy and that it should be construed against the insurer. The Macomb Circuit Court, Walter P. Cynar, J., granted summary judgment for the defendant as to the claim for lost-wage and disability-income benefits. The Court of Appeals, Danhof, C.J., and J. H. Gillis, J. (N. J. Kaufman, J., concurring), affirmed in an unpublished per curiam opinion (Docket No. 78-2). Plaintiffs appeal.

In an opinion by Justice Kavanagh, joined by Chief Justice Coleman and Justices Fitzgerald and Ryan, the Supreme Court *held:*

The exclusionary clause in this case is not ambiguous and is enforceable.

1. Any clause in an insurance policy is valid as long as it is clear, unambiguous, and not in contravention of public policy. The plaintiffs cite no public policy touching this case, but concentrate on the obscurity of the drafting on account of the placement of the clause in the policy, and the technicality of language used. The only pertinent question, therefore, is whether the exclusionary clause in this contract is ambiguous.

2. A contract is ambiguous when its words may reasonably be understood in different ways. However, if it fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear.

3. The plaintiffs also assert that the insurance policy did not meet their reasonable expectations. The expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. To allow a person who signs a contract without reading all of it or without understanding it to bind another to an obligation not covered by the contract because the first person thought the other was bound to such an obligation is neither reasonable nor just.

4. The capitalized reference on the first side of the endorsement to provisions on the second side and the capitalized heading "Exclusions" on the second side of the endorsement should leave no doubt that the use of a vehicle not named in the policy which is either owned by the insured or furnished for his or her regular use is excluded from coverage.

Justice Williams, joined by Justices Levin and Moody, dissented. He would hold that the "owned automobile" exclusion of the endorsement for disability income coverage is invalid under the traditional rule that an insurance contract, as a contract of adhesion, is construed in favor of the insured, and

also under the rule that it is construed in terms of the reasonable expectations of the insured, unless it can be shown that the effect of the qualifying clauses was understood by the Raskas.

1. The traditional rule is that the policy of insurance will be construed against the drafter in case of ambiguity or contradictions because the insurance contract is not made between parties of equal bargaining strength with each side choosing the language of the agreement and understanding what it means. The rule of reasonable expectations derives from the application of the general principle that any exception to the liability of the insurer must be so stated as clearly to apprise the insured of its effect. When a standardized insurance contract is put before a consumer to take it or leave it, the doctrine of the adhesion contract has been applied, in view of the disparate bargaining status of the parties, to ascertain the meaning of the contract which the insured would reasonably expect.

2. The meaning of the owned-automobile exclusion in this case can be discovered only by construing the whole endorsement for medical payments and disability coverage, which is printed on two sides of one sheet of paper. On the first side, the policy unconditionally announces that the endorsement covers every named insured in any automobile accident. The language indicates that the insured is covered while driving the cars with respect to which the insurance was specifically purchased and every other car as well. The exclusions, which are first mentioned and described on the second page of the form, limit the coverage, and the "owned automobile" exclusion depends in part upon the definition of an owned automobile found on the first page, so that understanding of the coverage requires a search and construction back and forth between the pages. The principle is that obscurant drafting is construed against the drafting insurer. The "owned automobile" exclusion in this case is invalid because it is ambiguous, unless it can be shown that the Raskas were personally advised of the exclusion.

3. The plaintiffs reasonably expected their family policy to cover them while driving the vehicles of Robert Raska Trucking. The undertaking of the insurer in the endorsement for disability income coverage is so unrestricted that without further clarification it would lead the insureds reasonably to expect coverage in almost all vehicular accidents, and certainly in the present one. The unconditional statement of coverage on the face of the endorsement would lead the insured logically to assume that the policy provides complete portability. Such a

reasonable expectation should not be defeated by the obscure drafting of the policy. The average consumer does not expect that an automobile owned by a family member or owned by an unrelated person but furnished for his regular use will be considered by the insurer not to be a "non-owned" automobile but, rather, to be the equivalent of an automobile owned by the insured for which he should obtain insurance. To make such an exclusion from the expected coverage, without explaining or offering the additional coverage the insured should purchase for protection in the excluded situation, is to set a trap for the policyholder. The average consumer does not have the skill, or may not make the attempt, to piece the statement of coverage together.

4. The policy and purpose of the "owned automobile" exclusion is to preclude, where an insured purchases more extensive protection on one of his automobiles than on another, the use of the greater protection to cover loss which occurs while the insured is occupying or driving the automobile with the lesser protection. This is, in itself, generally reasonable. Likewise, the policy behind the "furnished for regular use" exclusion is understandable, if the exclusion is made clear to the buyer. The insurer can rightfully insist on being paid an additional premium for the additional risk when the use of a non-owned automobile is not occasional but regular. However, it is not conscionable to sell non-owned automobile coverage and then to exclude the risk incurred by the policyholder while driving a regularly furnished automobile already insured for another owner without offering or, perhaps, even selling coverage for the excluded risk. If the insurer wishes to treat the automobile furnished for the regular use of the insured as an owned automobile, then it is incumbent on the insurer to offer coverage on such non-owned automobiles as it offers coverage on owned automobiles.

5. If one of the Raskas purchased both insurance policies in question after both the "owned automobile" and "furnished for regular use" exclusions had been fully explained and understood and after an opportunity to purchase special insurance to cover such exclusions had been presented, any expectation of coverage in the excluded situations would be unreasonable. However, if the Raskas honestly and reasonably believed that they had particularly chosen and paid for complete portability of coverage and the insurer had failed to inform them of the exclusions and had likewise not offered them supplementary insurance, their reliance on coverage would not be unreasonable because of the expectations created by the obscurant

drafting. There is, however, no record from which to resolve the question, and therefore the case should be remanded for an evidentiary hearing on whether Mary Raska reasonably expected the endorsement of the family policy to protect her when driving another vehicle and whether she was offered or, if offered, whether she rejected, supplementary insurance for disability income coverage on vehicles owned by Raska Trucking Company.

OPINION OF THE COURT

1. INSURANCE — CONSTRUCTION OF POLICY — AMBIGUITY — PUBLIC POLICY.

Any clause in an insurance policy is valid as long as it is clear, unambiguous, and not in contravention of public policy.

2. INSURANCE — CONSTRUCTION OF POLICY — AMBIGUITY.

A contract of insurance is ambiguous and should be construed against its drafter if a fair reading of the entire contract leads to the understanding that there is coverage under particular circumstances and another fair reading of it is that there is no coverage under the same circumstances.

3. INSURANCE — CONSTRUCTION OF POLICY — AMBIGUITY.

A contract of insurance, however inartfully worded or clumsily arranged, which fairly admits of but one interpretation may not be said to be ambiguous.

4. INSURANCE — CONSTRUCTION OF POLICY — REASONABLE EXPECTATIONS.

The expectation that a contract of insurance will be enforceable other than according to its terms may not be said to be reasonable; to allow one person to bind another to an obligation not covered by the contract because the first person thought the other was bound to such an obligation is neither reasonable nor just.

5. AUTOMOBILES — INSURANCE — EXCLUSIONS — OWNED VEHICLE.

The "owned vehicle" exclusion clause in an endorsement providing disability income benefits in a family automobile liability policy which denies such coverage for injuries incurred by the named insured while occupying an automobile owned by or furnished for the regular use of the named insured or any relative is not ambiguous where a capitalized reference on the first side of the endorsement to provisions on the second side and a capitalized heading "Exclusions" on the second side of the endorsement leave no doubt that the use of a vehicle not

named in the policy which is either owned by the insured or furnished for his or her regular use is excluded from coverage.

DISSENTING OPINION BY WILLIAMS, J.

6. INSURANCE — EXCLUSIONS — CONSTRUCTION OF POLICY.

*The language of an insurance policy chosen by the insurer must be given the construction of which it is susceptible most favorable to the insured in case of ambiguity or contradictions; exceptions to the liability of the insurer are to be strictly construed against the insurer.*

7. INSURANCE — CONSTRUCTION OF POLICY — CONTRACTS OF ADHESION — REASONABLE EXPECTATIONS.

*When a standardized insurance contract is put before a consumer to take it or leave it, the doctrine of the adhesion contract has been applied, in view of the disparate bargaining status of the parties, to ascertain the meaning of the insurance contract which the insured would reasonably expect.*

8. AUTOMOBILES — INSURANCE — EXCLUSIONS — OWNED VEHICLE.

*The "owned vehicle" exclusion clause in an endorsement providing disability income benefits in a family automobile liability policy which denies such coverage for injuries incurred by the named insured while occupying an automobile owned by the named insured or any relative other than one defined as an owned vehicle in the policy on the second side of the endorsement, after providing apparently unlimited coverage on the first side, should be construed against the insurer as ambiguous.*

9. INSURANCE — EXCLUSIONS — CONSTRUCTION OF POLICY — REASONABLE EXPECTATIONS.

*Not only the provisions of an insurance policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he reasonably had a right to expect; to that end doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in the insured's favor.*

10. AUTOMOBILES — INSURANCE — EXCLUSIONS — OWNED VEHICLE — REASONABLE EXPECTATIONS.

*An endorsement providing disability income benefits in a family automobile liability policy which undertakes, by an unconditional statement of coverage on the face of the endorsement, to provide coverage for the insured who sustains bodily injury while occupying or through being struck by an automobile*

*would lead the insured logically to assume that it provides complete portability of the coverage for the named insured; such a reasonable expectation of coverage should not be defeated by the obscurant drafting of an "owned vehicle" exclusion clause on the second side of the endorsement.*

11. AUTOMOBILES — INSURANCE — EXCLUSIONS — REGULAR USE — REASONABLE EXPECTATIONS.

*The average consumer of insurance does not reasonably expect that an automobile owned by a family member or a vehicle owned by an unrelated person but furnished for his regular use would be considered by the insurer not to be a non-owned automobile, but the equivalent of an automobile owned by the insured for which he should obtain insurance, especially when he has purchased optional coverage for injuries caused by non-owned vehicles; such an exclusion from the expected coverage of the endorsement providing disability income benefits in a family automobile liability policy, without explaining or offering the additional coverage the insured should purchase for protection in the excluded situation, is to set a trap for the policyholder.*

12. AUTOMOBILES — INSURANCE — EXCLUSIONS — OWNED VEHICLE — UNCONSCIONABILITY.

*An insurer can rightfully insist on being paid for the additional risk when the use of a non-owned automobile by the insured is not occasional but regular, but it is unconscionable for the insurer to sell coverage for non-owned automobiles in the endorsement providing disability income benefits in a family automobile liability policy and then to exclude from coverage a vehicle "furnished for the regular use" of the insured without explanation or without offering the excepted coverage.*

*Jack C. Chilingirian* for plaintiffs.

*Glime, Daoust, Wilds, Rusing & Widlak* (by *James R. Daoust* and *Denis R. LeDuc)* for defendant.

KAVANAGH, J. *(for affirmance).* This case involves the validity of an exclusionary clause in a pre-no-fault automobile insurance policy.

Any clause in an insurance policy is valid as

long as it is clear, unambiguous and not in contravention of public policy.

Although plaintiffs here assert that this "owned automobile" exclusion clause violates public policy, they cite us no public policy touching the area. Their argument is concentrated on the "obscurity" of the drafting on account of the placement of the clause in the policy, and the technicality of language used—both of which touch not on public policy but rather on the clarity or ambiguity of the words.

The only pertinent question, therefore, is whether the exclusionary clause in this contract is ambiguous, for if it is not ambiguous we are constrained to enforce it.

A contract is said to be ambiguous when its words may reasonably be understood in different ways.

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.

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. If a person signs a contract without reading all of it or without understanding it, under some circumstances that person can avoid its obligations on the theory that

there was no contract at all for there was no meeting of the minds.

But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just.

The capitalized reference at the bottom of the first page and the capitalized heading "Exclusions" on the second page of the endorsement involved here persuade me that a fair reading of the entire policy should leave no doubt that use of a vehicle not named in the policy which is either owned by the insured or furnished for his or her regular use is excluded from coverage.

I would affirm.

COLEMAN, C.J., and FITZGERALD and RYAN, JJ., concurred with KAVANAGH, J.

WILLIAMS, J. *(dissenting).* Defendant insurance company almost simultaneously (within 11 days) sold a family automobile insurance policy for the Raska family and a business automobile insurance policy for the unincorporated Raska Trucking Company. The family policy included a special endorsement for disability income. The business policy did not. Mrs. Raska was injured in an accident while driving a Raska Trucking Company vehicle. She unsuccessfully sought recovery for disability income. The insurance company defended on the basis of an "owned automobile exclusion" in the family policy. The trial court granted the insurance company a summary judgment and the Court of Appeals affirmed.

There are two issues in this case. The first is whether the "owned automobile exclusion" is valid, construing it within the four corners of the

family policy. The special disability income endorsement has a Dr. Jekyll/Mr. Hyde character. The front page grants complete and unlimited coverage for injuries occurring "while occupying or through being struck by an automobile", *i.e.,* any automobile. However, the back page excludes coverage "while occupying an automobile owned by or furnished for the regular use of either the named insured or any relative" except a car listed in the policy. In short, what the front page gives, the back page purports to take away. Validity or invalidity will be considered first under the traditional rule that an insurance contract, as a contract of adhesion, is construed in favor of the insured; and, second, under the rule of reasonable expectations. Under both rules we find the owned-automobile exclusion invalid as to the Raskas unless it can be shown that the effect of the qualifying clauses was understood by them.

The second issue is the impact in this case of the principle that the owned-automobile exclusion has the legitimate function of protecting an insurer from a policy purchaser taking adequate insurance on a low-risk owned vehicle and inadequate insurance on a high-risk owned vehicle and trying to collect from the adequate coverage on the inadequately insured owned vehicle. For example, if a person owns a conservative four-cylinder soundly built sedan and a racy eight-cylinder sports car and insures the sedan for twice as much as the sports car, he should not expect to use the sedan insurance to collect on the sports car. If Mrs. Raska, who was injured, had herself purchased both the family automobile insurance policy and the business insurance policy with full knowledge that the special disability income endorsement did not apply to the vehicles owned by the Raska

Trucking Company and she had been offered supplementary coverage so that she could have had such coverage, then Mrs. Raska would probably not be entitled to disability income benefits. However, if Mrs. Raska had purchased the family automobile insurance policy with the special disability income insurance policy seemingly providing complete portability, and her husband had purchased the business automobile insurance policy without being informed by the insurer that the special disability income endorsement would not protect him or Mrs. Raska if either were injured in a Raska Trucking Company vehicle and without being offered a policy to provide such coverage, then in that case Mrs. Raska probably should be covered, particularly because of the obscurant drafting of the family automobile insurance policy. The problem with this case is that it comes to this Court on summary judgment with sparse pleadings, which illuminate not at all the circumstances surrounding the purchase of the two automobile insurance policies.

So it is impossible on the present record for this Court to know the favorable and unfavorable factors in the conduct of the respective parties. We are left with the obscurant drafting of the disability income endorsement and no information as to whether the Raska family with a purchase of a business automobile insurance policy from the same insurance company within 11 days should or should not have reasonably realized or been informed that their disability income endorsement in the family policy was not meant to cover them in Raska Trucking Company vehicles. As a consequence, the order granting summary judgment to the defendants is vacated and the matter is remanded to the trial court for further proceedings

not inconsistent with this opinion. The judgments of the trial court and Court of Appeals are reversed.

## I. FACTS

Defendant Farm Bureau Mutual Insurance Company of Michigan issued plaintiffs Mary and Robert Raska a family automobile policy on February 5, 1973 for their three family cars. The policy included a special endorsement for disability income and medical benefits. On February 16, 1973, Farm Bureau issued a combination (business) automobile policy to Robert Raska, doing business as Robert Raska Trucking. As relevant, the business policy provided some medical coverage but no disability-income or wage-loss benefits.

Plaintiffs allege but did not plead that "the defendant-appellee never informed plaintiffs-appellants that they would need duplicate coverage on the commercial vehicles for the special endorsements that appeared on the family policy". In other words, plaintiffs say that defendant at the time of purchase of the combination policy did not tell them that the "owned vehicle" exclusion clause in the family policy's endorsement would deny plaintiffs disability-income or wage-loss benefit coverage while they drove vehicles used in plaintiff Robert Raska's trucking business. Further, it is not of record whether the insurer offered disability-income coverage to override the "owned auto" exception.

On March 24, 1973, plaintiff Mary Raska was injured in a collision with another vehicle while driving a Robert Raska Trucking dump truck.

Plaintiffs Raska sought compensation from defendant Farm Bureau for all medical bills, disabil-

ity income, and lost wages resulting from the injuries sustained by Mary Raska in a suit alleging breach of contract and requesting relief by way of declaratory judgment. Plaintiffs alleged that both the combination policy and the family policy protected Mary Raska. The family policy provided:

"PERSONS INSURED.

"Division 1. To or for the named insured and each relative who sustains bodily injury or death caused by accident, while occupying or through being struck by an automobile."

In response Farm Bureau moved for summary judgment or, in the alternative, for declaratory judgment to determine its liability, if any, under the policies. Farm Bureau contended, basically, that plaintiffs had failed to present it with proof of medical expenses over and above those paid or payable by Blue Cross, as required by the terms of the combination policy. Farm Bureau further, and for this case significantly, contended that the family automobile policy, by its terms, did not apply to an accident involving a truck owned by Mary Raska's husband's business.

This latter contention was based on the following provisions in the family policy:

"EXCLUSIONS. This policy does not apply under Coverage C [medical payments and disability income] to Bodily Injury:

* * *

"(b) sustained by the named insured or a relative (1) while occupying an automobile owned by or furnished for the regular use of either the named insured or any relative, other than an automobile defined herein as an 'owned automobile.' "

"Owned automobile" was defined under a section entitled "Definitions" as follows:

"(a) a private passenger, farm or utility automobile *described in this policy* for which a specific premium charge indicates that coverage is afforded,

"(b) a trailer owned by the named insured,

"(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided (1) it replaces an owned automobile as defined in (a) above, or the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and (2) the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

"(d) a temporary substitute automobile" (emphasis supplied).

The trial court denied Farm Bureau's motion for summary judgment respecting the controversy relating to the payment of medical expenses under the business policy since a factual question existed as to the amount of Blue Cross payments. However, as respects the subject matter of the appeal to this Court, the trial court granted Farm Bureau's motion for summary judgment under the family policy by giving effect to the "owned vehicle" exclusion clause found in that policy, thus finding plaintiffs not entitled to lost wages and disability income. The trial court, by construing together the "Persons Insured", the "Exclusions" and the "Definitions" sections, decided that the dump truck involved in the accident was not an "automobile defined herein as an *owned automobile*" in the family policy and that the dump truck was owned by a named insured under the policy, *i.e.,* Robert Raska, since doing business as Robert

Raska Trucking did not serve to create a separate entity apart from the sole proprietor. The trial court opined that the provisions of both policies must be complied with and that the purchase of two policies by the same party did not, by itself, insure coverage for any injury suffered by the insured or a relative.

The Court of Appeals affirmed in an unpublished per curiam opinion, holding that the trial court properly awarded Farm Bureau summary judgment on the basis of the "owned vehicle" exclusion in the family policy. Because it found an absence of ambiguities or unconscionable results, the Court of Appeals felt compelled to enforce the insurance contract as written. However, Judge KAUFMAN, writing separately, found the drafting style of the insurance policies seriously wanting.

Although we consolidated this case with that of *State Farm Mutual Automobile Ins Co v Ruuska, ante,* p 321, since both cases involved the automobile insurance industry's use of substantively similar "owned vehicle" exclusions, the two cases are not otherwise similar. The statutory milieus and the types of coverage at issue in the two cases are extremely different and thus what is said as to one case, especially with respect to public-policy considerations, may have little applicability to the other. Whereas *Ruuska* concerned statutorily required liability insurance coverage respecting an accident that occurred after the enactment of no-fault automobile legislation, 1972 PA 294; MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.,* and had to be decided under its provisions, the present case involves an automobile accident which occurred prior to the effective date of the no-fault legislation, requiring it to be resolved in accordance with then-applicable statutory provisions.

## II. REVIEW OF INSURANCE POLICY LANGUAGE

This Court is made up of human beings who are aware that very few insureds will try to read the detailed, cross-referenced, standardized, mass-produced insurance form, nor necessarily understand it if they do. Courts generally have gradually moved away from the traditional rule of *caveat emptor,* realizing that the modern insurance contract is not made between parties of equal bargaining strength with each side taking a part in choosing the language of the agreement and understanding what the contract means.

Thus the approach we must take in examining insurance contracts such as the one in issue was accurately described by the New Jersey Supreme Court as follows:

> "An insurance policy, though in form a contract, is a product prepared and packaged by the insurer. The buyer scarcely understands the detailed content of what he is buying. When a court construes a policy, it cannot be indifferent to that reality." *DiOrio v New Jersey Manufacturers Ins Co,* 63 NJ 597, 602; 311 A2d 378, 381 (1973).

As a consequence Michigan and other courts in this country have generally recognized two important rules in construing insurance contracts. The first rule is the common traditional black-letter law that a contract will be construed against the drafter in case of ambiguity or contradictions. Our Court spoke to this in an insurance contract as follows:

> "It is a principle of law too well established in this jurisdiction and others to need discussion or citation of authorities, that a policy of insurance couched in language chosen by the insurer must be given the *con-*

*struction of which it is susceptible most favorable to the insured;* that technical constructions of policies of insurance are not favored; and that exceptions in an insurance policy to the general liability provided for are to be strictly construed against the insurer. *Pawlicki v Hollenbeck,* 250 Mich 38 [229 NW 626 (1930)]." (Emphasis added.) *Pietrantonio v Travelers Ins Co of Hartford,* 282 Mich 111, 116; 275 NW 786 (1937).

The second rule is the outcome of long application of the first rule by the courts and is often referred to as the rule of reasonable expectations. This Court spoke to that rule in *Zurich Ins Co v Rombough,* 384 Mich 228, 232-233; 180 NW2d 775 (1970), as follows:

"Justice Tobriner, writing for the California Supreme Court in the case of *Gray v Zurich Ins Co,* 65 Cal 2d 263, 269-270; 54 Cal Rptr 104; 419 P2d 168 (1966), construing similar provisions said:

" '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 obligation must be so stated as clearly to apprise the insured of its effect.*

" 'These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract. As this court has held, a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a "take it or leave it basis" carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties.

" '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 that meaning of the contract which the insured would reasonably expect.'* " (Emphasis added.)

## III. THE RULE OF CONSTRUCTION "MOST FAVORABLE TO THE INSURED"

Does the insurance contract in this case contain such doubt, contradiction or ambiguity that it must be construed in favor of the insured?

The medical payments and disability income coverage endorsement here at issue is printed on two sides of one sheet of paper. On the front side, after describing what benefit payments are available under two capitalized headings, "Hospital and Medical Expense Benefit" and "Disability Benefit", there follows a similar capitalized heading "Persons Insured". Here the reader is advised as follows:

"PERSONS INSURED.

"Division 1. To or for the named insured and each relative who sustains bodily injury or death caused by accident, while occupying or through being struck by an automobile."

If the policy purchaser happened upon this language, he or she would logically assume that his or her insurance covered *any* "accident, while occupying or through being struck by an automobile".

The insurer has here published the flat, outright, unconditional announcement that every named insured is covered by the endorsement in any automobile accident. This language indicates that the insured is covered driving the cars with respect to which the insurance was specifically

purchased *and every other car as well.* In short, the policy provides complete portability. As plaintiffs remark in their brief,

> "A liberal reading and construction of the family policy would extend such coverage to any person covered by either policy."

Plaintiffs further argue in their brief, but do not include in their complaint,

> "The defendant-appellee at no time made it known that the exceptions embedded in the language of the contract would allow them to escape liability."

It would not be unreasonable then to say that the "Persons Insured" language raises high expectations and, perhaps as it turns out, a false sense of security.

The third heading below the "Persons Insured" heading is entitled "Definitions". The definition of "owned automobile" is fully set forth in Part I. For our present analysis all that is necessary to understand is that an "owned automobile" is one that is "described in this policy" and for which premiums have been paid to afford coverage. At this point it does not appear that the "owned automobile" definition has any particular significance. It has significance only in connection with exclusions on the reverse side of the page.

One must turn the page at the end of the definition section. It is fair to say that the reader is warned of further provisions by the capitalized note at the bottom of the page stating "THE PROVISIONS ON THE BACK OF THIS FORM ARE HEREBY REFERRED TO AND MADE A PART THEREOF *[sic]*". When one turns the page the heading "Exclusions" is first found.

The policy purchaser who reads under "Persons Insured" of unlimited coverage might have been better informed if the presence of "Exclusions" could have been learned in the same glance.

Under "Exclusions" is the exception to the coverage here in issue: "This policy does not apply under Coverage C [medical payments and disability income] to Bodily Injury: * * * (b) sustained by the named insured or a relative (1) while occupying an automobile owned by or furnished for the regular use of either the named insured or any relative". After this comes the exception to the exclusion: "other than an automobile defined herein as an 'owned automobile' ", which the previous "Definition" section advised us was the specifically insured automobile. In sum, we are supposed to be able to piece together the absolutely contradictory language in different paragraphs on different pages so as to understand that coverage is available "[t]o or for the named insured and each relative who sustains bodily injury or death caused by accident, while occupying or through being struck by an automobile" except (turn the page) where the automobile occupied is "an automobile owned by or furnished for the regular use of either the named insured or any relative" (turn back the page) unless such automobile is one insured under the policy.

This is a jigsaw-puzzle statement of coverage. First, one has to realize that until one has all the pieces together any statement may be qualified or altered by another statement. Second, one has to recognize and find these other pertinent pieces. Third, one has to put them together in proper order. When one gets it all together, one has a more or less coherent statement which negates and contradicts the absolute coverage previously

announced. But again, until one gets it all together, one cannot be sure of what coverage exists —and there is no guarantee that one will know when one has it all together.

To recapitulate, coverage 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. It is this process which causes the plaintiffs to argue that they were unaware of any limitations and that the insurance company mentioned none.

At this point it is instructive to quote from *DeLand v Fidelity Health & Accident Mutual Ins Co,* 325 Mich 9, 19; 37 NW2d 693 (1949), as follows:

> "Cases, too numerous to permit detailed review herein, from other jurisdictions are relied upon by appellant wherein a somewhat stricter construction is placed upon insurance contracts by holding that such contracts must be construed as a whole and each provision therein rendered effective; but in this jurisdiction a more liberal rule of construction has been adopted, as noted in the *Pietrantonio Case [Pietrantonio v Travelers Ins Co of Hartford,* 282 Mich 111; 275 NW 786 (1937)]."

*DeLand* concerned an insurance policy which prominently indicated it was noncancellable but also contained a more obscure sentence found in the middle of the second of three paragraphs under the heading of "Additional Provisions", which provided that "[t]he acceptance of any renewal premium shall be optional with the com-

pany". This Court affirmed the trial court's decree against the insurance company preventing it from terminating the policy on the basis of the option.

The principle in *DeLand* is of direct importance in construing this case. There a prominent notice of noncancellation was purportedly countermandable by a contradictory clause making acceptance of a renewal premium optional. *DeLand* held the later clauses would not justify termination of the contract. The principle, of course, is that one cannot subsequently steal away what one has previously so convincingly given.

While it is arguable that the "owned automobile exclusion" in the instant case is less obscure than the clause of retroaction in *DeLand,* if it is, it is not so in a degree sufficient to ignore the principle stated in *DeLand. DeLand* speaks straightforwardly to the principle that obscurant drafting is construed against the drafting insurer. This is a rule we follow here today and we find the "owned automobile exclusion" a piece of obscurant unsupportable drafting.

The case of *Wadsworth v New York Life Ins Co,* 349 Mich 240, 257; 84 NW2d 513 (1957), like *DeLand,* deals with an insurance contract that in one breath says one thing but in another says something else. In *Wadsworth,* unlike the instant case, the language is juxtaposed. Here is the *Wadsworth* language:

" '18 Write policy to take effect
" '(a) as of last date of parts 1 and 2 of this application ..... (x)
" '(b) as of date policy is written ..... ( )
" '(c) as of ..... 19.....
" 'It is mutually agreed that:
" '1. If the applicant shall have paid the soliciting agent in cash, as indicated in item 25 above, an amount

which equals the full first premium for the policy applied for, and if the company shall receive evidence satisfactory to it that at the time of completion of this application the proposed insured (and the applicant for the child's protection benefit, if any) was an acceptable risk for said policy at the company's published premium rate therefor, the policy as applied for shall be deemed to be in effect as from the date specified in item 18 above as if it had been delivered.' "

In other words, from the top lines it would clearly appear that the effective date of the policy was "as of [the] last date of parts 1 and 2 of this application", whereas the agreement below contradicts the first statement and would set the date as of some other time. This Court refused to permit a policy to be nullified by the "agreement" provision.

A Philadelphia lawyer, after some study, might understand that the defendant insurance company in its obscurant drafting was avoiding liability if the insured was in an accident in a car owned by or furnished for the regular use of him or her other than a car specifically insured in the policy. It is quite another matter whether an ordinary person in Hickory Corners or Detroit should reasonably be expected to understand this convoluted contradictory language and structure.

We hold that the "owned automobile exclusion" in this case is invalid unless it is shown that the Raskas were personally advised of the exclusion.

## IV. THE RULE OF REASONABLE EXPECTATIONS

The traditional rule that ambiguities will be construed against their drafter has done yeoman's service for insureds seeking relief from provisions of their insurance policies. However, as the Iowa Supreme Court has observed when considering the ability of traditional rules of construction to effec-

tively and justly resolve problems arising under insurance policies,

> "The mass-produced boiler-plate 'contracts' necessitated and spawned by the explosive growth of complex business transactions in a burgeoning population left courts frequently frustrated in attempting to arrive at just results by applying many of the traditional contract-construing strategems." *C & J Fertilizer, Inc v Allied Mutual Ins Co,* 227 NW2d 169, 175 (Iowa, 1975).

Thus instead of straining such traditional rules to the breaking point, courts gradually started to speak more openly and forthrightly in terms of the "reasonable expectations" of an insured in purchasing certain insurance.[1] See, *e.g., Kievit v Loyal Protective Life Ins Co,* 34 NJ 475, 482-483; 170 A2d 22, 26 (1961); *Gray v Zurich Ins Co,* 65 Cal 2d 263, 273-275; 54 Cal Rptr 104; 419 P2d 168, 174-175 (1966); *Zurich Ins Co v Rombough,* 384 Mich 228, 232-233; 180 NW2d 775 (1970). However, the judicial willingness to construe an insurance contract in terms of "reasonable expectations" did not mean that the courts stopped considering the problem of ambiguities in insurance policy provisions. Indeed, the presence or absence of ambiguities continued to serve as an aid or crutch in the determination of an insured's "reasonable expectations".[2] As one court early stated,

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[1] As Professor Keeton notes, courts had often either strained the outer limits of the theory of resolving ambiguities against the insurer, pressed beyond such a rationale, or even invented ambiguity where none existed, all to reach a result which, "if * * * supportable at all, generally it is because the principle of honoring policyholders' reasonable expectation applies". Keeton, Basic Text on Insurance Law, § 6.3(a), pp 353-356.

[2] By this discussion we do not wish to imply that a finding of ambiguity in relevant policy provisions is required as a condition precedent for a determination of "reasonable expectations". *Stordahl v Government Employees Ins Co,* 564 P2d 63, 66 (Alas, 1977).

"Not only the provisions of the policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he *reasonably had a right to expect, and to that end* doubts, ambiguities, and uncertainties arising out of the language used in the policy must be resolved in his favor." *Coast Mutual Building-Loan Ass'n v Security Title Ins & Guarantee Co,* 14 Cal App 2d 225, 229; 57 P2d 1392, 1393 (1936) (emphasis supplied). See also *Allen v Metropolitan Life Ins Co,* 44 NJ 294, 305-306; 208 A2d 638, 644 (1965); *Gray, supra,* 273-275; *INA Life Ins Co v Brundin,* 533 P2d 236, 241 (Alas, 1975).

Plaintiff insureds argue they reasonably expected their family policy to cover them while driving the vehicles of Robert Raska Trucking. As we read plaintiffs' brief, these "reasonable expectations" are based on the broad sweep of the language in the family policy providing the sought-for coverage, and the concomitant lack of any warning in the policy or by the insurance company that such expansive language was subject to the exclusionary clause in issue. In essence then, plaintiffs contend that the undertaking of defendant insurer to insure "the name insured * * * who sustains bodily injury * * *, while occupying or through being struck by an automobile" is so unrestricted that without further clarification it would lead the insureds reasonably to expect coverage in just about all vehicular accidents, and certainly the present one.

Most people would agree that the average insurance consumer purchasing a policy providing non-owned automobile protection enters into that agreement with the reasonable expectation that he will be protected whenever he drives a non-owned automobile. The unconditional statement of coverage on the face of the instant endorsement would lead the insured logically to assume that the in-

stant policy "provides complete portability". Such a reasonable expectation should not be defeated by the obscurant drafting of the policy.

The average consumer does not expect that an automobile owned by a family member or owned by an unrelated person but "furnished for [his] regular use" will be considered by the insurer not to be a "non-owned" automobile but, rather, to be the equivalent of an automobile owned by the insured, for which he should obtain insurance. Even if the automobile is owned by a relative or furnished for the insured's regular use, it is still an automobile which belongs to someone else. The average consumer does not expect to have to buy insurance on someone else's automobile, especially when he has purchased non-owned vehicle coverage.

To make such an exclusion from the expected coverage, without explaining or offering the additional coverage the insured should purchase to protect himself or herself in the excluded situation, is to set a trap for the policyholder. The average insurance consumer, who does not have the skill to piece this jigsaw-puzzle statement of coverage together or who, like most of us, has been intimidated by the language, detail and organization of insurance policies into not even making the attempt, cannot reasonably be expected to anticipate this exclusion.

In balancing the expectations of the Raskas, particularly in light of the all-inclusive language of the coverage, with the obscurant language of the "owned automobile exclusion", we do not find their expectations at all unreasonable and we hold that they could properly expect coverage.

## V. IMPACT OF SALE OF FAMILY AND BUSINESS INSURANCE POLICIES TO RASKAS

The second issue requires this Court's determination whether the general policy behind the "owned automobile exclusion" or "furnished for regular use", despite the obscurant drafting in this case, should prevail over the apparent, absolute coverage and portability granted by the particularly purchased special endorsement for disability income, or vice versa.

The policy and purpose of the "owned automobile exclusion" is to preclude, where an insured purchases more extensive insurance protection on one of his automobiles than on another, the use of the greater protection to cover loss which occurs while the insured is occupying or driving the automobile with the lesser protection. The insurer rightly requires the insured to purchase coextensive coverage on his two (or more) automobiles if he desires coextensive protection in respect to his two (or more) automobiles.

Such a requirement and policy by the insurer is, in itself, generally reasonable. The average consumer should understand that to obtain protection in respect to all the automobiles he owns he must purchase coverage on all the automobiles he owns. Likewise, if he expects to enjoy the same kind of coverage, he should understand he must buy the same kind of coverage.

The cogency of this policy is readily apparent and insurance companies deserve protection against unfairly being taken advantage of by those who consciously seek more compensation than they are due or have paid for.

Likewise the policy behind the "furnished for regular use" exclusion is understandable, if the exclusion is made clear to the buyer. The insurer's

risk is indeed greater when the use of a non-owned automobile is not occasional but regular. The insurer can rightfully insist on being paid for the additional risk. If it were to ask for additional payment, for example, based on the number of miles automobiles owned by others are driven a year, and payment were refused, the exclusion of the additional risk would be entirely conscionable. What is not conscionable is to sell non-owned automobile coverage and then to exclude the risk incurred by the policyholder while driving a regularly furnished automobile already insured for another owner without offering or, perhaps, even selling coverage for the excluded risk.

The circumstances here relate only to the amount of the additional premium that is appropriate if the insured is regularly driving another automobile. It is not consonant with the conscionable treatment of the policyholder for the insurer to fail to explain the exclusion from the coverage the insured thinks he is buying, *or to fail to offer the excepted coverage* for sale. If the insurer wishes to treat the non-owned but "furnished for regular use" automobile as an owned automobile, then it is incumbent on the insurer to offer coverage on such non-owned automobiles as it offers coverage on owned automobiles. It may not properly avoid all responsibility by simply writing a nondisclosed exclusion from the expected coverage.

The second issue in this case is whether the Raskas consciously violated the policies behind the "owned automobile exclusion" and "furnished for regular use" exclusion or whether the insurance company unfairly caused either or both of them to believe they had absolute coverage for driving other automobiles including the Raska Trucking Company vehicles, despite the latent presence of

an "owned automobile exclusion", of which they might have been unaware or which they might not have understood.

Certainly, if either Robert Raska or Mary Raska purchased both the family and business automobile insurance policies in question after both the "owned automobile" and "furnished for regular use" exclusions had been fully explained and understood and after an opportunity to purchase special insurance to cover such exclusions had been presented, any expectation of protection on an "owned automobile" or in an automobile "furnished for regular use" would be an unreasonable expectation. However, if the Raskas honestly and reasonably believed that they had particularly chosen and paid for complete portability and the insurer had failed to inform them of the exclusions and had likewise failed to offer them supplementary insurance to fill the gap, their reliance on coverage would not be unreasonable because of the expectations created by the obscurant drafting.

However, the present state of the record is such that it is impossible to know what the actual facts were. For example, we don't know whether either or both of the Raskas knew of and understood either or both of the exclusions. We don't know whether the insurer or his agent attempted to point out and explain either or both of the exclusions. We don't know whether the insurer then had available optional coverage to protect against the exclusions, nor do we know whether the insurer or his agent offered such coverage to either or both Mary and Robert Raska. We don't know whether the truck in question was in fact furnished for Mary Raska's regular use, assuming that driving such a vehicle came within the intendment of the statute. In short, the record be-

fore us is inadequate for a summary judgment decision.

The case must therefore be remanded for an evidentiary hearing to give the insurance company and Mary Raska an opportunity to show whether or not she reasonably expected the specially purchased disability income endorsement to protect her not only when driving a family vehicle but any other vehicle by whomsoever owned or whether or not furnished for regular use and whether or not she was ever offered or, if offered, whether she or anyone who properly could be said to be acting for her, rejected supplementary disability income insurance covering Raska Trucking Company vehicles.

The order of summary judgment for defendant is vacated and the matter is remanded as above indicated.

LEVIN and BLAIR MOODY, JR., JJ., concurred with WILLIAMS, J.

ATTORNEY GENERAL v MICHIGAN PUBLIC SERVICE COMMISSION

Docket Nos. 67938, 67944, and 67945. Argued October 15, 1981 (Calendar Nos. 23, 24, and 25).—Decided January 27, 1982.

Docket Nos. 67944, 67945. The Detroit Edison Company sought the approval of the Michigan Public Service Commission for the issuance of $625 million in securities, part of which would finance the continued construction of the Enrico Fermi 2 nuclear-powered generating plant and the Belle River coal-fired generating plants, and part of which would retire maturing short-term and long-term debt. A year later, Edison sought approval of the issuance of an additional $1.996 billion in securities, primarily to finance continued construction of the power plants and to retire existing short-term and long-term debt.

Docket No. 67938. Consumers Power Company sought the approval of the Michigan Public Service Commission for the issuance of $564 million in securities, primarily to finance the continued construction of the Midland nuclear-powered generating plant and to retire maturing short-term and long-term debt.

In all three cases, the Attorney General and the Michigan Citizens Lobby intervened at the commission's hearings on the applications for approval. They argued in each case that the power plants under construction were unnecessary and unreasonably costly, and that the commission should not approve issuance of the securities insofar as the proceeds would be used to finance their construction. In each case the commission declined to consider evidence relating to the need for the power plants, and authorized issuance of the securities. While appeals by the intervenors were pending in the Court of Appeals, the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4-8, 10-13] 64 Am Jur 2d, Public Securities and Obligations §§ 107, 181.

64 Am Jur 2d, Public Utilities §§ 225, 264.

[3] 64 Am Jur 2d, Public Securities and Obligations § 96.

[9] 2 Am Jur 2d, Administrative Law §§ 233, 241, 243.

[11-13] 64 Am Jur 2d, Public Utilities § 240 *et seq.*

Supreme Court granted leave to appeal prior to decision by the Court of Appeals and ordered the three cases consolidated for argument.

In an opinion by Justice Levin, joined by Chief Justice Coleman and Justices Kavanagh, Fitzgerald, and Ryan, the Supreme Court *held:*

In a proceeding under the utility securities act as written, the inquiry is limited to whether there is a need to issue securities to obtain funds for a lawful purpose of the utility and does not extend to whether, to accomplish that purpose, there is a need for the project to which the funds will be devoted. The inquiry is the need for the funds, not the need for the project. It may be wise, in this era of multi-billion-dollar power plants, for the commission to pass upon the necessity for any such plant before construction begins, but the policy question whether approval by the commission should be required before construction begins is properly for the Legislature, and not for the Court, to decide.

1. The statute requires that in the opinion of the commission the use of the capital to be raised by the issuance of securities is reasonably required for the purposes of the utility. The intervenors argue that this means that the commission must find that the underlying projects are reasonably required, not only whether the funds are reasonably required for the projects. But two other uses of the word "purposes" in the statute show that it means "the acquisition of property, the construction, completion, extension or improvement of facilities or * * * the improvement or maintenance of service or * * * the discharge or lawful refunding of obligations". No one has argued that construction of additional generating capacity is not a lawful utility purpose. It is a separate question whether the utility needs the additional generating capacity, as it is whether the additional capacity should be fossil- or nuclear-fueled or whether the proposed plant is cost-efficient or reasonable.

2. The act does not give the commission discretion to inquire into immaterial subjects in determining whether it should grant the authority to issue the securities. The Michigan cases cited by the intervenors show that a securities issue proceeding is limited to a review of the financial decisions of the utility, and does not go into the reasonableness of the underlying projects. The utilities statutes of other jurisdictions offer little guidance in construing the Michigan act; some are too dissimilar, and others contain language given diverse interpretations.

3. The intervenor's assumption that the utility securities act

provides the only means of inquiry into the reasonableness of plants during construction is inaccurate. Ongoing construction is evaluated during rate hearings under the electricity transmission act approximately yearly, and, in addition, the utility can request that construction work in progress be included in the rate base. Moreover the commission, in the exercise of its supervisory powers, may conduct pre-construction review without regard to whether the utility seeks to have the plant's costs included in the rate base.

4. The Court cannot confidently predict that the Legislature would today conclude that the reasonableness of a utility construction project should be made the subject of a pre-construction hearing. The Legislature might conclude that the public interest is better served by the present system which requires a utility, its shareholders, and its bondholders to carry the risk involved in deciding to construct additional generating capacity. If they have made erroneous decisions and the cost of the addition is not included in the rate base, stockholders or bondholders or both would lose, but the ratepayers would be largely unaffected.

The orders of the commission authorizing the issuance of securities are affirmed in all three cases.

Justice Williams, joined by Justice Moody, writing separately, would hold that the intention of the Legislature was that there should be a complete feasibility examination both at the time of the original financing application and at the time of ratemaking, that is, when it is determined whether the plant should be included in the utility's rate base. At the time of a subsequent financing application a complete feasibility examination is not necessary and the more limited determination of the necessity of the financing is adequate. Their opinion is based both on the construction of the statute and on consideration of policy implications. The Legislature, by requiring property for which securities were to be issued to be reasonably required for the purposes of the utility, intended two things: 1) that the property be employed, in this use, "for the * * * completion of facilities", and 2) that the property be reasonably required for a utility purpose within the overall context of utility regulation, namely property that would adequately serve consumers at a reasonable rate and make a reasonable return for the utility. The latter determination will be achieved if the MPSC makes a complete feasibility examination at the time of the original application for financing and later evaluates the costs of the project when the utility requests inclusion in the rate base. It was not the legislative intent to allow a utility's

investors to invest billions of dollars in a facility that will be evaluated for viability at the time a company requests inclusion of the costs of the facility in its rate base, when failure to include the costs might bankrupt the utility and inclusion might compel the consumers to pay unreasonably swollen rates.

OPINION OF THE COURT

1. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — SCOPE OF INQUIRY.

In a proceeding under the utility securities act as written, the inquiry is limited to whether there is a need to issue securities to obtain funds for a lawful purpose of the utility and does not extend to whether, to accomplish that purpose, there is a need for the project to which the funds will be devoted (MCL 460.301 *et seq.;* MSA 22.101 *et seq.).*

2. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — SCOPE OF INQUIRY.

The utility securities act requires that in the opinion of the Michigan Public Service Commission the use of the capital to be raised by the issuance of securities is reasonably required for the purposes of the utility; however, the inquiry is the need for the funds, not the need for the project (MCL 460.301 *et seq.;* MSA 22.101 *et seq.).*

3. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — WORDS AND PHRASES — PURPOSES.

The uses of the word "purposes" in the utilities securities act show that it means "the acquisition of property, the construction, completion, extension or improvement of facilities or * * * the improvement or maintenance of service or * * * the discharge or lawful refunding of obligations" (MCL 460.301 *et seq.;* MSA 22.101 *et seq.).*

4. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — PURPOSES.

No one has argued that construction of additional generating capacity is not a lawful utility purpose under the utility securities act; but it is a separate question whether the utility needs the additional generating capacity, as it is whether the additional capacity should be fossil- or nuclear-fueled or whether the proposed plant is cost-efficient or reasonable (MCL 460.301 *et seq.;* MSA 22.101 *et seq.).*

5. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — SCOPE OF INQUIRY.

The utility securities act does not give the commission discretion to inquire into immaterial subjects in determining whether it should grant the authority to issue the securities (MCL 460.301 *et seq.;* MSA 22.101 *et seq.).*

6. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — SCOPE OF INQUIRY.

A securities issue proceeding, under the utility securities act, is limited to a review of the financial decisions of the utility, and does not go into the reasonableness of the underlying projects (MCL 460.301 *et seq.;* MSA 22.101 *et seq.).*

7. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — POWER PLANTS — STATUTES.

A rate hearing by the Michigan Public Service Commission under the transmission act or an investigation upon complaint under the general enabling act provides an adequate method for questioning the continued construction of a power plant without disturbing the ongoing construction; it is unnecessary and inappropriate to suspend the issuance of securities for the power plant under the utility securities act and to interrupt the construction while the necessity of the plants is fully and carefully considered (MCL 460.58, 460.301 *et seq.,* 460.552; MSA 22.8, 22.101 *et seq.,* 22.152).

8. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — POWER PLANTS — STATUTES.

The policy question whether approval by the Michigan Public Service Commission should be required before construction begins on a power plant is properly for the Legislature, and not for the Court, to decide.

9. ADMINISTRATIVE LAW — ATTORNEY AND CLIENT — APPEAL — STATUTES — CONSTRUCTION.

The view in an appellate brief of a lawyer representing a regulatory commission charged with the administration of an act should not be accepted by the Court as an authoritative construction by the agency.

10. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — UTILITY SECURITIES ACT — STATUTES.

The authoritative statement of the view of the Michigan Public Service Commission regarding the meaning of the utility secu-

rities act is to be found in its decisions and opinions (MCL 460.301 *et seq.*; MSA 22.101 *et seq.*).

SEPARATE OPINION BY WILLIAMS, J.

11. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — POWER PLANTS — RATEMAKING.

*The intention of the Legislature in the utility securities act was that there should be a complete feasibility examination of a power plant by the Michigan Public Service Commission both at the time of the original financing application and at the time of ratemaking, that is, when it is determined whether the plant should be included in the utility's rate base; at the time of a subsequent financing application a complete feasibility examination is not necessary and the more limited determination of the necessity of the financing is adequate (MCL 460.301 et seq.; MSA 22.101 et seq.).*

12. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — POWER PLANTS — RATEMAKING.

*The Legislature, by requiring property for which securities were to be issued by a public utility to be reasonably required for the purposes of the utility, intended two things: 1) that the property be employed, in this use, "for the * * * completion of facilities", and 2) that the property be reasonably required for a utility purpose within the overall context of utility regulation, namely property that would adequately serve consumers at a reasonable rate and make a reasonable return for the utility.*

13. PUBLIC UTILITIES — UTILITY SECURITIES ACT — PUBLIC SERVICE COMMISSION — POWER PLANTS — RATEMAKING.

*It was not the legislative intent to allow a utility's investors to invest billions of dollars in a facility that will be evaluated for viability at the time a company requests inclusion of the costs of the facility in its rate base, when failure to include the costs might bankrupt the utility and inclusion might compel the consumers to pay unreasonably swollen rates (MCL 460.301 et seq.; MSA 22.101 et seq.).*

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Hugh B. Anderson, Roderick S. Coy* and *Patrick J. Devlin,* Assistants Attorney General, and *Deborah K. Canja* for plaintiffs Attorney General and Michigan Citizens Lobby.

*Arthur E. D'Hondt* and *Leo H. Friedman,* Assistants Attorney General, for defendant Michigan Public Service Commission.

*Lawrence B. Lindemer, Allen B. Bass,* and *Paula H. Mills,* and *Loomis, Ewert, Ederer, Parsley, Davis & Gotting* (by *George W. Loomis, William D. Parsley* and *Michael G. Oliva)* for defendant Consumers Power Company.

*Foster, Swift, Collins & Coey, P.C.* (by *Theodore W. Swift, David W. McKeague* and *Charles E. Barbieri),* and *Leon S. Cohan* and *Thomas A. Hughes* for defendant The Detroit Edison Company.

Amici Curiae:

*Conner, Harbour & Dew* (by *Pat D. Conner)* and *Thomas Cresswett* for The Dow Chemical Company.

*Max Dean* for Fusion Energy Foundation.

*Donald J. Prebenda* and *Paul Jacobs* for Michigan State and Greater Detroit Building and Construction Trades Councils, AFL-CIO.

LEVIN, J. The question presented concerns the scope of inquiry by the Michigan Public Service Commission when a public utility requests authorization to issue securities. We are persuaded, upon examination of the language of this state's utility securities act,[1] Michigan cases construing the act, cases construing similar statutes in other jurisdictions, and Michigan's utility regulation scheme, that the scope of inquiry in a securities issue proceeding does not extend to the wisdom of the

[1] MCL 460.301 *et seq.;* MSA 22.101 *et seq.*

project which a utility seeks to fund through the issuance of long-term securities.

## I

Three cases have been consolidated in this appeal, each presenting the same issue.[2]

In No. 67944 *("Edison I"),* the utility, in July 1979, sought approval pursuant to the act for the issuance of $625 million in securities,[3] part of which would finance the continued construction of the Enrico Fermi 2 nuclear generating plant and the Belle River coal-fired generating plants and part of which would retire maturing short-term and long-term debt. At the commission hearing, the Attorney General and Michigan Citizens Lobby (MCL) intervened, contending that the plants were unnecessary and unreasonably costly. Specifically, the intervenors criticized the utility's 15-year forecast of energy needs, termed the utility's planned "reserve margins" (capacity in excess of anticipated peak demand) unjustifiably large, asserted that a nuclear generating plant is considerably more expensive than a coal-fired unit of similar capacity, and argued that continual cost

[2] A fourth case, presently before the Court of Appeals, involves the same issue. Two rural electric cooperatives own 20% of Fermi 2. In January 1980, the cooperatives sought permission to issue an additional $181 million of securities to finance their share of the cost overruns of Fermi 2. The commission authorized the securities and refused to inquire into the underlying project. *Re Wolverine Electric Cooperative, Inc,* case no U-5407 (Nov 25, 1980); *Re Northern Michigan Electric Cooperative, Inc,* case no U-5408 (Nov 25, 1980).

[3] The utility sought authorization to issue 7,500,000 shares of common stock, $90 million aggregate amount of preference stock or preferred stock or any combination thereof, $365,000,000 aggregate principal amount of general and refunding mortgage bonds, and $50 million aggregate principal amount of general and refunding mortgage bonds or an equivalent amount of promissory notes for early redemption of its series CC bonds due January 15, 1982. *Re Detroit Edison Co,* case no U-6217, pp 18-19 (Apr 1, 1980).

overruns indicated that Fermi 2, if completed, would prove far more expensive than the utility had originally calculated. On April 1, 1980, the commission authorized issuance of the securities. Declining to consider the evidence pertaining to ongoing plant construction presented to the hearing officer, the commission found construction of the plants a lawful purpose of the utility and found the issuance of securities reasonably required to provide funds for the construction of the plants.[4] On May 9, 1981, the Attorney General and MCL filed a delayed application for leave to appeal in the Court of Appeals, which was denied on June 11, 1980. On May 11, 1981, this Court remanded the cause to the Court of Appeals for consideration as on leave granted.[5]

In No. 67945 *("Edison II"),* the utility sought authorization in July 1980 to issue an additional $1.996 billion in securities,[6] primarily to finance continued construction of the power plants and to retire short-term and long-term debt already incurred. Again the Attorney General and MCL intervened, challenging the issuance of the securities insofar as the proceeds would be used in respect to the construction of the power plants, which the intervenors claimed was unreasonable.

[4] The commission found that a consideration of ongoing construction projects was "unnecessary and irrelevant" in a securities proceeding. *Id.,* p 17. The commission indicated, however, that in a future securities issue proceeding where the utility intends to finance a new plant, the need for the plant would be investigated. *Id.*

[5] 411 Mich 903 (1981).

[6] The securities were to include $60 million in bonds to collateralize pollution control bonds, $90 million aggregate value of preferred stock and preference stock, 9,750,000 shares of common stock, several installment sales contracts "to the extent they constitute evidences of indebtedness", $800 million of long-term promissory notes (as required by the Belle River Project Financing Credit and Term Loan Agreement), another $800 million in bonds to refund those Belle River notes, and $100 million in bonds to retire short-term and long-term debt. *Re Detroit Edison Co,* case no U-6557, pp 1-2 (July 7, 1981).

On July 7, 1981, the commission approved the issuance of the securities, and declared that "[e]vidence relating to electric load forecasting and generating plant alternatives is irrelevant and immaterial in carrying out the intent of 1909 PA 144 [the utility securities act]".[7] On August 6, 1981, the Court of Appeals stayed the commission's order approving issuance of the securities. This Court denied an emergency application for leave to appeal the stay.[8]

In No. 67938 *("Consumers Power"),* the utility sought permission in December 1979 to issue $564 million in securities,[9] primarily to finance the continued construction of the Midland nuclear generating plant and to retire maturing short-term and long-term debt. The Attorney General and MCL intervened in this proceeding as well, arguing that the Midland nuclear plant had far exceeded original cost projections and that continued construction was unjustified. The commission approved the issuance of the securities on August 4, 1981, and again declared that a securities issue proceeding was an inappropriate time to inquire into the utility's construction program.[10] On Sep-

[7] *Id.,* p 18. The commission said that the requirements of the utilities securities act had been met:

"The evidence presented by applicant in this proceeding established that: (1) the proceeds from the sale of securities for which authorization is herein sought are intended for specific lawful purposes as required by 1909 PA 144, as amended (MCL 460.301); (2) the proposed issues are essential to carry out such purposes; and (3) the use of such funds is reasonable and necessary to meet the requirements of applicant's construction program." *Id.,* p 24.

[8] 411 Mich 1028 (1981).

[9] The securities were to consist of $250 million of long-term debt, 1 million shares of preferred stock, 4 million shares of preference stock, and 8.5 million shares of common stock. *Re Consumers Power Co,* case no U-6360, pp 1-2 (Aug 4, 1981).

[10] *Id.,* pp 20-28. Partial final orders on May 19, 1980, and August 8, 1980, had approved $201 million of the originally requested securities so that the utility could retire maturing debt. The utility moved for a

tember 14, 1981, the Court of Appeals granted the intervenors' application for leave to appeal, but denied a request for a stay of the commission's order authorizing issuance of the securities.

On September 15, this Court, in *Consumers Power,* granted a stay of the commission's order and bypass of the Court of Appeals, granted bypass on its own initiative in *Edison I* and *II,* and ordered all three cases consolidated for argument.[11]

Following oral argument, this Court, on October 16, 1981, lifted the stays in *Edison II* and *Consumers Power.*[12]

## II

The Attorney General and MCL contend that the utility securities act requires the commission to determine that projects to be funded by the issuance of securities are reasonable. The commission and the utilities contend that the act grants the commission broad discretion in determining the scope of inquiry in a securities issue proceeding and does not mandate an inquiry into the reasonableness of a project.

We conclude that the utility securities act does not provide for an inquiry into the reasonableness of a project. Because such an inquiry is not material in a proceeding under the utility securities act, the commission has no discretion in such a

third partial final order on September 4, 1980, for the same purpose. The administrative law judge recommended denial, and the commission did not rule on the request before its August 4, 1981, final order.

Not yet a member of the commission when the order in *Edison I* was issued, Commissioner Anderson dissented in both *Edison II* and *Consumers Power.* She said that the commission had adopted an "unnecessarily narrow" interpretation of the utilities securities act.

[11] 411 Mich 1063-1065 (1981).

[12] 411 Mich 1064, 1065 (1981).

proceeding to inquire into the reasonableness of a project.

The Michigan cases cited by the Attorney General and MCL do not hold that the commission must investigate the wisdom of underlying projects; those cases indicate that the concern of the act is more limited. The cases from other jurisdictions cited by the Attorney General and MCL provide limited guidance.

We hold that, in a proceeding under the utility securities act, the inquiry is limited to whether there is need to issue securities to obtain funds for a lawful purpose of the utility and does not extend to whether, to accomplish that purpose, there is need for the project to which the funds will be devoted. The inquiry is whether funds are required to construct the project—the need for the funds, not the need for the project.

A

The utility securities act, as amended, is set forth in the margin.[13] Subsection (1) provides that

[13] "(1) A person, corporation, or association, * * * owning, conducting, managing, operating, or controlling a plant or equipment within this state used wholly or in part in the business of * * * producing or furnishing heat, artificial gas, light, water, or mechanical power to the public, * * * may issue stocks, bonds, notes, or other evidences of indebtedness payable at periods of more than 12 months after the date of issuance, if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations and may issue stock to represent accumulated earnings invested in capital assets and not previously capitalized, if the public service commission issues an order authorizing the issue and the amount of the issue, and states that in the opinion of the commission the use of the capital or property to be acquired to be secured by the issue of the stock, bonds, notes, or other evidences of indebtedness, is reasonably required for the purposes of the person, corporation, or association, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized. Approval of securities does not presume that the projects to be constructed or property to be acquired will be included in the company's rate base.

"(2) A person, corporation, or association desiring authority to issue stocks, bonds, notes, or other evidences of indebtedness shall make written application to the commission in the form as the commission requires. After receiving the application, the commission, for the purpose of determining whether the commission should grant the authority, may make an inquiry or investigation, hold hearings, and examine witnesses, books, papers, documents, or contracts the commission considers of importance in enabling it to reach a determination. An interested person, including municipalities and organizations whose membership consists of a substantial number of ratepayers within the service area of the utility, shall have the right to intervene as provided in the rules of the commission. If the applicant fails, neglects, or refuses to furnish the information required by the commission, or if the commission directs, an appraisal of the property of the applicant shall be made by a disinterested person to be appointed by the commission and whose compensation shall be fixed by the commission. The entire expense of making the appraisal shall be borne by the applicant. After the appraisal is made and filed with the commission and before any action is taken by the commission upon the application, the expenses of the appraisal as determined by the commission shall be paid by the applicant to the commission, which shall deposit the amount in the treasury of the state to be credited to the general fund, taking the receipt of the treasurer for the deposit and filing the receipt in the commission's office with the application. If the applicant refuses or neglects to pay the expense of the appraisal, the commission shall dismiss the application and the commission may bring an action against the applicant in a court of competent jurisdiction in this state for the recovery of the expense of the appraisal. The expense of the appraisal shall be paid by the state treasurer to the person certified by the commission to be entitled to the appraisal fee.

"(3) If from the application filed and other information obtained from the investigation authorized in this act the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized, the commission shall grant authority to make the issue. In granting the authority, the commission may impose as a condition of the grant reasonable terms and conditions that the commission considers proper.

"(4) A person, corporation, or association may issue notes for lawful purposes, payable at periods of not more than 24 months, without authority from the commission; but the notes shall not in whole or in part, be refunded by an issue of stock or bonds or by an evidence of indebtedness running for more than 12 months without the consent of the commission.

* * *

"(7) Stocks, bonds, notes, or other evidences of indebtedness issued pursuant to an order of the commission shall be binding in accor-

a utility may issue long-term securities only if authorized by the commission. An order authorizing the issuance of securities must state that "in the opinion of the commission the use of the capital * * * to be secured by the issue of the [securities] is *reasonably required for the purposes* of the [utility]". (Emphasis supplied.) The Attorney General and MCL argue that this language requires the commission to determine that underlying projects are reasonably required, and not only, as the utilities contend and the commission found, whether the funds are reasonably required to construct the projects.

Subsection (3) provides that "the commission *shall* grant authority to make the issue" (emphasis added) if it is "satisfied that the funds derived from the issue of [the securities] *are to be applied to lawful purposes* and that the issue and amount is essential to the successful carrying out of the purposes". (Emphasis added.) The commission and utilities argue that this language indicates the commission is required to make only two determinations before authorizing the issuance of securities: (1) that the funds will be applied to lawful purposes; and (2) that the issue, and the size of the issue, are essential to carrying out those purposes.

The parties thus rely on different and seemingly dissimilar subsections of the statute.[14] There is,

dance with their terms notwithstanding that the order of the commission is later vacated, modified, or otherwise held to be invalid in whole or in part, unless either of the following occurred:

"(a) Operation of the order of the commission has been stayed or suspended by the reviewing court before issuance, which issuance shall not precede the expiration of 30 days following the date of the final order of the commission. * * *" MCL 460.301; MSA 22.101.

[14] If it is thought that there is a conflict in the act regarding the proper scope of commission inquiry, subsection (3) appears to us to provide a better indication of legislative intent. Addressed to the utilities, subsection (1) provides that a utility may issue long-term securities only if it has obtained commission authorization. Addressed

however, no difference in meaning. The conditions upon which a utility may issue securities are first described in subsection (1):

"[A utility may issue securities] *if necessary for the acquisition of property, the construction,* completion, extension, or improvement *of facilities* or for the improvement or maintenance of service or for the discharge of lawful refunding of obligations * * *." (Emphasis supplied.)

These three references to the need for the securities, twice in subsection (1) and once in subsection (3), are equivalent, as the alternative purpose stated in tandem with each of the three references further indicates.[15]

The Attorney General and MCL concentrate on the second reference in isolation and ask this Court to construe that second reference, "reasonably required for the purposes", to mean that the use of the funds must be reasonable. If the second reference in subsection (1) were the only articulation in the act of the standard, the Attorney General and MCL might offer a reasonable construction of the act.[16] The other two references, however, clarify the term "purposes": not the general utility purposes of providing service to the public at reasonable rates, but rather "lawful purposes" (subsection [3]), which the statute first describes in subsection (1) as "the acquisition of

to the commission, subsection (3) prescribes the conditions upon which it shall grant authorization.

[15] The act allows a utility to "issue stock to represent accumulated earnings invested in capital assets and not previously capitalized" and requires the commission to find that "the issue of the stock fairly represents accumulated and undistributed earnings *invested in capital assets* and not previously capitalized". (Emphasis supplied.) This alternate purpose was added by 1919 PA 381 to each of the three references in the utility securities act.

[16] See text following fn 31.

property, the construction, completion, extension, or improvement of facilities or * * * the improvement or maintenance of service or * * * the discharge or lawful refunding of obligations".

The failure to modify "purposes" where, in the second reference, it first appears is not significant. The first reference lists a number of possible utility purposes. The second reference abbreviates that list with the phrase "purposes of the person, corporation, or association". The third reference, even shorter, simply states "lawful purposes". Read in context, the third version does not mean any purpose that is lawful, *i.e.,* not illegal, but rather a lawful purpose described or implied in the first reference. Similarly, the second reference, "purposes of the [utility]", must mean "lawful purposes". Thus "reasonably required" means reasonably required for a lawful utility purpose.

We need not hold that the first reference to "purposes" constitutes an exclusive list of lawful utility purposes. We conclude only that the three references to "purposes" are equivalent in their description of the scope of commission inquiry.[17]

No one has argued that constructing additional generating capacity does not constitute a lawful utility purpose. It is a separate question whether the utility needs the additional generating capacity, as is whether that additional generating capacity should be fossil- or nuclear-fueled or whether the proposed plant is cost-efficient or "reasonable". We have already stated our conclusion that these

[17] There remains a possible ambiguity in the act, but not regarding the scope of the commission's inquiry. The three references regarding the standard provide for different levels of commission scrutiny. The act states that the commission shall determine whether the securities are (1) "necessary" for the purpose; (2) "reasonably required" for the purpose; or (3) "essential" to the purpose. Since the proper level of commission scrutiny is not before us today, we need not consider that question.

separate questions cannot be raised in a utility securities act proceeding.

B

The commission and the utilities do not contend that the reasonableness of underlying projects may never be within the scope of the commission's inquiry in a securities issue proceeding.[18] They assert, rather, that the commission possesses broad discretion regarding the scope of the inquiry,[19] and that the commission did not abuse its discretion by refusing to inquire into the reasonableness of the underlying projects in this case.

The exercise of agency discretion in a matter of this kind is subject to judicial review as provided for in Const 1963, art 6, § 28, and therefore the utility securities act cannot give the commission absolute discretion regarding the scope of its inquiry.

To hold that the commission has discretion would subject every decision, whether to inquire or not to inquire into the reasonableness of a project, to "direct review by the courts" with the attendant delays. The question of *whether* the merits should be inquired into might thus postpone such inquiry

[18] The utilities suggest that the commission need not hold a hearing at all. However, subsection (7)(b), added in 1977, provides that the securities issued pursuant to an underwritten public offering and registered under Title I of the Securities Act of 1933 by an electric utility with assets of over $1 billion are not necessarily valid obligations if the commission did not hold a hearing before authorizing their issuance, which may imply that the commission must hold a hearing before authorizing the issuance of such securities by an electric utility with over $1 billion in assets.

[19] They rely on the clause reading, "the commission * * * *may* make an inquiry or investigation, hold hearings, and examine witnesses, books, papers, documents, or contracts the commission *considers of importance* in enabling it to reach a determination". (Emphasis supplied.) MCL 460.301(2); MSA 22.101(2).

into the merits under provisions of law which provide means therefor. See Part III, *infra.*

While the utility securities act empowers the commission to make any inquiry "the commission considers of importance", that inquiry must be "for the purpose of determining whether the commission should grant the authority".[20] The act does not give the commission discretion to inquire into immaterial subjects.

C

The Michigan cases cited by the Attorney General and MCL do not demonstrate that the reasonableness of underlying projects is a material inquiry in a securities issue proceeding. Rather, the cases show that a securities issue proceeding is limited to a review of the financial decisions of the utility.

In *Michigan Gas Storage v PSC,* 405 Mich 376; 275 NW2d 457 (1979), and *Indiana & Michigan Power Co v PSC,* 405 Mich 400; 275 NW2d 450 (1979), this Court declared that the utility securities act is intended to protect not only investors in utility securities, but also the ratepayers. The question now presented is *how* the act protects ratepayers. "The issuance of securities has an important bearing on the financial structure of a public utility and that in turn has a direct bearing on the rates set for such companies." *Great Lakes Transmission Co v MPSC,* 24 Mich App 77, 85; 180 NW2d 59 (1970). The commission can protect the interests of ratepayers in securities issue proceedings by reviewing the utility's financial structure without inquiring into the reasonableness of underlying projects.

[20] *Id.*

The Attorney General and MCL direct our attention to the statement in *Hillsdale Light & Fuel Co v MPUC,* 220 Mich 101, 105; 189 NW 893 (1922), indicating that the act was intended to prevent overcapitalization. They argue that overcapitalization may be caused by "unreasonable, imprudent and unnecessary capital expenditures". In *Hillsdale,* this Court held that the commission had the power to regulate the amount of stock issued by a utility:

> "Manifestly if the plain purpose of the [utility securities act] was to prevent the over-capitalization of public utilities, the amount of its capital stock and bonds should correlate with the amount and value of its property. The commission was empowered by the act to fix the amount of the issue of the stock and bonds and quite properly fixed it at the value of the property."

The commission protects against "overcapitalization", as defined in *Hillsdale,* by determining that "the amount of [the utility's] capital stock and bonds * * * correlate[s] with the amount and value of its property". In *Hillsdale,* the commission determined the value of the property by reviewing the accounting method[21] used and did not investigate the need for the property.

The Attorney General and MCL also quote at length from the dissenting opinion of Justice BIRD in *Venner v Michigan Railroad Comm,* 205 Mich 573, 578; 172 NW 567 (1919), for the proposition that the utility securities act was designed to protect the investor from "reckless and unlawful expenditures". The question in *Venner* was whether the commission had the power to autho-

[21] The central question in *Hillsdale* was the proper accounting method to be used in evaluating the property: "cost of reproduction new less depreciation", or a more flexible combination of prior appraisals plus going concern value.

rize the issuance of securities that would capitalize expenditures already made.[22] Justice BIRD argued that the commission had no such power, but must instead approve in advance all expenditures that the utility intends to capitalize later, since in his view overcapitalization could occur just as easily through unlawful expenditures as through the issuance of excess stock: "The abuses which the act was created to prevent give the impression that it was intended by the legislature that the commission should pass upon the *lawfulness* of the expenditures before they were made, and if found *unlawful* to prevent them from being made." 205 Mich 577. (Emphasis added.) Thus, not even the dissenting opinion in *Venner* supports the intervenors' position.[23]

In sum, none of the decisions of this Court relied on by the Attorney General and MCL considered the reasonableness of underlying projects a material inquiry in a securities issue proceeding.[24]

D

The Attorney General and MCL direct our attention to utility securities statutes of other jurisdictions. Some appear too dissimilar to illuminate the meaning of the Michigan act, and others contain language given diverse interpretations.

The Attorney General and MCL assert that the

[22] The New York Central Railroad had been investing in real estate in New York, including the Hotel Biltmore and several office buildings, and also had advanced $1,450,000 to a realty company "engaged in buying and selling New York city real estate". 205 Mich 579.

[23] The majority in *Venner* adopted a broader reading of the utility securities act, holding that the commission had the power to authorize stock that would capitalize expenditures previously made.

[24] Nor is *Detroit Edison v Public Service Comm,* 359 Mich 137; 101 NW2d 273 (1960), in point. There, this Court held that a utility's "guaranty contract" was a "security" subject to the requirements of the utility securities act.

New York and Michigan laws are substantially similar, but two dissimilarities militate against looking to the New York statute for guidance in the construction of the Michigan act. First, the New York Public Service Law includes a siting statute expressly requiring that no gas or electrical corporation begin construction of a plant without prior approval by the appropriate commission.[25] The New York Court of Appeals concluded that the siting and the securities issue provisions, in combination, indicated that the Legislature did not intend a securities issue to be authorized until a gas or electrical corporation's right to acquire property and to construct a plant became "certain and complete".[26] Second, the New York statute does not provide, as does the Michigan act, that commission approval of a securities issue does not "presume" the subsequent inclusion in the utility's rate base of the properties acquired or projects constructed with the proceeds of the issue.[27]

The New Jersey Supreme Court construed the term "purpose"[28] broadly to reflect its perception

[25] Public Service Law, § 68; see also art VIII, §§ 140-149-a, entitled Siting of Major Steam Electric Generating Facilities.

[26] The Court held that the language of the securities statute "* * * establishes the conclusion that the commissions are not empowered to authorize the issue of securities upon the application of a corporation which has not received the permission and approval provided in [section] 68 * * *". *People ex rel New York Edison Co v Willcox,* 207 NY 86, 94; 100 NE 705, 707 (1912).

[27] The Michigan act provides:

"Approval of securities does not presume that the projects to be constructed or property to be acquired will be included in the company's rate base." MCL 460.301(1); MSA 22.101(1).

[28] "In the construction of such legislation the principle is, of course, axiomatic that the existing mischief is the vital consideration to which attention must be directed, in order to ascertain the legislative mind. Therefore the word 'purpose' in this connection must be accorded a meaning which will enable the board to investigate not only the object of the proposed bond issue, but the conditions under which it is to be made, and the entire environment of the company with its antecedents, and the prospective opportunities it may encounter in

that the Legislature intended the Board of Public Utility Commissioners to approve "the very merits of the subject-matter itself from the standpoint of a wise public policy, which was to have for its [the legislation's] ultimate object the safeguarding of the public against ill-considered and reckless financial ventures * * *".[29] The New Jersey statute provides for approval of a securities issue when the board of public utility commissioners has determined "that such issue is to be made in accordance with law *and the purpose thereof is approved* by the board".[30] (Emphasis added.)

The Massachusetts statute provides that the department of public utilities shall approve a securities issue if "reasonably necessary for the purpose for which such [securities have] been authorized".[31] In a case where a utility sought to exchange preferred stock for common stock without transferring tangible assets or value, Massachusetts' highest court stated that protection against the evils of overcapitalization required the department to "determine whether the purposes themselves are reasonably necessary".[32] The Court construed the term "reasonably necessary" to mean:

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view of its past history, to meet the financial demands that the proposed burden is likely to impose upon it." *Interstate Telephone & Telegraph Co v Board of Public Utility Comm'rs,* 84 NJL 184, 188; 86 A 363, 365 (1913).

[29] *Id.*

[30] NJ Stat Ann 48:3-9.

[31] "Gas and electric companies shall issue only such amount of stock and bonds, and of coupon notes and other evidences of indebtedness payable at periods of more than one year after the date thereof, *as the department may from time to time vote is reasonably necessary for the purpose for which such issue of stock, bonds, coupon notes or other evidences of indebtedness has been authorized.* The department may take into consideration any resources of the companies available or which might have been available for said purpose." Mass Ann Laws, c 164, § 14 (emphasis added).

[32] *Lowell Gas Light Co v Dep't of Public Utilities,* 319 Mass 46, 52; 64 NE2d 640, 643 (1946).

"[r]easonably necessary for the accomplishment of some purpose having to do with the obligations of the company to the public and its ability to carry out those obligations with the greatest possible efficiency."[33]

It is again relevant that the words "reasonably required for the purposes" do not stand alone in the Michigan act.

Where a securities issue statute employs the term "corporate purpose", both broad and narrow interpretations have been adopted. The Oklahoma public service commission stated that approval of a securities issue "would be tantamount to" approval of construction plans and refused to grant such approval on a record which insufficiently demonstrated the necessity for a nuclear power plant in preliminary stages of construction.[34] The commission discerned a legislative intent that it examine the need for the plant before authorizing issuance of securities in light of the statute limiting securities issues to "*proper* corporate purposes".[35] (Emphasis added.) The word "proper", in contrast with the word "lawful", can be read as meaning appropriate or necessary.

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[33] *Id.*, p 52; 64 NE2d 644.

[34] *Re Public Service Co of Oklahoma,* No 26824 (Okla Corp Comm, 1980), appeal docketed *sub nom Public Service Co v State* (Sup Ct, 1981) (No 55147).

[35] "(1) A public utility organized under laws of this State may, when authorized by order of the Commission, and not otherwise, issue securities when necessary for the acquisition of property, the construction, extension or improvement of its facilities, or the improvement of its service, or for the discharge or lawful refunding of its obligations, or reimbursement of moneys actually expended from income from any source, or for any other corporate purpose authorized by the Commission. Such public utility may issue securities for *proper corporation purposes* payable at periods of not more than twelve (12) months, without the consent of the Commission; but no such note, in whole or in part, shall be refunded by any issue of securities, with maturity date later than twelve (12) months from date of issue, without the consent of the Commission." Okla Stat 1971 § 184(1). (Emphasis supplied.)

The Wisconsin Supreme Court has more narrowly construed the term "*proper* corporate purposes".[36] (Emphasis added.) The Wisconsin regulatory scheme requires a utility to seek approval, under the siting statute, for proposed construction and a certificate of authority in a securities issue proceeding. The Wisconsin Supreme Court approved the public service commission's differentiation between a finding of "public convenience and necessity" under the siting statute and "proper corporate purposes" under the securities act.[37] The Court noted, in a case where utilities sought a declaratory judgment regarding the validity of securities authorized by the commission, that the commission's order directed that no proceeds be applied to construction as yet unapproved in a siting statute proceeding, refused to invalidate the securities, and concluded that the term "proper corporate purpose" extended to construction of a power plant.[38]

In other states, the statutes expressly require a determination of the public interest. For example, the Alabama regulatory scheme[39] charges its pub-

[36] "(1) No securities shall be issued by any public service corporation until it shall first have obtained from the commission, and recorded upon its books a certificate authorizing such issue *and the commission shall not authorize the issuance of securities for any purposes which are not proper corporate purposes, or in an amount greater than is reasonably necessary for such corporate purposes,* having in view the immediate requirements of the corporation and its prospective requirements over a reasonable period in the future, and other relevant considerations.

"(2) All securities issued in violation of any of the provisions of this chapter shall be void." Wis Stat Ann 184.03. (Emphasis added.)

[37] *State ex rel Wisconsin Electric Power Co v Bardwell,* 71 Wis 2d 718, 721-722, 724; 239 NW2d 78, 81, 85 (1976).

[38] The Court was confident that should approval for the proposed plant subsequently fail to materialize, the commission would appropriately channel funds generated by the securities issue.

[39] Ala Stat § 37-4-28 directs a utility to secure a certificate of convenience and necessity before any construction other than "ordinary extensions of existing systems in the usual course of business".

lic service commission with the duty of determining that the securities issue "is compatible with the public interest" and that the issue "will not impair [the utility's] ability to perform [its] service [to the public]".[40] On the ground that the commission has a statutory obligation to find a security issue compatible with the public interest, the Alabama Supreme Court approved a condition imposed by the commission.[41]

This survey of the course of adjudication in other jurisdictions indicates nothing more than that utility securities statutes are susceptible to expansive as well as to narrow statutory interpretations.

Unlike New York, Massachusetts,[42] and Wisconsin,[43] Michigan has no siting statute[44] and alone

[40] Ala Stat § 37-4-7.

[41] *Alabama Power Co v Alabama Public Service Comm,* 278 Ala 597, 601; 179 So 2d 725, 728 (1965).

See similar approval in dictum of a Florida public service commission rule mandating consideration of the compatibility of the issue with the public interest, pursuant to Fla Stat Ann § 366.04, as amended in 1980. *Ft Pierce Utilities Authority v Florida Public Service Comm,* 388 So 2d 1031 (Fla, 1981).

The Virginia State Corporation Commission has construed the term "reasonably necessary to carry out one or more of the purposes set forth in the application", and language in the Virginia securities act, Va Code § 56-61 (1981), empowering the commission to impose terms and conditions upon an authorized issue as obligating the commission to consider the public interest in a securities issue proceeding and to determine the reasonableness of the purpose for which a utility seeks to generate funds through securities. *Re Old Dominion Electric Cooperative,* 86 PUR (NS) 129, 134-136 (1950) (noting the long-standing commission practice of express reference or incorporation by reference of the public interest standard in orders relating to the issuance of securities.)

[42] Massachusetts added a siting statute, c 164, §§ 69G-69R, to its utility regulation scheme in 1973.

[43] Wis Stat Ann 196.491. The Chairman of the Wisconsin Public Service Commission noted that Wisconsin has joined California, Iowa and Maine in declaring a moratorium on applications for new nuclear power plant construction. Advance Plans for Construction, Wis Pub Serv Comm case no 05-EP-1, p 18 (Aug 17, 1978). See, generally, Allison, *Judging the Prudence of Constructing Nuclear Power Plants:*

among the jurisdictions surveyed declares in its utility securities act that commission approval of a securities issue does not presume inclusion of underlying projects in the rate base.[45]

The utility securities statutes in other states offer little guidance in construing the Michigan act. Those statutes and their construction by their courts do not persuade us to conclude that the commission has an obligation to investigate the reasonableness of proposed or ongoing construction projects in its review of a securities application.

## III

The parties have buttressed their conflicting constructions of the utility securities act with different visions of the overall scheme of utility regulation. The commission and the utilities have, in our judgment, offered a more accurate picture of the regulatory system.

### A

The Attorney General and MCL have challenged

*A Report to the Oklahoma Corporation Comm,* 15 Tulsa LJ 262 (1979).

[44] Michigan requires a certificate of convenience and necessity where one utility seeks to provide service in an area where another utility already provides service. MCL 460.502; MSA 22.142. Such a requirement seeks to avoid unnecessary multiplication of companies and wasteful duplication of facilities. *Huron Portland Cement Co v Public Service Comm,* 351 Mich 255; 88 NW2d 492 (1958).

The Michigan Legislature, through its Public Utility Reform Task Force, is now studying potential reform of the scope of inquiry. The task force is drafting siting legislation to be submitted to the Legislature in early 1982. The proposed Power Plant Certification Act would require that a utility obtain commission approval before beginning construction of a power plant. Under the bill, the commission would decide whether there is need for a new plant and whether the proposed type of power plant is superior to alternative methods of power generation.

[45] See fn 27, *supra.*

the issuance of these securities on the ground that cost overruns and errors in recent load forecasts have rendered continued construction of the power plants unreasonable. Stating that there must be an opportunity for commission review of the need for these plants while they are still under construction, the Attorney General and MCL contend that the utility securities act requires such a review during a securities issue proceeding.

To demonstrate the need for review of ongoing construction in a securities issue proceeding, the Attorney General and MCL construct the following scenario. If the commission cannot review the need for these plants before they are completed, it may face a disastrous choice. If it should find that the completed plant is unnecessary and should never have been built, the commission must exclude the cost of the plant from the utility's rate base. While completed projects have been excluded from the rate base, these plants represent costs of unprecedented magnitude: the Midland plant's cost is now estimated at $3.1 billion and Fermi 2's cost at $2 billion. A decision by the commission to exclude a multi-billion-dollar power plant from the rate base would put the utility in severe financial straits, possibly even bankruptcy. Faced with such catastrophic consequences, the commission would be under pressure to include an unnecessary power plant in the rate base. Such inclusion would violate the commission's statutory mandate to prescribe rates based on actual public need and would force Michigan ratepayers to subsidize the utility's multi-billion-dollar mistake.

The intervenors' assumption that the utility securities act provides the only means of inquiry into the reasonableness of plants during construction is inaccurate. At least two statutory methods,

other than a securities issue proceeding, provide an opportunity for review of the ongoing construction of a power plant.

The commission holds lengthy rate hearings under the transmission act,[46] approximately every year, during which it evaluates ongoing construction. In requesting a rate increase, a utility must file with the commission a detailed report of its construction projects.[47] In addition, the utility can request that Construction Work in Progress (CWIP) be included in the rate base.[48] If, during a rate proceeding, the commission finds continued construction of a power plant unreasonable, it can exclude the cost of unjustified construction from CWIP. The commission has employed this method of review. In a 1977 rate proceeding involving Detroit Edison, PIRGIM (Public Interest Research Group in Michigan) challenged Edison's continued construction of nuclear power plants as unreasonable and asked the commission to exclude the costs of their construction from CWIP. The commission considered the challenge on its merits and indicated that it was not persuaded that the costs of Edison's nuclear construction programs should be excluded from the rate base.[49]

Admittedly, a rate hearing does not allow review of the necessity of a plant unless the utility seeks to have the plant's costs included in the rate base. While review under the transmission act may be belated, that does not make the utilities securities act an appropriate means for pre-construction review.

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[46] MCL 460.552; MSA 22.152.

[47] *Re Standard Filing Requirements,* case no U-4771 (May 10, 1976).

[48] See General Application for Change in Utility Rates, Schedule B1, Supplemental Appendix of Defendant-Appellee Detroit Edison, p 3626.

[49] *Re Detroit Edison Co,* case no U-5108 (May 27, 1977).

Moreover, the commission, in exercise of its supervisory powers, set forth in the general enabling act,[50] may conduct pre-construction review without regard to whether the utility seeks to have the plant's costs included in the rate base. The general enabling act creating the commission directs it to conduct an investigation "[u]pon complaint in writing that any rate, classification, regulation or practice charged, made, or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant * * *".[51] In its rules prescribing the contents and kinds of complaints, the commission authorizes a "person", *i.e.,* "an individual, partnership, corporation, association, body politic, or state agency",[52] or the commission itself to challenge "unreasonable acts" of a public utility.[53]

The core of the intervenors' argument is that a securities issue proceeding provides an appropriate and perhaps the only forum for review of the construction of the plants in question before their completion. However, both the investigation procedure outlined in the general enabling act and a rate hearing under the transmission act provide an opportunity for commission review of the wisdom and reasonableness of plants during construction.

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[50] MCL 460.58; MSA 22.8.

[51] MCL 460.58; MSA 22.8.

[52] 1979 AC, R 460.11(d).

[53] "Rule 21. (1) A complaint shall be limited to matters involving alleged unlawful or *unreasonable acts, practices* or omissions of a utility or carrier. A complaint may be either formal or informal and may be made by *a person having good or sufficient reason therefor* or by the commission on its own motion.

"(2) An informal complaint shall be in writing and signed by complainant, and contain a concise statement of the facts involved and the name and address of the complainant and the party complained against. The commission will attempt to settle problems arising under an informal complaint without formal action when possible." 1979 AC, R 460.31 (emphasis added).

Detroit Edison concedes that the commission can, under the transmission act, inquire into the reasonableness of continued construction of these plants.

B

The utility securities act does not require a utility to secure commission approval before obtaining short-term credit.[54] A utility could thus complete considerable preliminary and construction work on a plant, financed by short-term debt, without filing an application under that act. Only when the utility decided to convert to long-term financing would the commission have an opportunity, under the utility securities act as the Attorney General and MCL would construe it, to review the decision to build a plant.

The purely financial decision to convert short-term debt into long-term securities bears no necessary relation to the construction of a new power plant or to regulatory review of a utility's decision to construct a new plant.[55]

In the instant case, the utilities planned to utilize a substantial part of the funds sought to be raised to retire maturing debt. The money thus had already been spent. Halting the rollover of existing debt while the commission ponders whether the money was wisely expended serves no apparent purpose and may raise the utility's interest costs.

Implicit in a regulatory scheme which permits a

[54] MCL 460.301(4); MSA 22.101(4). The Attorney General states that the total amount of a utility's short-term credit is regulated by the Federal Energy Regulatory Commission (FERC).

[55] Difficulties in rolling over short-term debt might exert some restraint on the availability or cost of short-term debt. But such control by the commission of the amount of short-term debt would be haphazard at best.

utility to borrow large amounts of money on a short-term basis and to roll over and add to short-term debt until the *utility decides* to refinance short-term debt with long-term is the concept that regulatory review is limited to the financial aspects of the refinancing and does not extend to a review of decisions that cannot be recalled (money already spent) or to decisions which, but for the financing, would not be subject to regulatory review (projects that were or could be initially financed with short-term debt).

C

An inquiry into the underlying projects would require extended investigation, lengthy hearings, and careful consideration by the commission. Long delays are inappropriate in a securities issue proceeding. The utility's decision to issue securities, its determination of the optimal combination of securities to be issued, and the commission's review of those decisions all are premised on the conditions prevailing in the financial markets at the time the utility decides to seek additional financing. If there is a long delay between the utility's decision and the actual issuance of the securities, conditions in the financial markets may change considerably. A propitious time to issue securities may be lost, and the utility's evaluation of the best combination of securities and the commission's review, along with any appeals, are outdated.

An appellate court reviewing a commission decision in a securities issue proceeding may feel constrained to stay the order authorizing a securities issue until it is satisfied that the commission acted properly, because the securities, once issued, may become valid obligations that the utility can-

not withdraw. Such a stay would generally remain in effect until the parties have exhausted appeals. A protracted commission hearing on the merits of underlying projects, or a stay of an order authorizing issuance of securities, might arrest any construction and, therefore, does not preserve the status quo.

A rate hearing under the transmission act or an investigation upon complaint under the general enabling act provides an adequate method for questioning the continued construction of a power plant, and in such a hearing or an investigation ongoing construction need not be disturbed and thus the status quo can be preserved.[56] It is unnecessary and inappropriate to hold the financing hostage while the necessity of the plants is fully and carefully considered.

Finally, the issuance of securities without commission determination that the proceeds will be spent wisely does not leave the purchasers of securities deceived in any way. Aware that the cost of these plants may be excluded, in whole or in part, from the rate base, the market discounts the price of the securities to reflect this risk.

Protracting a securities issue proceeding provides no additional protection to the ratepayers. It disturbs the financing program, makes it difficult to refinance maturing debt, and simply pushes capital costs, which are paid by the ratepayers,[57] still higher.

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[56] The commission can grant a temporary rate increase for which it can later compensate ratepayers, should that decision prove incorrect, by a reduction in subsequent rates. Even if the commission grants no temporary rate increase, the utility can continue to charge the old rates, thus preserving the status quo.

[57] The ratepayers are *already* paying for the completion of these plants, by subsidizing the higher capital costs that reflect the capital markets' estimate of the risk that these plants, if and when completed, will not be included in the rate base.

## IV

It may be wise, in this era of multi-billion-dollar power plants, for the commission to pass upon the necessity for any such plant before construction begins. The policy question whether the commission should be required to approve the construction of additional generating capacity before construction begins is properly for the Legislature, and not this Court, to decide.

We cannot confidently predict that the Legislature would today conclude that the reasonableness of a utility construction project should be made the subject of a pre-construction hearing.[58] The Legislature might conclude that the public interest is better served by the present system which requires a utility, its shareholders and bondholders to shoulder the responsibility and risk involved in deciding to construct additional generating capacity.

Pre-construction review and approval might saddle ratepayers with the cost of erroneous business decisions in which the commission, under the proposed regulatory scheme, will have participated. If whatever the commission approves in advance would assuredly or even probably become part of the rate base, advance approval might absolve the company from error in deciding to construct addi-

[58] This regulatory scheme was devised in 1909, long before the nuclear/fossil power debate, and at a time when the cost of constructing new generating capacity, in absolute or comparative terms, was far less than it is today. It was also a time when generating plants and other utility facilities could be constructed in a relatively short period of time.

If the construction of the act advocated by the Attorney General and MCL were adopted, the scope of inquiry upon issuance of long-term securities would or could include whether particular railroad tracks should have been laid or electrical or other lines or mains installed, as well as whether additional generating facilities should have been constructed.

tional generating capacity. A utility might then be inclined to err on the side of constructing additional generating capacity because it is less likely to be subject to criticism for having inadequate capacity, and the ratepayers will pick up the bill if there is excess capacity.

Contrariwise, if the corollary of commission approval is that an underlying project becomes part of the rate base, the commission may bar the construction of additional generating capacity lest it be charged with unnecessarily adding to the rate base and the cost of power.

In a word, the Legislature may conclude that the present regulatory scheme is more consonant with the concept of a private public utility system subject to public regulation than a scheme *requiring* the regulatory agency to prognosticate future energy needs and to assess the relative advantages and disadvantages of the means by which to meet these needs.

Under the present regulatory scheme, the utilities may indeed be betting the company on the wisdom of their decisions to build nuclear generating plants costing several billion dollars. If they have made erroneous decisions and the cost of the additional generating capacity is not included, in whole or in part, in the rate base, stockholders or bondholders or both would lose, but the ratepayers would be largely unaffected.

## V

The separate opinion would require feasibility review by the commission of a new construction project upon the initial application for the issuance of long-term securities but not upon subsequent applications in respect to ongoing construc-

tion. It makes two arguments in support of that construction.

—The separate opinion reflects the view of the commission, which has "changed its position". There is, however, no adequate basis for the conclusions that the commission has adopted the view advanced in the separate opinion or changed to that position.

—A determination of the feasibility of a new construction project, upon an initial application for the issuance of securities, is necessary to achieve the "aims of regulation" which are to protect ratepayers and investors. Initial feasibility review would not, however, have protected ratepayers or investors in the instant case against the cost overruns caused by technological changes, regulatory restrictions and inflationary spirals following the commencement of construction of these power plants.

(1)

The separate opinion states that, while the commission initially took the position that there was no need for it to inquire regarding the need for an additional power plant, "regardless of whether the requested securities were to finance new construction or ongoing construction", "the commission has modified its position somewhat. It now concedes that before approval of the initial issue of securities, a thorough and complete examination into the necessity of the construction of generating plants is appropriate".[59]

[59] The separate opinion also states:

"(4) The MPSC has *changed its position* on whether a determination of need and cost-effectiveness ever has to be made under the securities act from denying such a determination had to be made to *stating such a determination had to be made* but only in connection with approval of the first securities application.

"(5) The MPSC has recognized that a securities act proceeding

That statement is based in part upon a sentence in the brief of counsel for the commission in the *Consumers Power* case:

"A thorough and complete inquiry by the commission into the necessity of the initial issue of securities for the construction of generating facilities is appropriate."

While lawyers often make concessions binding on their clients in particular litigation, the views of a lawyer representing a regulatory commission should not be accepted by this Court as an authoritative construction by an agency charged with the administration of an act. The authoritative statement of the views of the commission regarding its concept of the meaning of the utility securities act is to be found in its decisions and opinions.

The commission's view, as set forth in its decision in *Consumers Power,* is that the commission has discretion to determine the scope of the inquiry.[60]

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concerns not only overcapitalization but also service at reasonable rates.

* * *

"We have observed that there are essentially three types of protection in question: complete feasibility investigations, first, at the original financing application; second, at subsequent financing applications; and third at rate proceedings. * * * The MPSC contends the answer is yes in the first instance but no in the second. * * * We hold such an examination is required at the original financing application but normally not at subsequent ones." (Emphasis supplied.)

The separate opinion concludes:

"We hold that the Legislature intended that (1) a complete feasibility examination should be made by the MPSC in connection with approval of the original application for securities, (2) upon subsequent applications it would suffice that the MPSC consider whether the statutory requirements were met with respect to the work to be next undertaken, and (3) a complete feasibility examination should be undertaken in connection with inclusion of the project in the rate base."

[60] "The commission must determine on a case by case basis whether certain issues are relevant to making the determination that the statutory requirements have been met because the issue raised in

The statement of the commission's counsel in *Consumers Power* that an inquiry into the necessity of an initial issue of securities for the construction of additional generating facilities is "appropriate", is entirely consistent with the concept advanced by the commission that it has discretion regarding the scope of the inquiry. It is one thing to say that it is "appropriate" to make an inquiry into the necessity of an initial issue of securities and quite another to say that such inquiry *must* be made. The statement of counsel for the commission may be read as simply saying that the commission, in the exercise of discretion, could appropriately make such inquiry; it need not be read as saying that such inquiry must be made by the commission.

While the commission's explanation for the manner in which it exercised discretion in *Consumers Power* was related to the circumstance that the Midland plant is "ongoing construction", that explanation cannot properly be read, as does the separate opinion, as implying that "a determination of need and cost-effectiveness" "had to be made but only in connection with approval of the first securities application". The opinion of the commission nowhere states affirmatively that such a determination *must* be made in connection with an initial application for the issuance of long-term securities for new construction. Moreover, such a

securities proceedings vary and the application of funds from the issuance of securities varies for different utilities. The Legislature did not restrict the commission's *exercise of discretion* because it recognized that conditions would vary with different utilities and different properties and therefore vested the commission *with extremely broad discretion to determine the relevant issues in securities proceedings."* (Emphasis supplied.) *Re Consumers Power Co,* case no U-6360, p 19 (Aug 4, 1981).

We have expressed our disagreement with the commission's view that it has discretion to determine the materiality of issues in a securities issue proceeding. See Part IIB.

reading of the explanation advanced by the commission in support of its decision to refrain, in the exercise of its discretion, from making such an inquiry in *Consumers Power* is inconsistent with the subsequent statement of the commission, on July 7, 1981, in *Edison II* that "[e]vidence relating to electric load forecasting and generating plant alternatives is irrelevant and immaterial in carrying out the intent of 1909 PA 144 [the utility securities act]".

Such a reading is also inconsistent with the commission's reasoning in *Consumers Power:*

"The commission also finds that the issue of cost-effectiveness as raised by the intervenors is not synonymous with the issue of overcapitalization with regard to ongoing construction projects and therefore examination of cost-effectiveness in a securities proceeding does not necessarily further the purpose of the securities act to protect against overcapitalization."[61] *Re Consumers*

[61] The decision and opinion goes on:

"Carrying the intervenors' argument to its logical conclusion, the intervenors are urging this commission to accept the view that overcapitalization will never occur if the least costly plant is built and that conversely, overcapitalization will always occur if the more costly plant (as compared to an alternative plant) is built. *This commission does not believe that this cost comparison approach to overcapitalization comes within the concept of overcapitalization as defined by the Supreme Court since it does not attempt to correlate the liabilities of the applicant with its assets. The commission, therefore, is not persuaded that the intervenors have raised a valid claim of overcapitalization with respect to the Midland plant by their contention regarding cost-effectiveness.*

"The intervenors' dispute of applicant's estimated cost of completion and operation of the Midland plant is central to their position that the Midland plant is not cost-effective. *Insofar as the evidence regarding the ultimate cost of construction is tied to the issue of cost-effectiveness, the commission does not find this evidence relevant to a determination in this proceeding for the reasons set forth with respect to cost-effectiveness.* In addition, insofar as the ultimate cost of construction raises the issue of the reasonableness of expenditures made in constructing the Midland plant, the commission points out that alleged cost overruns in the construction of the Midland plant *should be dealt with in the ratemaking proceedings or in other* proceedings *specifically designed to address utility construction programs.*

*Power Co,* case no U-6360, p 23 (Aug 4, 1981).

Since the statement of counsel for the commis-

"The language of the securities act unambiguously provides that approval of securities for construction projects does not bind this commission to include the total cost of that project in that company's rate base. The commission points out that in case no U-4717 the commission disallowed the inclusion of a certain portion of the cost of the Marysville Synthetic Natural Gas Plant in the rate base of the company although the commission had previously authorized the issuance of securities to fund construction of that plant. Since the securities act and the commission decision in U-4717 make clear that applicant proceeds at own risk, for ratemaking purposes, in constructing a plant, it is not appropriate for this commission to continually reexamine in securities proceedings, changes in the estimated costs of construction of an ongoing construction project once the commission has approved the issuance of securities for the initial construction of the project. Adequate *protection against unreasonable and imprudent expenditures by the applicant is provided by the statutory provisions governing the setting of rates for that applicant.* The commission does not feel that the Legislature intended to provide the same protection for the ratepayers under the rate setting statutes and securities act. In giving the commission the discretion to determine the scope of inquiry or investigation in securities proceedings the commission believes the Legislature intended to permit the commission to reach determinations on securities applications in the most efficient manner possible in order to meet effectively the financing needs of a utility.

"The commission notes that power plant siting legislation has been previously introduced in the state Legislature addressing the problems presented by changing demands for electricity, rising construction costs, environmental regulations, and other factors relating to the construction of power plants. If circumstances have changed during the past several years so that additional protection should be provided against imprudent or unreasonable management decisions relating to the construction of power plants, the commission feels that power plant siting proceedings, and not securities proceedings, are the appropriate forum for examining those issues.

"Finally in connection with the ultimate cost of construction of the Midland plant, the commission wishes to emphasize that past securities orders involving the Midland plant have not in any way inherently approved the reasonableness of the applicant's expenditures in constructing the Midland plant during the various phases of construction. In approving the initial issues of securities for purposes of constructing Midland, the commission inherently found that the construction of Midland was a lawful purpose and that the plant was reasonably required for the purposes of the applicant. Subsequent authorizations for funding of continued construction found that the amount of funds requested for continued construction were essential for the purposes of continuing construction at the Midland plant but in no way did it give a stamp of approval to the expenditures made for Midland." *Id.,* pp 24-26.

sion can be read as consistent with the view expressed by the commission that it has discretion, there is no adequate basis for concluding—especially in light of the other rationale in *Consumers Power* and the subsequent statement of the commission in *Edison II*—that the commission has "changed its position" or has adopted the construction of the utility securities act advanced in the separate opinion.

(2)

The separate opinion states that the language of the utility securities act—"purposes" of a utility and "reasonably required"—must be construed consonant with and in the context of the "aims of regulation" and that those aims are utilities providing "adequate services at reasonable rates and earning reasonable profits". The separate opinion continues that, since those are the aims of regulation, the commission cannot approve a securities issue for an additional power plant without determining that the additional plant is feasible and will provide adequate service at a reasonable rate and earning a reasonable profit.[62]

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[62] The separate opinion concludes:

"[T]he Legislature, by requiring securities to be reasonably required for the purpose of the applying utility, expected the MPSC to balance the interests of investors and ratepayers along with the interests of the utility *before* the original securities are issued to finance the construction of electric plants. * * *

"This balance will be achieved if the MPSC makes a complete feasibility examination at the time of the original application for financing and later evaluates the costs of the project when the utility requests inclusion in the rate base. Thus, we do not believe that the legislative intent was to allow a utility's investors to invest billions of dollars into a facility that the MPSC claims will be evaluated for viability at the time a company requests inclusion of the costs of such facility in its rate base. Such a result would be inherently unfair to investors, the utility and its ratepayers. Moreover, this approach implies that a utility can proceed at its own risk even though the costs of construction may ultimately leave the utility impoverished and the ratepayers with an unwontedly swollen rate base. * * *

If the "aims of regulation" impose upon the commission the duty, as part of a securities issue proceeding, to determine the feasibility of additional power plants to assure adequate service at a reasonable rate with a reasonable return, then that rationale should require such review upon each application for a securities issue, as well as upon the initial application.

An initial determination of the feasibility of these nuclear and the other challenged power plants would not have provided protection either to ratepayers or investors.

The separate opinion states that the Midland plant was announced in 1967:

"Originally the plant was to be completed by 1974-1975 at a cost of $370 million. It is not near completion, however, but Consumers Power anticipates completion by 1984-1985. The current construction costs which have been subject to tremendous inflationary pressures and additional safety engineering costs are now set at $3.1 billion by Consumers Power and $3.5 billion or more by the staff of the MPSC."

The separate opinion states with regard to the Detroit Edison plants:

"The Fermi 2 plant has experienced 14 cost overruns since its construction began in 1969. Originally it was projected to cost $229 million, but in the last several years the cost estimates have multiplied to $1.8 billion. Moreover, the utility has acknowledged that it cannot guarantee against further cost overruns, and it admitted that the final costs of the plant may include an additional $200 million. Similarly, the Belle River units

"We agree with the commission, however, that in these particular cases it is too late in the day to make a *post hoc* examination about the need and cost-effectiveness of the plants." (Emphasis in original.)

have also experienced cost overruns. The most recent projected cost overrun was for $500 million."

Manifestly, initial feasibility review, 10 to 14 years ago, would not have protected ratepayers or investors from miscalculations of the magnitude described.

There is no basis for concluding that if the procedure advanced in the separate opinion had been in place 10 to 14 years ago, the Attorney General, the Michigan Citizens Lobby (if it had then existed), the commission staff, or anyone else, would have recognized that nuclear plants would cost ten times the estimates of the utilities and would take as long as they have to complete. There would have been the same lack of omniscience regarding load forecasting, alternative generating facilities and cost-effectiveness.

Since the history of the efforts to bring on line these additional generating facilities demonstrates that initial feasibility review may be no protection at all, if the utility securities act is construed, on the aims of regulation rationale, to require feasibility review, such review should be upon each application for the issuance of securities.

The commission and the separate opinion both recognize, however, that an ongoing construction project cannot be constantly interrupted by ongoing securities review. Every issue of securities cannot be subjected to the delays of a new feasibility study, hearings and appeals. As the commission states, and we hold, feasibility review should be in a proceeding separate from utility securities issuance either during the course of construction or, alternatively, in a rate proceeding following the completion of construction.

The assumption of the separate opinion that the

aims of regulation described in that opinion can only be achieved by feasibility review in a securities issue proceeding has not been demonstrated. Ratepayers can, in the main, be protected by review in a rate hearing following the completion of construction. As suggested in Part IV, ratepayers may even be better protected by a procedure which, as set forth in the decision and opinion of the commission in *Consumers Power,* requires the managers of the utilities to assume responsibility for commitments of this magnitude[63] and by a regulatory process which does not impose upon regulatory agencies an obligation of prognosticating 10 to 15 years or longer into the future.

It is apparent that Consumers Power and Detroit Edison have the capacity to borrow hundreds of millions of dollars on a short-term basis. They, therefore, have the capacity, without filing an application under the utility securities act, to complete preliminary work, commence construction and perhaps even complete a small plant or gener-

[63] "It is obvious that because of this state of flux, even a careful thorough assessment of the need for, and the cost-effectiveness of a particular power plant at one point in time, does not guarantee that the power plant will at its completion still be needed, or still be economical as compared to other generating alternatives. Thus the question becomes whether it is reasonable for this commission to examine the need for, and the cost-effectiveness of a power plant at several stages of construction, and thereby assume the *role of an overseer of management decisions* [emphasis supplied] in attempting to insure that, at its completion, the electricity generated by the power plant is needed to meet the demand for electricity and the plant is cost-effective in that its ultimate cost of completion is less than the cost for an alternative generating facility with the same capacity.

"The commission is convinced that it is not reasonable in the context of securities proceedings to examine the need for, and the cost-effectiveness of the power plant *once actual construction has commenced* [emphasis in original] and that such examination does not further the purpose of the securities act to protect against overcapitalization and serve the interest of customers in efficient and uninterrupted service at a reasonable rate." *Re Consumers Power Co,* case no U-6360, p 21 (Aug 4, 1981).

ating facility without going to the long-term market.

Because there is no need to file a securities application for short-term financing, initial feasibility review would often occur only after the plant had become "ongoing construction" or sometimes completed construction. The extent or timing of such initial feasibility review would thus often be at the option of the utility.

A construction of the act which makes the extent and timing of the proposed initial feasibility review dependent upon whether the utility seeks or needs long-term financing is not consistent with the argument that initial feasibility review of new construction projects is necessary to achieve the aims of regulation.

## VI

We do not now pass on the need for additional generating capacity or on the merits of fossil or nuclear power or of these particular plants. We hold only that a securities issue proceeding is not the proper method by which to raise those questions.

We affirm the orders of the commission authorizing the issuance of securities in *Edison I, Edison II* and *Consumers Power.* No costs.

COLEMAN, C.J., and KAVANAGH, RYAN, and FITZGERALD, JJ., concurred with LEVIN, J.

WILLIAMS, J. The basic issue in these cases is the amount of protection the Legislature intended to provide both utility investors and ratepayers through the Michigan Public Service Commission (hereinafter MPSC or commission) in the securities

act, MCL 460.301; MSA 22.101, and the transmission act, MCL 460.552; MSA 22.152.

There are essentially three types of protection in question. First, the MPSC can make a thorough investigation into the need and cost effectiveness of the utility project, in these cases electric power generating plants, in connection with the commission's determination whether or not to authorize "the issue and the amount of the issue" of the original utility application for securities to develop such a project. Second, the MPSC can make such a thorough feasibility investigation each time a utility applies for subsequent financing for a project already investigated and approved instead of the more limited ascertainment that the additional financing is appropriate for the amount of ongoing work to be undertaken during that segment of the work. Third, the MPSC can undertake a thorough investigation into the need and cost-effectiveness of the utility project or a part thereof at the time the utility seeks to include the cost of the project or a part thereof in the utility's rate base.

The Attorney General and various intervenors with him take the position that the Legislature intends utility investors and ratepayers to have the complete advantage of all three types of protection, to wit, a complete MPSC feasibility examination on original application for project financing by the utility, a similar complete MPSC feasibility examination on each and every subsequent financing application, and finally such an MPSC examination when the utility seeks to enter the cost of the project or a part thereof into the rate base.

The MPSC takes the position, after long and eye-opening experience, that the Legislature intends utility investors and ratepayers to have the complete protection of the first and third types of

protection and the more limited protection of the second type. In other words, the MPSC will undertake complete feasibility examination at the time of original application for financing and at the time of consideration of the cost of the project or a part thereof for inclusion in the rate base. At the time of requests for approval of subsequent financing, the MPSC would not undertake a complete feasibility examination, but would only determine whether the financing requested was necessary for the next step of the ongoing project.

The utility defendants take a position somewhat short of the MPSC. They do not consider directly whether the Legislature intended the first type of protection, but insist that in this case the MPSC has provided such protection by actually making such a comprehensive feasibility examination. They insist, like the MPSC, that a complete MPSC feasibility examination is not called for on subsequent financing applications for ongoing projects. They acknowledge that the third type of protection requires a complete feasibility examination.

Our brother LEVIN'S opinion takes a position short of both the MPSC and defendant utilities. He finds legislative intention for the protection of complete feasibility examination only at the third stage, ratemaking, and finds no legislative intention for complete feasibility examination protection in connection with securities act financing.

The position of this opinion is similar to that of the MPSC. We believe the Legislature contemplated the protection of complete feasibility examination both at the time of original financing application and at the time of ratemaking. At the time of subsequent financing application a complete feasibility examination is not necessary and the more limited determination of the necessity of the

financing for the next stage of ongoing construction is adequate.

Our opinion that the Legislature intended complete feasibility examination at the time of original financing application is based both on construction of the language of the statute and consideration of policy implications. In construing the statute we found the phrase "property * * * reasonably required for the purposes of the * * * corporation", MCL 460.301(1); MSA 22.101(1), of particular significance. We found that the "purposes of the * * * corporation" necessarily contemplated, under the regulatory scheme, the problem of adequate services by a healthy utility making a reasonable return to consumers at reasonable rates. Therefore, since the statute required the commission to state "that in the opinion of the commission the use of the * * * property * * * is reasonably required for the purposes of the * * * corporation,. the MPSC would necessarily have to make a complete feasibility examination. Without making such an examination, the MPSC would not have the information on which to base such an opinion.

The caveat that such approval does not presume inclusion in the company's rate base (MCL 460.301; MSA 22.101) is perfectly legitimate advice to one and all based on the possibility of occurrences subsequent to approval of the original financing application and prior to actual consideration of incorporation in the rate base. While this provision is some indication that the commission's feasibility study at the time of application for original financing is not definitive as to incorporation in the rate base, it by no means negatives the requirement that the financing be for lawful purposes.

In addition to statutory construction, we believe public policy dictates the conclusion we have reached. We are convinced that the whole policy of utility regulation is to ensure consumers adequate service at reasonable rates through the maintenance of financially healthy utilities supported by such reasonable rates. This policy scheme would be subverted by failing to make a complete feasibility investigation at the initial financing application. If there were no such examination, a utility might consciously or unconsciously embark upon a major and enormously costly project that was not needed or not cost-effective. By the time of determination whether the cost of the project should be included in the rate base, which could be years later, the MPSC would be confronted with an impossible dilemma.[1] On the one hand, if it included all or the major portion of the cost in the rate base, the rate base would be so swollen as to make rates prohibitively expensive and an unwarranted economic burden on the ratepayer.[2] On the other hand, if such costs were not included in the rate base, the financial well-being of the utility might be disastrously affected to the serious detri-

[1] In MPSC case no U-5331, an electric rate proceeding, the MPSC implicitly recognized the horrendous problems of a 10 year late feasibility study. An intervenor argued among other things that Midland was unnecessary to meet future power requirements. MPSC's order stated in part:

"* * * Moreover, the forced abandonment of all of the Midland plant would be a financial disaster for applicant and would seriously compromise applicant's ability to finance any additional construction, including coal-fired and cogeneration facilities. Finally, to the extent that the financial community perceived the commission as acting irresponsibly by enforcing the abandonment of the total Midland project, all other utilities in Michigan would have increased difficulty in financing their construction projects."

[2] For example, Commissioner Anderson, in her dissent, states: "Staff figures indicate rate increases of 20% to 25% or more of the then current rates will be necessary when the Midland plant became operational. Such increases are devastating."

ment of its investors and creditors. Furthermore, such economic catastrophe to the utility would not leave the ratepayer unscathed. The least that could happen to the ratepayer would be increased rate payments, because the catastrophe would so lower the credit-worthiness of the utility that the cost of money would inevitably affect utility costs and rates. What is more, the lower credit-worthiness and cost efficiency of the utility could very well affect the level or the extent of utility services, or both. In other words, if protective steps are not taken at the outset, it can become impossible at the rate-fixing time to act to prevent insupportable economic burdens for both the investors and the ratepayers. We cannot believe that the Legislature contemplated this possibility.

At the same time, the decision of not also requiring a complete feasibility examination at each subsequent financing application is logically supportable in law and public policy. To begin with, the complete feasibility examination in connection with the original financing application would, under normal circumstances, provide the MPSC with a reasonable basis for judgment of the appropriateness of subsequent financing with investigation only of the reasonableness of the financing for the next work stage in the ongoing development of the project. On the other hand, the delay and business implications of another complete feasibility examination might very well, as it did in these cases, jeopardize the ability to market securities in a fast-moving and inherently suspicious market atmosphere.

These policy and logical factors reinforce the correctness of our legal interpretation of the statutory schemes as set out above. No one challenges the necessity of the third type of protection, a

complete feasibility examination at the time of incorporation of project costs into the rate base.

Under our interpretation of this provision, we hold that the MPSC must make a thorough inquiry of need and cost-effectiveness of a plant and the amount of capital necessary to accomplish the construction when the initial issuance of securities for the construction of that plant is requested by a utility. Moreover, if the commission authorizes the securities after such a determination, when approval for additional securities is requested, a redetermination should not be needed in most cases. Under the facts of the instant case, we do not believe that an inquiry of need and cost-effectiveness is necessary.

We also hold that the operative statutory standard indicates that such a determination should be made by the MPSC as specific findings of fact. We are supported in our statutory interpretation by the objectives of the statute which are to protect both investors and ratepayers of a utility.

Finally, we believe that once the initial determination at the initial security request is made and the securities are authorized for this purpose, additional protection against unreasonable and imprudent expenditures by a utility is provided in the statutory provisions governing the setting of rates.

## I. FACTS (CONSUMERS POWER COMPANY)

### *A. MPSC Case No U-6360 Proceedings*

The issues in the instant appeal arise from complicated administrative and judicial proceedings. The Attorney General and the Michigan Citizens Lobby (MCL) have requested an indefinite stay to prevent the issuance of securities by Con-

sumers Power Company which was authorized by the MPSC on August 4, 1981 in security case no U-6360. The opinion and order of the MPSC authorized the total financing of $363 million through the sale of various types of securities, presumably needed to finance the construction of the Midland plant.

In the administrative proceedings before the commission, the Attorney General and the MCL intervened[3] and offered in opposition to the requested securities issuance evidence which indicated that the Midland plant was not cost-effective as it would be less costly to build two coal-fired generating plants and that the company's forecasting of future energy demand was inaccurate. Although this evidence was presented before the MPSC, the commission ruled in its opinion and order of August 4, 1981 that this evidence was irrelevant in a subsequent securities application because once securities have been approved for actual construction, the need to examine the cost-effectiveness of a power plant does not further the purpose of the securities act. MCL 460.301; MSA 22.101. Specifically, it ruled that once construction has begun a determination of need and cost-effectiveness (1) increases the risk of investment in the construction project which then increases the cost of capital; (2) creates extended proceedings which burdens the commission in meeting its statutory responsibility of making a determination on each securities application that comes before it; (3) "is not synonymous with the issue of over-capitalization with regard to ongoing construction projects"; and (4) is not proper in a security case to control alleged cost overruns which should be dealt with

[3] Under MCL 460.301(2); MSA 22.101(2), an interested person "shall have the right to intervene as provided by the rules of the commission".

in ratemaking proceedings or in other proceedings specially designed to address utility construction programs.

On August 24, 1981, the intervenors filed an emergency motion for a stay and an emergency appeal with the Michigan Court of Appeals. On September 14, 1981, the Court of Appeals granted the application for leave to appeal but denied the stay. *Id.*

On September 15, 1981, the intervenors filed an emergency motion for a stay with this Court. *Id.* On the same day, we issued an order staying the Court of Appeals proceeding and bypassing that Court. 411 Mich 1064 (1981).

*B. The Midland Plant Construction*

The plans for the Midland plant were announced in 1967 by Consumers Power Company. As of today, it has been almost 14 years since the site outside the city limits of Midland was chosen. Since its inception, it has been plagued by much controversy at the state and federal levels.

Originally the plant was to be completed by 1974-1975 at a cost of $370 million. It is not near completion, however, but Consumers Power anticipates completion by 1984-1985. The current construction costs, which have been subject to tremendous inflationary pressures, and additional safety engineering costs are now set at $3.1 billion by Consumers Power and $3.5 billion or more by the staff of the MPSC. See MPSC security case no U-6360, dissent, p 2 (August 4, 1981) (Anderson, *dissenting).*

The "cost-plus construction" of Midland plant is an excellent example of the phenomenon that if anything can go wrong, it will. It has set records in long construction time and high expense. In addition, it is located in an urban center which

has forced the Nuclear Regulatory Commission to closely scrutinize and expand safety requirements amidst frequent public outcry. Moreover, the design of the nuclear units is substantially similar to the notorious Three-Mile Island units. MPSC case no U-6360, *supra,* dissent, p 4 (Consumers Power's Appendix, p 329b).

There have also been specific problems with soil erosion, underground caverns, and the ventilation systems. In addition, Consumers Power has been forced to conduct stress analyses on the reactor pipes which has impeded completion of the plant and increased its actual and projected costs.

In short, the projected costs of the Midland plant have increased 737% from $370 million to $3.1 billion. There have been approximately 11 years of construction which could easily escalate to 15 years before completion of the plant.

Moreover, energy needs were either not originally considered by MPSC or substantially overestimated, according to Commissioner Anderson. When the Midland units become operational in 1984, they will generate approximately 1,350 megawatts (mw) of electricity. In 1984 alone, Consumers expects an excess summer generating capacity of 35.4% (1,842 mw) and an excess winter capacity of 56.6% (2,323 mw). Moreover, in 1985, the excess capacity is estimated to be 38.3% (2,113 mw) for the summer and 50.1% (2,609 mw) for the winter season. MPSC case no U-6360, *supra,* dissent, p 5. Nevertheless, Consumers still maintains that this plant is needed because their energy forecasts indicate strong future energy demand. However, there is no record of commission consideration of this point in a securities case, although the staff of the MPSC generally considers a 20% reserve capacity as being desirable. MPSC case no U-6360,

*supra,* dissent, p 5. Moreover, justification for increased energy capacity is based on an assumption of increased energy usage and demand which is not taking place. This problem is further exacerbated by the fact that these excess reserves are resulting in a period of energy conservation.

In her dissent in case no U-6360, Commissioner Anderson stated after reviewing the procedural and construction history of the plant that:

> "The point is the Michigan Public Service Commission majority does not examine these relevant issues before or during construction. Instead, it allows a utility company's investors to put millions or, as in this case, billions of dollars into facilities that it claims will be evaluated for viability at the time a company requests inclusion of such facilities in its rate base."

## II. FACTS (DETROIT EDISON)

### *A. Edison I: MPSC Case No U-6217*

On July 26, 1979, Detroit Edison filed an application with the MPSC requesting authorization to issue $625 million of long-term securities needed to finance the continued construction of the Fermi 2 nuclear generating plant, the Belle River coal-fired generating plants and the refunding of short-term and long-term debt. The commission issued a notice of inquiry which scheduled hearings to begin on September 12, 1979. The Attorney General and the Michigan Citizens Lobby (MCL) intervened, arguing and presenting evidence that the utility's forecasting of future energy needs was inaccurate; the utility's reserve energy capacity was too large; the nuclear plant was more expensive than coal-fired plants; and the cost overruns

of the Fermi 2 indicated that the plant was more expensive than the utility had acknowledged.

On April 1, 1980, the MPSC issued its opinion and order approving the application of the company. The commission, however, held that the evidence in opposition to the securities request was irrelevant and immaterial in carrying out the intent of the securities act. The intervenors then filed a delayed application for leave to appeal in the Court of Appeals which was denied on June 11, 1980. Later, they filed an application for leave to appeal in this Court and in lieu of granting leave we remanded the case to the Court of Appeals for consideration as if leave was granted. 411 Mich 903 (1981).

*B. Edison II: MPSC Case No U-6557*

On July 29, 1980, the utility once again filed an application seeking authority to issue up to $1.996 billion of securities needed to finance the continued construction of the power plants and to refund outstanding short-term and long-term debt. On August 22, 1980, the commission issued a notice of inquiry which scheduled hearings to commence on September 24, 1980. Once again the Attorney General and the MCL intervened, presenting evidence relating to the need and cost-effectiveness of the plants. On July 7, 1981, the commission authorized the issuance and held that evidence relating to electric load forecasting and generating plant alternatives was irrelevant and immaterial in carrying out the intent of the securities act.

On July 27, 1981, the intervenors filed in the Court of Appeals a claim of emergency appeal, an emergency complaint for an order of superintending control, an emergency application for leave to appeal and a motion for immediate consideration and stay of the order. The Court of Appeals issued

an order granting the motion for immediate consideration, application for leave to appeal and stay of the proceedings. On August 6, 1981, Detroit Edison filed an application for emergency leave to appeal and to vacate the stay in this Court. We denied leave on August 14, 1981. 411 Mich 1028 (1981).

While the Edison orders were being appealed, Consumers Power's securities order (MPSC case no U-6360) was being appealed to the Court of Appeals by the Attorney General. The Court of Appeals denied leave. The Attorney General immediately sought emergency relief from this Court, and on September 15, 1981, we granted a stay of the commission's order and bypass of the Court of Appeals. We also granted bypass on our own motion in *Edison II* and ordered all three cases consolidated for argument. 411 Mich 1063-1065 (1981).

We lifted the stay in *Edison II* and *Consumers Power* on October 16, 1981. 411 Mich 1064, 1065 (1981).

*C. The Fermi 2 and Belle River Plants*

Although the Midland plant has been plagued by many more construction problems, the construction history of the Edison plants reflects a similar pattern under the regulatory supervision of the MPSC. Specifically, there are two coal-burning plants (Belle River units 1 and 2) and one nuclear plant (Fermi 2) where there are allegations of construction cost overruns, waste, and inaccurate energy demand forecasts.

The Fermi 2 plant has experienced 14 cost overruns since its construction began in 1969. Originally it was projected to cost $229 million, but in the last several years the cost estimates have multiplied to $1.8 billion. Moreover, the utility has

acknowledged that it cannot guarantee against further cost overruns, and it admitted that the final costs of the plant may include an additional $200 million. Similarly, the Belle River units have also experienced cost overruns. The most recent projected cost overrun was for $500 million. Like the Midland plant, there was no determination of feasibility by the commission on the record when the original securities to finance these plants were requested by Detroit Edison.

## III. CONTENTIONS OF THE PARTIES

Because of the difficulty in defining the issues in the instant case, a review of each party's position will clarify our analysis of the statutory requirements as they apply to security cases and to a lesser degree in rate order cases.

### *A. Attorney General's Position*

Basically, the Attorney General, in challenging the regulatory behavior of the MPSC, believes that under the securities act the MPSC must determine (1) that the plant or project financed by a securities issuance must be reasonably required as it relates to a utility's ability to render service in a cost-effective way; (2) that the amount of funds generated by the securities issue should be the approximate amount essential for the purpose of the utility; and (3) that the purposes for which the funds are used must be lawful—conform to applicable statutes and regulations. Thus, the Attorney General argues that:

> "In order to determine whether a plant is 'reasonably required', and the amount spent on it 'essential', the commission must examine carefully the forecasted need for the plant's energy output. If forecasts show that a plant is unneeded to meet future demand, then investors

will suffer because the PSC cannot lawfully permit the plant to earn a return as part of the utility's 'rate base'. The alternative is to charge ratepayers for a plant they do not need."

Furthermore, the Attorney General believes that this determination must be made every time authorization to issue securities is requested by a utility.

For support of his position, he argues that this Court has construed the securities act as protecting not only the interest of investors from overcapitalization but also in protecting the interests of ratepayers by insuring efficient service at reasonable rates. *Indiana & Michigan Power Co v PSC,* 405 Mich 400, 410; 275 NW2d 450 (1979); *Michigan Gas Storage v PSC,* 405 Mich 376, 390; 275 NW2d 457 (1979). Moreover, he contends that other jurisdictions with similar acts have required proof of reasonableness, essentialness and lawfulness through load forecasting and cost-benefit analyses. *E.g., People v Willcox,* 207 NY 86; 100 NE 705, 706-707 (1912).

Under his analysis, the commission has violated its statutory mandate to make such determinations because it has ignored the forecasting evidence presented by intervenors in several securities cases. The reason that the MPSC has failed to consider such evidence is that it has consistently interpreted the act too narrowly when compared to its apparent legislative purpose.

In short, the Attorney General believes that the MPSC has routinely approved the reasonableness of Consumers' expenditures in constructing the Midland plant during its various phases.

*B. Michigan Public Service Commission's Position*

Initially, the MPSC took the position that under

the act it only had to determine, regardless of whether the requested securities were to finance new construction or ongoing construction, whether the issuance was necessary for construction of a plant which was reasonably required for the purpose of the utility. Secondly, it determined whether the funds generated by an issuance were to be applied for a lawful purpose. This means that the issue and the amount were essential to the successful carrying out of this purpose.

In response to the Attorney General's challenge of its regulatory behavior in security cases, the commission has modified its position somewhat. It now concedes that before approval of the initial issue of securities, a thorough and complete examination into the necessity of the construction of generating plants is appropriate. After approval of initial securities, however, MPSC believes re-examination is not necessary because of the time involved, the risk it would create for the investment community and the fact it would be duplicative.

The commission also disputes the case law which the Attorney General cites in support of his statutory interpretation. In addition, it finds support for its position by arguing that since proposed amendments to the act were not enacted by the Legislature, this Court should not interpret the language "reasonably required for the purpose of" a utility to include the objectives of siting legislation.

The MPSC also argues that in any event the determination argued for by the Attorney General has been made. It believes that it has considered the construction program of Consumers Power in 30 security cases since 1970. In approving the various security requests for purposes of constructing the plant, the MPSC argues that it found that the construction of the plant was lawful and that

it was reasonably required for the purposes of the utility. The continued authorizations of funding also indicated that the commission believed that the amount of funds requested was essential for the purposes of completing the plant.

Similarly, the MPSC contends that the examination requested by the Attorney General is not necessary as the construction program has also been considered in several ratemaking cases since 1970. In fact, the commission, in case no U-6360, stated that:

> "Adequate protection against unreasonable and imprudent expenditures by the applicant is provided by the statutory provisions governing the setting of rates for that applicant. The commission does not feel that the Legislature intended to provide the same protection for the ratepayers under the rate setting statutes and securities act."

Thus, the MPSC believes that the securities act vests it with authority to authorize the issuance of securities after determining that the securities are reasonably required for the ongoing construction of a generating plant where already the commission has continually authorized the issuance of securities through the various phases of construction.

*C. Consumers Power*

Consumers Power seems to argue even more strongly that the Midland plant had been considered in several rate cases. Implicitly, under its analysis, the fact that construction work in progress related to Midland was included in the rate base after being objected to by the Attorney General supports the notion that a re-examination does not have to be undertaken every time a

securities request is made. Edison made similar arguments.

## IV. A REVIEW OF THE SECURITIES AND RATE ORDERS DURING THE ONGOING CONSTRUCTION OF THE MIDLAND PLANT

Although the MPSC maintains that it has considered the feasibility of the construction program of the utility in several securities and rate orders which would have included the Midland plant, a review of these cases indicates, however, that on the record the commission has neither examined nor established the need, reasonableness and economic feasibility of this plant before or during construction. As Commissioner Anderson pointed out in her dissent in case no U-6360, the MPSC has not really addressed the problems of the Midland plant.

> "What the majority [of the MPSC] fails to note is that *this* commission does not address these serious concerns at *any* time. Instead the majority states that the securities act does not bind it to include the total plant cost in the company's rate base. It thus implies that Consumers is proceeding at its own risk." (Emphasis in original.)

Moreover, the MPSC denies that it has followed a routine approval of reasonableness during the construction of the Midland plant. Our review of the past orders, however, indicates that the MPSC has, without adequate specific findings of fact to support the conclusions reached, approved the reasonableness of the utility's construction program every time that it has applied for the authorization to issue securities.

*1. Securities Order Cases*

On March 8, 1968, after the plans for the Midland plant were announced in 1967, Consumers Power filed an application for authority to issue first mortgage bonds. In MPSC case no U-3050 (April 11, 1968), the commission granted the utility's $55,000,000 request. No specific statement that such funds were to be used for beginning construction of the Midland plant appears either in the application or in the order. At best a logical inference can be drawn from the timing of the request and order to indicate that a portion of the funds was to be used for the construction of the new Midland plant.

The MPSC made the following findings of facts in its order:

(1) The utility proposed to make capital expenditures in the year 1968 amounting to approximately $194,394,-100. Included in this total was the amount of $958,000 relating to the Ludington Pumped Storage Generating Plant.

(2) "The expenditures set forth [by Consumers in its application] were and are necessary for the acquisition of property, the construction, completion, extension or improvement of facilities, or for the improvement or maintenance of service."

(3) The funds were for the above purpose and also for the discharge or lawful refunding of obligations.

(4) The funds are to be applied to a lawful corporate purpose, the issue is "essential" for such purpose and is reasonably required for the purposes of the company.

From these conclusory findings developed solely from data Consumers supplied in its application, the MPSC authorized the issuance of these bonds without an indication for what specific projects the funds would be used.

In addition, MPSC authorized this security issuance without considering on the record the need

and cost-effectiveness of the Midland plant or any other proposed or existing construction project:

"2. The proceeds from the sale of said first mortgage bonds authorized by this order shall be used for the acquisition of property, the construction, completion, extension or improvement of facilities, or for the improvement or maintenance of service, or for the discharge or lawful refunding of obligations, including short-term bank loans, which may be made for such purposes.

* * *

"4. Our action herein approving the issuance of $55,000,000 of first mortgage bonds shall not be construed as passing upon the necessity for or feasibility of the Ludington Pumped Storage Generating Plant project."

Later in 1968, a similar application for first mortgage bonds resulted in the same litany of conclusions and the authorization to issue another $55,000,000 of bonds. MPSC securities case no U-3229 (September 12, 1968).

From 1969 to 1977, as the commission authorized every securities request without requiring the utility to specify on the record for what projects the funds were to be used and without examining on the record the need and cost-effectiveness of any new or existing construction program. During this period, there were at least 23 securities requests by Consumers which resulted in the authorization to issue various types of securities without any record of evaluation by the MPSC other than its litany that the utility's expenditures were economically necessary "for the acquisition of property, the construction, completion, extension, or improvement of facilities, or for the improvement or maintenance of service and were lawful,

essential and reasonably required for the purposes of the utility".

It was not until 1977 that the MPSC in a securities case addressed the general needs of Consumers' ongoing construction program as it related to energy production. In MPSC case no U-5388 (May 16, 1977), in an application hearing for authority to issue and sell securities, the utility presented evidence of future energy production and sales forecasting. The MPSC implicitly adopted this evidence as justification for the order to issue the securities even though need of the Midland plant was not considered by name. However, the staff of the MPSC requested that in all future applications the utility should present evidence "supported with testimony, [which gives] a full summary of the extent of its construction program relating that program in a precise way to its estimate of future energy sales and load for both electric and gas operations".

The commission thereafter continued to require the utility in securities requests to present evidence on energy and sales forecasting. It was not, however, until 1978 that the MPSC started to question the testimony and data presented by Consumers Power. In MPSC case no U-5836 (August 21, 1978), the commission stated in its findings of fact that:

> "The staff, through its counsel, supported the proposal of Consumers Power Company, but expressed concern over the possibility that applicant would have excess generating capacity, over and above reasonable reserve capacity, in the early 1980s. The staff requested that in its next security issue application Consumers Power Company present proofs regarding the likelihood and extent of capacity in excess of reasonable reserve requirements and plans or studies for the utilization of such excess capacity if it materializes."

Yet, it still did not require the utility to specify what projects the funds would be used for, or determine the need and cost-effectiveness of its ongoing construction program.

In MPSC case no U-6068 (October 9, 1979), the Michigan Citizens Lobby (MCL), Public Interest Research Group in Michigan, and the Great Lakes Energy Alliance intervened, challenging the Midland plant in a securities request where the MPSC authorized the utility to sell various types of stock to finance its construction program. The intervenors presented evidence that a delay in the construction of the Midland plant for one year would benefit ratepayers by $110.2 million. In addition, they argued, through their introduction of evidence, that the funds to be generated by the requested securities were not reasonably required for the utility's ongoing construction of the Midland plant as there were less expensive ways to produce electric energy. *Id.*

The commission rejected these contentions, ruling that the requirements of the securities statute were met as the funds were for the purpose of constructing nuclear plants. "As is evident from the statute, the purpose need not be reasonable; the purpose [of construction] need only be lawful. The use of the funds, however, must be reasonable."[4] Thus, the position of the commission was to implicitly accept that the purpose of construction was reasonable by using a limited and erroneous construction of "lawful" to find a lawful purpose and then only requiring that the use of the funds

[4] The commission's reasoning is erroneous. MCL 460.301(1); MSA 22.101(1) provides that the MPSC must find that "the use of the capital or *property* to be acquired to be secured by the issue of the [securities] is reasonably required for the purposes of the * * * corporation". In other words, the property must be reasonably required for a proper utility purpose. The use of funds derived must be lawful and essential under subsection (3).

be reasonably related to accomplishing the construction.

In MPSC case no U-6360 (August 4, 1981), the instant matter, the utility requested authority to issue various securities so that it could continue its construction program which included the Midland plant. The Attorney General and the MCL once again intervened, presenting evidence that the Midland plant was not cost-effective and that the applicant's energy and sales forecasting was inaccurate. The position of the intervenors was that the MPSC had never approved the Midland project by investigating its economics. They believed that the utility had to prove:

> (1) that the applicant's long-range energy forecasts and generation planning are reasonable and require construction of the Midland plant;
>
> (2) that the proceeds of the issuance are reasonably required for Midland, as opposed to an alternative;
>
> (3) that the amount of the proceeds requested for the plant is reasonable;
>
> (4) that issuing securities for the amount requested is essential for successfully meeting the applicant's generation needs.

The commission, however, ruled that the evidence of forecasting and cost-effectiveness was not at that point relevant in making a determination regarding the issuance of securities needed to finance ongoing construction of the plant. Under its interpretation of the securities statute, the MPSC stated that "it is not reasonable in the context of securities proceedings to examine the need for, and the cost-effectiveness of the power plant *once actual construction has commenced* and that such examination does not further the purpose of the securities act to protect against overca-

pitalization and serve the interests of customers in efficient and uninterrupted service at a reasonable rate" (emphasis in original).

In security case no U-6360, the MPSC had changed its position established in security case no U-6068 where it had maintained that a determination of the legislative standard "reasonably required" need not include a determination of need and cost-effectiveness. Thus, in the later security case no U-6360 its position seemed to be implicitly that such a determination was necessary and had been made in the earlier proceedings but once actual construction was commenced such an examination does not achieve the purpose of the act which is to protect against overcapitalization and to serve the interest of ratepayers. Furthermore, the MPSC recognized that the securities act concerned not only overcapitalization but "the interests of customers in efficient and uninterrupted service at a reasonable rate".

In short, a review of the important security order cases during the various phases of construction of the Midland plant indicates the following:

(1) That throughout the years the proceedings under the MPSC have become more adversarial and complex, but the issues have only recently been better defined on the record.

(2) The MPSC has never on the record indicated specifically the project's inclusion in the utility request for the securities approval nor has an MPSC order specified for what project the funds from the authorized securities would be used.

(3) The commission has never on the record conducted an analysis of whether the Midland plant was needed and cost-effective, but has entered orders requesting such information from the utility.

(4) The MPSC has changed its position on whether a determination of need and cost-effectiveness ever has to be made under the securities act from denying such a determination had to be made to stating such a determination had to be made but only in connection with approval of the first securities application.

(5) The MPSC has recognized that a securities act proceeding concerns not only overcapitalization but also service at reasonable rates.

*2. Rate Order Cases*

The MPSC and the utility, in response to the Attorney General's demand for an examination of need and cost-effectiveness, argue that the Midland plant has been "considered" in seven rate cases since 1970. An extensive review of these orders, however, initially indicates more concern by the MPSC with the utility's decline in earnings as it relates to the rate base than in the feasibility of the financing of new and ongoing construction of energy plants.

In MPSC rate case no U-4174 (November 24, 1972), the utility requested a rate increase of $29,012,000. Because of the utility's declining earnings and lack of ability to finance its construction program, the MPSC required the utility to file a proposed financing plan for the next five years and to file a semi-annual report on the progress of its construction program including "the status of each project, an estimate of percentage completion, expected in-service date, slippage from initially projected in-service date, * * * current estimated cost and initially estimated cost and other significant data".

In MPSC rate case no U-4576 (January 23, 1975), the commission, without identifying the

Midland plant, rejected the Attorney General's argument that the costs of Consumers' new generating plants were irrelevant as it related to inclusion in the rate base. Thus, the MPSC was concerned with the utility's erosion of earnings and not with the need and cost-effectiveness of any energy plants.

The MPSC, however, showed some movement in "considering" the Midland plant in MPSC rate case no U-5331 (July 31, 1978). The Public Interest Research Group in Michigan (PIRGIM) intervened and requested that all construction work in progress related to the Midland plant be excluded from the utility's rate base. The issue arose because PIRGIM believed that Consumers' load forecasting techniques were inaccurate. The commission, without addressing whether the specific forecasting was accurate, ruled that the construction work in progress associated with the Midland plant should be included in the rate base because sale and demand forecasting is inexact; some growth in demand was expected; the commission believed that the plant would provide power at a comparable price; and the cost of absorbing the Midland plant would be less than the cost of terminating construction.

Although the commission in this rate case included the costs of the construction work in progress of the Midland plant in the rate base, there was no examination of need and cost-effectiveness of the plant.

In MPSC rate case no U-5281 (March 14, 1980), the commission, on its own motion, addressed the appropriate treatment for ratemaking purposes of the direct and indirect costs of construction. By following its past practice, the commission included construction work in progress in the rate base but listed the allowance of funds used during

construction as an increase in the utility's net operating income.

In rate case no U-5979 (August 8, 1980), although the MPSC included the construction work in progress associated with the Midland plant, it refused to include a transmission plant used with the Midland plant because the Midland plant was not yet operational. Once again the commission refused to consider that the utility's load forecasting was unreliable as it related to the Midland plant.

In addition, MPSC recognized that the utility had to develop a plan which would employ cost-effective load management and conservation tools as an alternative to power plant construction. After millions of dollars had already been spent on the Midland plant, the MPSC finally recognized that some sort of cost-effectiveness analysis had to be made of energy plants in future rate cases.

In summary, we find that there has been a steadily increasing depth of consideration of the Midland plant in the rate cases. Our question, therefore, is whether the limited and fragmented inquiry in the rate cases is sufficient to fulfill the legislative requirements of the securities act.

Incidentally, we review only the *Consumers Power* record in depth as it is for a longer period and fuller and presents the problems we must consider.

## V. SECURITIES ACT

The basic issue in these cases, we have said, is the amount of protection the Legislature intended in the securities act to provide both utility investors and ratepayers through the MPSC. We have observed that there are essentially three types of

protection in question: complete feasibility investigations, first, at the original financing application; second, at subsequent financing applications; and third, at rate proceedings. In these cases there is no issue that such investigation is not required at the third or rate hearing. Our basic issue then is whether a complete feasibility examination is required first, at the original financing application, and second, at subsequent financing applications. The Attorney General contends the answer is yes as to both. The utilities contend there was such an examination at the original financing whether required or not and that no such examination is required at subsequent applications. The MPSC contends the answer is yes in the first instance but no in the second. Our brother LEVIN holds no such examination is required either time. We hold such an examination is required at the original financing application but normally not at subsequent ones.

Let us for convenience set forth the pertinent statutory language again:

"Sec. 1(1) [Certain public utilities] * * * may issue [more than 12-month securities] if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations * * * if the public service commission issues an order authorizing the issue and the amount of the issue, and states that in the opinion of the commission the use of the capital or property to be acquired to be secured by the issue of the [securities] is reasonably required for the purposes of the * * * corporation * * *. Approval of securities does not presume that the projects to be constructed or property to be acquired will be included in the company's rate base.

* * *

"(3) If from the application filed and other information obtained from the investigation authorized in this act the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes * * * the commission shall grant authority to make the issue * * *."

The most significant and important consideration in these cases, and more broadly in the kind of protection both utility investors and ratepayers will receive in Michigan, is how this Court reads the Legislature's intention in the securities act. In order to make an informed judgment, it is well to study the analyses of the parties in these cases.

*A. Party Analysis*

The Attorney General's brief instead of making its own analysis of the pertinent statutory language sets forth the colorful opinion of the hearing officer in the Consumers Power case. This opinion finds that the Legislature in the securities act intended the MPSC to make a complete feasibility investigation at both the original and subsequent financing applications. The hearing officer's opinion states in part:

"[D]o the provisions of the securities act permit an inquiry into the cost-effectiveness of Midland versus other generating or construction alternatives? Is this a relevant issue in this proceeding? This administrative law judge finds and concludes that it is.

"First, the plain language and *structure* of the securities act must be examined. Section 3 requires a finding that the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes, are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes. Section 1 requires the commission to state in

its opinion that the funds (from the securities issuance) are reasonably required for the purposes of the corporation. As such, this applicant must show not only that the funds are for a lawful purpose but that they are reasonably required. The requirements in section 1 are separate and distinct from the requirements of section 3. Neither section depends upon an interpretation of the other section to ascertain its meaning. Each may be read separately without resort to the other.

"In section 3, the word 'purposes' appears twice in the first sentence. The first time it is used it is modified by the word 'lawful'. The second usage of the word 'purpose' in the same sentence must carry the same modification. That means that that part of the sentence should read as though it says * * * and that the issue and amount is essential to the successful carrying out of *that lawful purpose.*

"No such modification of the word 'purposes' appears in section 1. Its omission must be considered to be intentional and done for a reason. That reason is that the Legislature did not intend to tie the commission down to looking at only whether the purpose was lawful, and then examining whether the funds were essential to carrying out *that specific lawful purpose,* and whether they were reasonably required for *that specific lawful purpose.* If the legislative intent were different, it would have included the above requirements in the same section under the same modification to the word 'purpose'.

"*Is this interpretation practical? Everybody agrees that at the least the statute is designed to prevent overcapitalization. Only the above interpretation will serve that interest. Assume, in an admitted absurdity, that XYZ Electric Company desires to reproduce a 'Taj Mahal' for its general offices. Under the interpretation of the applicant and the staff, we first look to see if it is a lawful purpose. Yes, XYZ Electric Company has a perfect legal right to construct such a building. Then we would look at subsequent security issues to determine only whether they were essential to complete that project and whether they were reasonably required to complete that project. Under the applicant's and staff's interpretation, those security issues would be approved*

*with no further inquiry and examination than that. When the cost of the 'Taj Mahal', or part of it, is later rejected for inclusion into the rate base, overcapitalization will have automatically occurred, and the commission will have been powerless to stop it under the applicant's and staff's interpretation of the securities act.* [Attorney General's emphasis.]

"But the securities act was designed for just the opposite purpose—to give, not deny, the commission an opportunity to take a look at the possibility that overcapitalization might occur if a certain securities issuance is approved. Under the applicant's and staff's interpretation of the securities act, overcapitalization in the above example could only be prevented by including the project in the rate base. The investor would then be protected, but only at the expense of the ratepayers."

The defendant utilities did not directly interpret the language of subsections (1) and (3) establishing the criteria for MPSC judgment in allowing a securities issue. Consumers Power concentrated on the alleged discretionary power of the MPSC in making an investigation rather than concentrating on what the Legislature obliged the MPSC to find before authorizing a securities issue. It is true subsection (2) does give the MPSC discretion as to the depth of investigation it will undertake. But subsections (1) and (3) establish what the MPSC must find, and the Consumers Power brief does not come to complete grips with analyzing those subsections. The Detroit Edison brief likewise does no basic analysis of the language of subsections (1) and (3), although it extensively reviews MPSC interpretation of the statute. While the Detroit Edison brief refers to the discretionary limits of the commission's investigation, it relies mostly on the idea that the transmission act is *the,* and in its mind the only, "appropriate time and place for extensive review of the need for a power plant",

and also on the idea that the utilities can finance construction projects with short-term debt without commission approval.

The MPSC brief makes a thorough and specific analysis of the language of subsections (1) and (3), more particularly in its *Consumers Power* case brief. After quoting the statutory language with emphasis on the appropriate words, the brief refers to and quotes from Michigan case law. Among the pertinent quotations are the following extracts.

"The commission is concerned with the stock, or bond, issue, the foundation, security and necessity therefor, and the purposes to which the fund acquired by sales thereof are to be devoted." *Venner v Michigan Railroad Comm,* 205 Mich 573, 582; 172 NW 567 (1919).

"Proper securities regulation serves the interest of the ratepayers in assuring continued service without interruption from utilities and in receiving that service at reasonable rates." *Michigan Gas Storage Co v Public Service Comm,* 405 Mich 376, 391; 275 NW2d 457 (1979).

"Briefly, we are convinced that securities regulation was intended to, and does, protect interests which rate regulation alone could not effectively control. It serves the interests of both the investors in, and creditors of, a company organized and operating and issuing securities under the laws of this state and those of ratepayers in efficient and uninterrupted service at reasonable rates. *People v County Transportation Co,* 303 NY 391; 103 NE2d 421 (1952), *app dis* 343 US 961 (1952). There is no reason to believe that the Legislature intended to reserve use of this valuable tool for serving the public interest to cases where rates are also being regulated while leaving some companies free to issue securities without public participation. The statutory language gives no indication of any such intent and we will not read limiting language into it." *Indiana & Michigan Power Co v Public Service Comm,* 405 Mich 400, 410-411; 275 NW2d 450 (1979).

With that general introduction, the MPSC brief directs its attention to the interpretation of subsections (1) and (3) of MCL 460.301; MSA 22.101 directly as follows:

"1909 PA 144, § 1, *supra,* is clear and unambiguous with respect to the purposes for which securities may be issued by an electric utility. An electric utility may only issue securities for the acquisition, construction, or improvement or capital assets used in its business of providing utility service or for the refunding or discharge of obligations previously issued for that purpose. 1909 PA 144, § 1, *supra,* is also clear and unambiguous with respect to the commission's duty to authorize the issuance of securities when the proceeds are to be applied to a lawful purpose of an electric utility and the issue and amount is essential to the successful carrying out of the purpose of an electric utility. Electric generating facilities are capital assets and security for debt and stock. The acquisition or construction of electric generating facilities is a lawful corporate purpose of an electric utility and necessary for the utility to provide service. Thus, if there were no other requirements in 1909 PA 144, § 1, *supra,* the commission would have to authorize an electric utility to issue securities in the amount necessary to construct an electric generating facility. However, 1909 PA 144, § 1, *supra,* requires that securities may only be issued if the commission authorized the issuance in an order stating the use of the capital secured by the debt or stock is reasonably required for the purposes of the electric utility, and the meaning of the term 'reasonably required' is what this Court must determine.

"The Court's determination of the legislative intent in requiring the commission to state that the capital to be acquired by the issuance of securities for the continued construction of electric generating facilities is reasonably required for the purposes of an electric utility in an order authorizing the issuance of such securities will decide this case and affect pending security cases and future security cases under 1909 PA 144, § 1, *supra.*"

The MPSC brief then concluded as follows:

"A thorough and complete inquiry by the commission into the necessity of the initial issue of securities for the construction of generating facilities is appropriate. However, once construction of a legitimate utility project is commenced, and particularly where construction is well-progressed toward completion following previous commission security and rate case determinations, as in this case, the continued construction of generating facilities need not be subject to a securities inquiry equally as extensive as the initial inquiry, because of the time involved and the resulting uncertainty upon the investment community as to whether the commission would, year after year, authorize additional securities for a project. Thorough and repeated inquiries before the commission relative to the need or cost-effectiveness of plants under construction or nearing completion also unreasonably focuses upon the same or similar issues, are duplicative, and cause unreasonable delays in both the construction itself and the financing thereof."

*B. Our Analysis*

Again for convenience, let us set out the pertinent language of subsections (1) and (3) of MCL 460.301; MSA 22.101, because it is the guide to our proper interpretation of the Legislature's intentions as to the protection it wished to provide:

"Sec. 1(1) [Certain public utilities] * * * may issue [more than 12-month securities] if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations * * * if the public service commission issues an order authorizing the issue and the amount of the issue, and states that in the opinion of the commission the use of the capital or property to be acquired to be secured by the issue of the [securities] is reasonably required for the purposes

of the * * * corporation * * *. Approval of securities does not presume that the projects to be constructed or property to be acquired will be included in the company's rate base.[5]

* * *

"(3) If from the application filed and other information obtained from the investigation authorized in this act the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes * * * the commission shall grant authority to make the issue * * *."[6]

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[5] The provision reads as follows:

"A person, corporation, or association, or a lessee or trustee of a corporation or association, except a municipal corporation or the owner of a renewable resource power production facility as provided in section 1a, organized or authorized to do business under the laws of this state, owning, conducting, managing, operating, or controlling a plant or equipment within this state used wholly or in part in the business of transmitting messages by telephone or telegraph, producing or furnishing heat, artificial gas, light, water, or mechanical power to the public, directly or indirectly, a railroad, interurban railroad, or other common carrier, or a corporation, association, or individual exercising or claiming the right to carry or transport natural gas for public use, directly or indirectly, or petroleum oil by or through a pipeline or engaged in the business of piping or transporting natural gas for public use, directly or indirectly, or engaged in the business of purchasing natural gas for distribution may issue stocks, bonds, notes, or other evidences of indebtedness payable at periods of more than 12 months after the date of issuance, if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations and may issue stock to represent accumulated earnings invested in capital assets and not previously capitalized, if the public service commission issues an order authorizing the issue and the amount of the issue, and states that in the opinion of the commission the use of the capital or property to be acquired to be secured by the issue of the stock, bonds, notes, or other evidences of indebtedness, is reasonably required for the purposes of the person, corporation, or association, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized. Approval of securities does not presume that the projects to be constructed or property to be acquired will be included in the company's rate base."

[6] MCL 460.301(3); MSA 22.101(3). The provision provides that:

"If from the application filed and other information obtained from

The following criteria clearly express the Legislature's intentions as to what protections it had in mind. "[C]orporation * * * may issue [securities]"

(1) "if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities * * * or for the discharge or lawful refunding of obligations"

(2) "if the public service commission issues an order authorizing the issue and the amount of the issue * * *"

(3) [if the commission] "states that in the opinion of the commission the use of the * * * property * * * is reasonably required for the purposes of the * * * corporation"

(4) there is no presumption that approval of securities means inclusion in rate base

(5) "if * * * the commission is satisfied the funds derived from [the securities] are to be applied to a lawful purpose"

(6) "if * * * the commission is satisfied * * * that the issue and amount is essential to the successful carrying out of the purposes"

*(1) Necessary for Acquisition of Property, etc.*

This criterion obviously limits the purposes for which the funds from a security issue may be used. It appears to cover a fairly broad spectrum of projects. Whether it is intended to be inclusive or exclusive, we need not here decide, as the

the investigation authorized in this act the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized, the commission shall grant authority to make the issue. In granting the authority, the commission may impose as a condition of the grant reasonable terms and conditions that the commission considers proper."

projects at issue in these cases appear to fall well within the spectrum. The major project is the completion of a nuclear reactor. There is also some refunding.

*(2) Authorization of Issue and Amount of Issue*

This criterion is important in that in addition to approving an issue, the commission must authorize the amount of the issue. This point ties in with the same point made in succeeding criteria when the significance of the point becomes more apparent.

*(3) Reasonably Required for the Purposes of the Corporation*

This criterion is a crucial one in our consideration as to the depth of protection the securities act provides. No securities may issue unless "the capital or *property* [is] * * * reasonably required for the purposes of the * * * corporation" (emphasis added). As noted in this case we are principally concerned with property, completing a nuclear reactor.

The phrase "purposes of the * * * corporation" is pregnant. It embodies the whole utility regulatory scheme, because the purposes of the utility corporation must be consonant with the aims of regulation. The aims of regulation envision economically healthy corporations providing adequate services at reasonable rates and earning reasonable profits. As a consequence, the project to be financed by the securities issue is impregnated with that purpose. The project must be devoted to providing adequate service at a reasonable rate and earning a reasonable profit.

The phrase "reasonably required" indicates that the MPSC may not authorize the issue of securities unless in its opinion the "use of the capital or *property* to be acquired to be secured by the issue

of [securities] is reasonably required for the purposes of the * * * corporation". In other words, the commission must have satisfied itself that the project to be undertaken is reasonably required to further a corporation purpose such as we have described.

Obviously this charge upon the MPSC is a heavy one. It must determine and state that in its opinion the project is reasonably required in the context of the aims of the regulatory system, *i.e.,* a healthy utility rendering adequate service at a reasonable rate and earning a reasonable return. It is impossible to visualize this determination except after a complete feasibility examination.

*(4) No Presumption Securities Approval Means Automatic Rate Base Inclusion*

This provision is sometimes cited to argue that subsection (1) does not require a complete feasibility examination. In our opinion the correct interpretation of this subsection is quite the opposite. Consideration of the exact language is significant:

> "Approval of securities does not presume that the projects to be constructed or property to be acquired will be included in the company's rate base."

This language was not originally a part of § 1(1). It therefore was presumably an afterthought because of conduct reactive to the original section. That conduct must have been the presumption that securities approval was equivalent to inclusion in the rate base. Inclusion in the rate base, however, cannot be presumed without some kind of feasibility examination, showing that the addition of the property to the base would be consonant with reasonable consumer rates and a reasonable rate of return to the utility. Obviously no such determi-

nation could be made without a feasibility study to some degree.

What then is the significance of the "no presumption" provision? Does it mean, as some believe, that feasibility examinations should cease or does it mean, as the language implies, that approval of securities creates no presumption of inclusion in the rate base? It is submitted that the latter interpretation is the correct one. On the one hand, if the Legislature had intended to ban feasibility examinations, it certainly would have used words to directly indicate that, which, of course, it has not. On the other hand, the "no presumption" proviso is perfectly compatible with the requirement of a feasibility study, in fact the only reason for having one. The occurrence of unforeseen factors or change in the economic situation or change in technology, engineering or management over the course of completing a project might very well mandate a new feasibility examination, for example.

In short, we believe the no-presumption proviso in no way prohibits feasibility studies but rather is perfectly compatible with them, in fact, implies that they are required.

*(5) Funds Derived Applied to Lawful Purpose*

The first thing to note is that this provision is in subsection (3) and the prior ones were in subsection (1). Subsection (1) concerns the propriety of the "use of capital or *property*". Subsection (3) concerns "funds derived" rather than "use of capital or *property*". This provision calls upon the MPSC to determine that the funds derived from the securities issue are not to be applied in violation of state or federal law. This, of course, was a significant factor in the construction of the Midland reactor where the federal government was

constantly changing safety regulations and requirements.

*(6) Issue and Amount Essential*

This provision ties in with provision 2. The commission must determine that the security issue will raise funds appropriate to carrying out the purposes, as approved in (3) and (5).

Our analysis of the pertinent provisions of MCL 460.301; MSA 22.101 makes clear that the MPSC, at least before approval of the original securities application, must make a complete feasibility examination to satisfy the statutory mandates.

Construing all these provisions together, we perceive that the Legislature had different although somewhat overlapping aims in subsections (1) and (3). In subsection (1) the Legislature mainly sets up objectives for the security issue. In subsection (3) the Legislature sets up tests for the "funds derived" from the securities.

In subsection (1), the Legislature set up two objectives. They both relate to "capital or property". The first objective is that the securities must be for either the acquisition or improvement of property or the discharge or refunding of obligations. The second objective is that the "use of capital or property" be reasonably required for the use of the corporation.

In subsection (3) the Legislature sets up two tests for the "funds derived" from the securities. First, the funds had to be applied to a lawful purpose. Second, the funds must be essential for the carrying out of the purposes of the corporation.

In these cases, the application of the objectives of subsection (1) shows first the nuclear reactor falls within "the completion * * * of facilities" test and second (2) the nuclear reactor must be

found by the MPSC to be reasonably required for the purposes of the corporation.

In subsection (3), the MPSC must find that the funds derived from the security issue are first, to be applied to a lawful purpose, and second, essential to the successful carrying out the purposes of the corporation.

The same kind of analysis could be made of that portion of the security issue devoted to the discharge or lawful refunding of obligations.

In short, we believe that the Legislature, by requiring securities to be reasonably required for the purpose of the applying utility, expected the MPSC to balance the interests of investors and ratepayers along with the interests of the utility *before* the original securities are issued to finance the construction of electric plants. In fact, the Legislature has given the MPSC broad powers in determining whether the commission should grant authority to issue securities. For the purpose of enabling it to determine whether or not it should issue such an order, the MPSC "may make an inquiry or investigation, hold hearings, and examine witnesses, books, papers, documents, or contracts the commission considers of importance in enabling it to reach a determination". MCL 460.301(2); MSA 22.101(2).

This balance will be achieved if the MPSC makes a complete feasibility examination at the time of the original application for financing and later evaluates the costs of the project when the utility requests inclusion in the rate base. Thus, we do not believe that the legislative intent was to allow a utility's investors to invest billions of dollars in a facility that the MPSC claims will be evaluated for viability at the time a company requests inclusion of the costs of such facility in its

rate base. Such a result would be inherently unfair to investors, the utility and its ratepayers. Moreover, this approach implies that a utility can proceed at its own risk even though the costs of construction may ultimately leave the utility impoverished and the ratepayers with an unwontedly swollen rate base. The commission has been forced to address this dilemma. It now recognizes that some type of determination or thorough inquiry should be made before the initial issuance of securities for the construction of an energy plant.

We agree with the commission, however, that in these particular cases it is too late in the day to make a *post hoc* examination about the need and cost-effectiveness of the plants. Therefore, we hold that the legislative standards of the act require the MPSC to make a thorough and complete inquiry into the necessity and cost-effectiveness at the time the commission is considering the initial issuance of securities for the construction of an energy plant.[7] Once construction of a lawful project is commenced after the initial issue is autho-

[7] MCL 460.301(1); MSA 22.101(1) becomes operative when (1) securities are issued for the "acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations"; and (2) securities are payable at periods of more than 12 months after the date of issuance.

A utility can proceed two ways in financing plant construction. It can, as occurred in the instant case, announce its plans to build a plant and then request securities payable at periods of more than 12 months to finance beginning construction. It is also possible that a utility could borrow money, or issue short-term evidence of indebtedness payable at periods of less than 12 months, to finance beginning construction. At some later date, it would then request securities or evidence of indebtedness payable at periods of more than 12 months to repay the obligations which were entered into for the construction of the plant.

The Legislature has stated that the standards of the act should be applied in both settings. In fact, this has been the position of the MPSC [MPSC's Appendix, p 12b]. Thus, our holding, by interpreting the act, must be followed in both settings.

rized, a redetermination should not be necessary under our statutory interpretation.

*B. Case Law*

Our interpretation of the securities act is supported by the relevant case law. We recognize that the interpretation of this statute by this Court has not remained static. Initially, we perceived the legislative purpose of the statute as protecting investors against the evils of overcapitalization. See *Peninsular Power Co v Secretary of State,* 169 Mich 595, 600; 135 NW 656 (1912). The early concern was not so much with the consuming public or ratepayers but with the equity or future equity owners of the utility companies. *E.g., Hillsdale Light & Fuel Co v Michigan Public Utilities Comm,* 220 Mich 101, 105; 189 NW 893 (1922); but see *Venner v Michigan Railroad Comm,* 205 Mich 573, 583; 172 NW 567 (1919).

Recently, this Court has broadened its interpretation of the apparent purpose of MCL 460.301; MSA 22.101. See *Indiana & Michigan Power Co v PSC,* 405 Mich 400; 275 NW2d 450 (1979); *Michigan Gas Storage v PSC,* 405 Mich 376; 275 NW2d 457 (1979). By recognizing that securities regulation and a utility's financial structure will impact on rates, we stated that securities regulation achieved important legislative objectives by protecting investors of a utility, creditors, and equally important, protecting ratepayers by assuring "efficient and uninterrupted service at reasonable rates". *Indiana & Michigan Power, supra,* 410. See also Roach & Reiss, *Administrative Law, 1979 Ann Survey of Mich Law,* 26 Wayne L Rev 359, 364 (1980).

In both cases, the utility companies filed applications with the MPSC for a disclaimer of jurisdiction or, alternatively, application under protest for

authorization to issue securities. The MPSC denied the request for disclaimer of jurisdiction and authorized the proposed securities. It also required both companies to pay fees based on the face value of the securities, which the utilities paid under protest. In addressing the basis under which the MPSC could assert jurisdiction over the utilities in a securities request, we unanimously stated that the apparent intent of the Legislature was not to protect only investors:

"Briefly, we are convinced that securities regulation was intended to, and does, protect interests which rate regulation alone could not effectively control. It serves the interests of both the investors in, and creditors of, a company organized and operating and issuing securities under the laws of this state and those of ratepayers in efficient and uninterrupted service at reasonable rates." *Indiana & Michigan Power, supra,* 410.

Although the Michigan courts until *Indiana & Michigan Power* seemed more concerned with the effects of overcapitalization on investors than on ratepayers, it was not so with the state of New York which has always had a similar statute.[8] In

[8] The New York statute was enacted in 1907 which was two years before the Michigan statute. In fact, Justice BIRD, in *Venner, supra,* 580, stated that "[t]he Michigan public utility act was taken bodily from the New York act".

The original New York statute provided:

"A gas corporation or electrical corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its plant or distributing system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations, provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof, and stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is reasonably required for the

fact, this Court has stated that the Michigan statute "may fairly be construed as though it read as the New York act reads". *Venner, supra,* 583.

In *People ex rel New York Edison Co v Willcox,* 207 NY 86, 93-95; 100 NE 705, 706-707 (1912), the New York court laid down the standard by which the New York Public Service Commission (NYPSC) had to fulfill in regulating utilities under the New York statute. In that case, the New York Court of Appeals reversed an order of the NYPSC which authorized the issuance of securities to be used in the acquisition of property upon which to construct power houses and substations. The court indicated that before a utility could issue securities to finance a new project under the New York statute the NYPSC had to protect the rights of the public by determining whether the new issuance, and implicitly the projects such securities would finance, were needed and would not lead to oppressive charges or rates:

"[The] law was enacted in response to a pronounced and insistent public opinion and was a radical and important modification of the relations and policy of the people toward the corporations which are its subjects. Its paramount purpose was to protect and enforce the rights of the public. It made the commissions the guardians of the public by enabling them to prevent the issue

said purposes of the corporation. For the purpose of enabling it to determine whether or not it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such gas corporation or electrical corporation may issue notes, for proper corporate purposes and not in violation of any provision of this or of any other act, payable at periods of not more than twelve months without such consent; but no such notes shall, in whole or in part, directly or indirectly be refunded by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the consent of the proper commission. * * *" L 1907, c 429, § 69; Public Service Commissions Law, § 69.

of stock and bonds for other than statutory purposes, or in appreciable and unfair excess of the value of the assets securing them, and to prevent also unneeded or extortionate competition, or indifferent and unaccommodating methods of operation or oppressive or discriminating charges or rates." *Willcox, supra,* 93-94.[9]

Moreover, in *People v Liberty Light & Power Co,* 121 Misc 424, 426; 201 NYS 302 (1923), the court, in an action brought to recover a penalty imposed by the public service commission law of New York because the defendant failed to comply with the provisions in relation to the issuance of stock, stated that:

"The objects sought by the legislature in the regulation of public utilities by the law here in question were, the prevention of corporate abuses and the protection of the public against excessive rates for services, the overcapitalization and the watering of securities, the establishment of a reasonable basis in operating expenditure, and the maintenance of investment security. The law places upon such corporations the burden of proving the need and security in its ventures for financial and corporate extension and provides that it must establish before the commission the facts of the proposals for expansion as being for the best interest of the public."

Thus, our over-all reading of the case law which has interpreted the legislative purpose behind the two similar statutes indicates that there is a clear statutory duty under which the MPSC should operate. The recent case law in Michigan and elsewhere stands for the proposition that the Michigan statute should be read as broadly as possible so that this state's regulatory system can accommodate not only the interests of equity own-

[9] Accord, *People v County Transportation Co, Inc,* 303 NY 391; 103 NE2d 421, 424 (1952).

ers but also the interests of ratepayers when securities are requested.

## VI. MPSC COMPLIANCE WITH LEGISLATIVE CRITERIA

We have developed the criteria that the Legislature intended for MPSC use in determining whether securities should issue. There remains consideration of how the MPSC has met these criteria.

The securities act contemplates judicial review by certiorari. MCL 460.301(6); MSA 22.101(6). This means that in addition to conclusions of law there must be findings of fact that support such conclusions of law. The courts can then determine whether there are any errors of law and whether the findings of fact support the conclusions of law and whether there are facts in the record to support the findings of fact.

Our review of the security and rate orders indicates a distressing repetition of the language of the statute as legal conclusions without discernible findings of fact supporting such conclusory language.

### *A. Security Orders*

In 1967 Consumers Power announced plans to construct a nuclear generating plant at the estimated cost of $256,000,000. Between April 11, 1968 and October 9, 1980 the MPSC issued 30 security orders for Consumers Power construction programs, including Midland. It is to these security orders that MPSC and the defendant Consumers Power refer in claiming that the commission made a complete feasibility examination.

The first securities orders after the Midland plant announcement was case no U-3050, April 11, 1968. There is another 1968 order, case no U-3229,

September 12, which is practically a mirror copy. Whether either of these is the first case authorizing the Midland plant cannot be definitively ascertained from the record, because it was not until 1976 that the MPSC made a specific reference to Midland by name.

Case no U-3050, April 11, 1968, is set out in Appendix A attached hereto. Only by perusal of the entire order is it possible to understand the vague and conclusory nature of the document. Commentworthy, however, is:

1. There is no description whatsoever of any particular item for which funding is asked or given.

2. The statutory language of the criteria is quoted in the findings of fact, without any quoted factual basis whatsoever. For example, finding E states in part "in the opinion of the commission the use of the capital to be acquired by the issuance of said bonds is reasonably required for the purposes of the company". That is all there is. There is no reference either to what the use of the capital is to be or for what purpose of the company would require that use.

In short, the MPSC orders of this date in no way satisfy the requirements of MCL 460.301; MSA 22.101 nor the kind of record needed for judicial review.

*B. Rate Orders*

During the oral arguments, Justice KAVANAGH several times asked, "Was there any determination made before the plant was started that it was necessary?" Mr. D'Hondt for the MPSC replied that the MPSC eventually answered the question as to whether the plant was necessary in 1978 in *Re Consumers Power Co,* 25 PUR 4th 167 (case no U-5331, July 31, 1978). This case appears to be the

first time that the Midland plant was specifically considered by name. This case was a rate hearing case, and the question considered, which is of importance to us, is whether the construction work in progress costs of the Midland plant should be included in the rate base. The Public Interest Research Group in Michigan (PIRGIM) contended that Consumers Power power needs forecasting was so faulty that it could not be relied on and that there was no evidence that the Midland plant would be needed. The MPSC opinion and order's principal comment on PIRGIM's contention follows:

"Sales and demand forecasting is inexact at best, requiring subjective judgments in the adoption of assumptions and the choice of methods. Although improvements might be made in applicant's methods, the commission finds that on this record applicant's forecast of annual sales growth, the projected load factor, and the projected range of demand are not unreasonable. It is true that applicant's past forecasts have often been too high. However, forecasts are constantly being revised in response to changing conditions. It does not necessarily follow that because previous forecasts were too high that the present forecasts are likewise too high.

"Perhaps more important, even assuming applicant's forecasts are somewhat high, it does not follow that the Midland project is unneeded and therefore an imprudent investment to be totally excluded from the rate base. The record shows that some growth in demand is to be reasonably expected, in the absence of a drastic shift in usage patterns which cannot be reasonably assumed at this time. The Midland project is designed to be a major baseload plant and if it runs properly it should provide power at a price which is comparable to many other units. A temporary minor overcapacity would not be a justification for excluding the plant from the rate base. In a period of increasing construction costs, it may be cheaper to construct new plant now

than to delay construction for a significant period. In addition, applicant may have the opportunity to sell temporarily excess power.

"In any event, the costs of abandoning the Midland plant, as recommended by PIRGIM, have to be weighed against the benefits. Assuming applicant is close on its sales and demand predictions, abandoning the Midland plant, as PIRGIM contends should be done, would have serious and possibly catastrophic results for the supply of electricity in the 1980's and 1990's not only for applicant's retail customers but also for the whole state of Michigan. Moreover, the forced abandonment of all the Midland plant would be a financial disaster for applicant and would seriously compromise applicant's ability to finance any additional construction, including coal-fired and cogeneration facilities. Finally, to the extent that the financial community perceived the commission as acting irresponsibly by enforcing the abandonment of the total Midland project, all other utilities in Michigan would have increased difficulty in financing their construction projects.

"For these reasons the commission finds that the construction work in progress (CWIP) associated with the Midland plant should not be excluded from the rate base." 25 PUR 4th 179-180.

Obviously the MPSC has come closer to answering the criteria set forth in the securities act in 1978 than in 1968, although, of course, this is a rate, not a securities, case. However, even this much more specific treatment does not completely answer the question whether the property was reasonably required for the purposes of the corporation. Furthermore, this MPSC opinion illustrates the jeopardy in not making a feasibility study at the beginning. The MPSC reaches its conclusion in part by relying on the *in terrorem* argument that even if not cost effective "the forced abandonment of all the Midland plant would be a financial disaster for applicant [Consumers Power Co.]".

Further, "all other utilities in Michigan would have increased difficulty in financing".

## VII. PROPOSED FINDINGS STANDARD

On the record before us, it would be difficult to attempt to definitively indicate those specific findings appropriate to support a conclusion that expenditure of funds was "reasonably required for the purposes of the * * * corporation". For a new generating plant for an electric utility, however, these are some of the specific findings that should be made:

1. the name and detailed description of the project for which funding is requested;

2. the amount of funding requested;

3. the estimated costs of the project and the bases for the estimates;

4. the amount of power the plant would generate by a particular time plus the amount of power from other sources of the corporation;

5. the amount of demand for that power and the source of such estimates;

6. the amount of reserve power appropriate and the sources for that conclusion;

7. whether there are other more efficient power sources and, if there are, why they are not to be used;

8. what effect the project will have on rates and why.

Such a determination should create no strain in the securities regulatory system in Michigan as the MPSC has acknowledged under the existing statute that "[a] thorough and complete inquiry by the commission into the necessity of the initial issue of securities for the construction of generat-

ing facilities is appropriate". As has been discussed, the paramount purpose of the securities statute is protection of the public which includes both investors and ratepayers. By addressing itself to the legislative standard as we view it before the financing of new energy plant construction commences, the MPSC ensures that the apparent legislative purpose of the statute will be fulfilled. It also ensures that all the citizens of this state shall have sufficient energy at the most reasonable rates.

## VIII. CONCLUSION

The issue before us is what is the extent of protection the Legislature intended to provide utility investors and ratepayers. We hold that the Legislature intended that (1) a complete feasibility examination should be made by the MPSC in connection with approval of the original application for securities, (2) upon subsequent applications it would suffice that the MPSC consider whether the statutory requirements were met with respect to the work to be next undertaken, and (3) a complete feasibility examination should be undertaken in connection with inclusion of the project in the rate base. We further hold that the MPSC in connection with its determinations must make specific, not conclusory, findings of fact.

BLAIR MOODY, JR., J., concurred with WILLIAMS, J.

APPENDIX A

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * *

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|---|---|
| In the matter of the application of Consumers Power Company for authority to issue first mortgage bonds. | Case No. U-3050 |

At a session of the Michigan Public Service Commission held at its offices in the City of Lansing, Michigan, on the 11th day of April, A.D., 1968.

PRESENT: Hon. Peter B. Spivak, Chairman
Hon. Willis F. Ward, Commissioner
Hon. William A. Boos, Jr., Commissioner

SECURITIES

In this matter, Consumers Power Company (company) filed with this commission on March 8, 1968, an application praying for authority to issue and sell $55,000,000 aggregate principal amount of its first mortgage bonds.

Said matter was brought on for hearing before the commission on March 22, 1968, at the offices of the commission in the City of Lansing, Michigan.

From the application filed on March 8, 1968, the records and files of the commission, and the testimony taken, the commission finds that:

A. The company made capital expenditures during the year 1967 in the aggregate amount of $140,775,739; and it has made and proposes to make capital expenditures during the year 1968 in

the aggregate amount of approximately $194,394,-100.

B. The expenditures set forth in paragraph A above were and are necessary for the acquisition of property, the construction, completion, extension or improvement of facilities, or for the improvement or maintenance of service.

C. In order to provide a portion of the funds required for the purposes referred to in paragraph A above and for the discharge or lawful refunding of obligations, including short-term bank loans, made or expected to be made for such purposes, the company proposes to issue and sell $55,000,000 aggregate principal amount of its first mortgage bonds, of a series maturing May 1, 1998, for the best price obtainable in the judgment of the board of directors of the company, or the executive committee thereof, at competitive bidding.

D. No contract, agreement, or arrangement has been made or entered into by the company for the sale of the first mortgage bonds proposed to be issued by the company.

E. The funds to be derived from the issue and sale of first mortgage bonds are to be applied to lawful corporate purposes and that such issue and sale of said first mortgage bonds is essential to the successful carrying out of such purposes, and in the opinion of the commission the use of the capital to be acquired by the issuance of said bonds is reasonably required for the purposes of the company.

F. Company Exhibit 1 introduced at the hearing in this matter sets forth details of proposed plant expenditures totaling $194,394,100 for the calendar year 1968. Included in this total is the amount of $958,000 shown as relating to the Ludington Pumped Storage Generating Plant. The approval

herein given to the issuance of $55,000,000 of first mortgage bonds should not be construed as a finding of necessity for or feasibility of the Ludington Pumped Storage Generating Plant project.

G. The company has paid into the treasury of the State of Michigan the sum of $55,000, which is the statutory fee payable on the sum of $55,000,000 of the first mortgage bonds herein authorized to be issued and sold.

Now, therefore, upon consideration of all the foregoing and by virtue of the power and authority vested in this commission by law, it is hereby ordered that:

1. Consumers Power Company be and is hereby authorized to issue and sell $55,000,000 aggregate principal amount of its first mortgage bonds, of a series maturing May 1, 1998, for the best price obtainable in the judgment of the board of directors of the company, or the executive committee thereof, at competitive bidding.

2. The proceeds from the sale of said first mortgage bonds authorized by this order shall be used for the acquisition of property, the construction, completion, extension or improvement of facilities, or for the improvement or maintenance of service, or for the discharge or lawful refunding of obligations, including short-term bank loans, which may be made for such purposes.

3. On or before December 31, 1968, Consumers Power Company shall report to this commission, by a statement duly certified by an officer of the company having knowledge of the facts, the principal amount of said first mortgage bonds sold by the company pursuant to this order, the interest rate thereof, the amount received by the company from the sale of said bonds, and the total expense of issuing and selling said bonds. The company

shall also file a copy of its fifteenth supplemental indenture as finally executed.

4. Our action herein approving the issuance of $55,000,000 of first mortgage bonds shall not be construed as passing upon the necessity for or feasibility of the Ludington Pumped Storage Generating Plant project.

The commission specifically reserves jurisdiction of the matters herein contained and the authority to issue such further order or orders as the facts and circumstances may require.

MICHIGAN PUBLIC SERVICE COMMISSION

*/s/ Peter B. Spivak*

Chairman

(SEAL)

*/s/ Willis F. Ward*

Commissioner

*/s/ William A. Boos, Jr.*

Commissioner

By the Commission and pursuant to its action of April 11, 1968.

*/s/ Knight D. McKesson*

Its Secretary

THE CLARKE-GRAVELY CORPORATION v DEPARTMENT OF TREASURY

Docket No. 63743. Argued December 9, 1980 (Calendar No. 4).—Decided February 1, 1982.

The Clarke-Gravely Corporation and other subsidiaries of Studebaker-Worthington, Inc., filed individual state income tax returns for 1971, 1972 and 1973. They later learned that individual filing had resulted in a substantially greater tax liability than had they filed a combined return, and on September 12, 1975, they submitted amended combined returns for those years to the Department of Treasury. The tax commissioner accepted the amended returns for 1972 and 1973, and decided that a refund of $251,654.28 was owed to the taxpayers but that no interest would be allowed. The 1971 amended return was not accepted on the ground that it was beyond the three-year statute of limitations of the Income Tax Act of 1967. The taxpayers brought an action against the Department of Treasury and the State Treasurer, claiming interest on the refunds and claiming a refund for 1971 on the ground that the statute of limitations was tolled while the 1971 federal income tax return of Studebaker-Worthington, Inc., was audited and in litigation. The Ingham Circuit Court, Thomas L. Brown, J., granted summary judgment for the defendants on the issue of the refund for 1971 and summary judgment for the plaintiffs on the claim of interest for the 1972 and 1973 refunds, but computed the interest from the date of filing the amended returns. The Court of Appeals, V. J. Brennan, P.J., and Allen and P. F. O'Connell, JJ., affirmed (Docket No. 77-4477). The plaintiffs appeal.

In an opinion by Justice Ryan, joined by Chief Justice Coleman and Justices Kavanagh, Levin, and Moody, the Supreme Court *held:*

The tax commissioner has broad discretionary power to

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4, 8] 71 Am Jur 2d, State and Local Taxation §§ 593, 610, 611.
When right to refund of state or local taxes accrues, within statute limiting time for applying for refund. 46 ALR2d 1350.

[2-4, 7] 72 Am Jur 2d, State and Local Taxation § 1141.

[5-7] 71 Am Jur 2d, State and Local Taxation § 593.

require or permit combined reporting; consequently, the interest on the refunds for 1972 and 1973 runs only from the time that the amended returns were accepted, because until then the plaintiffs were not entitled to a refund. Combined reporting is not, however, outside the scope of the limitations and tolling provisions of the Income Tax Act of 1967. The submission of an amended combined report more than three years after filing the initial separate returns cannot, in this instance, be logically construed as anything other than a claim for a refund. It is apparent that the tax commissioner felt bound by the three-year limitations period for claiming refunds. However, the audit and litigation of the 1971 federal tax return of the plaintiffs' parent corporation tolled the statute of limitations by operation of the tolling provision of the state Income Tax Act, with the result that the plaintiffs' claim of a refund for 1971 was made within the statutorily required period. It is not necessary that the claimed state refund "flow" from the federal action which suspends the running of the limitations under the Michigan Income Tax Act.

The matter is remanded to the tax commissioner to determine whether, in the exercise of his discretion, there is any rational basis to refuse to accept the plaintiff taxpayers' 1971 amended combined return, and if there is none, to pay the refund with interest from the date of the original refusal to accept that return.

Justice Fitzgerald, joined by Justice Williams, dissented. He would hold that the plaintiffs are not entitled to a refund for 1971.

The tax commissioner has discretion, under the Michigan Income Tax Act, to permit the election of combined reporting by two or more taxpayers. Inherent in the discretionary language of the statute is the authority to make combined reporting a prospective election only, or to give it limited retroactive effect. The fact that the plaintiffs were permitted retroactively to utilize combined reporting for certain years does not nullify the discretionary power of the tax commissioner for the year at issue. Nor is it controlling that the tax commissioner had used a three-year statute of limitations as a guideline in assessing belated requests to file combined reports. Combined reporting is a unique matter outside the scope of the statute of limitations and the tolling provisions.

The conclusion that the tax commissioner was empowered by the Income Tax Act to reject the plaintiffs' belated 1971 combined report makes it unnecessary to address the other provi-

sions of the statute cited by the plaintiffs on the issue of the refund. It also renders moot the discussion of interest for that year.

It was within the authority of the tax commissioner to accept the amended returns for 1972 and 1973 and to grant refunds for those years. Until that determination was made, the plaintiffs were not entitled to any refunds and, *a fortiori,* were not entitled to any interest.

89 Mich App 732; 282 NW2d 202 (1979) reversed.

OPINION OF THE COURT

1. TAXATION — INCOME TAX ACT — REFUNDS — INTEREST.

The tax commissioner had broad discretionary power under the Income Tax Act of 1967 to require or permit combined income tax reporting of subsidiary corporations, so that a right to a refund on a combined return did not arise until the combined return was accepted by the commissioner in place of individual returns previously filed, and interest on the refund did not start to run until the acceptance (MCL 206.335; MSA 7.557[1335]).

2. TAXATION — INCOME TAX ACT — LIMITATION OF ACTIONS.

The Income Tax Act of 1967 unambiguously indicates a legislative decision to limit the time for the state to claim a deficiency and for the taxpayer to claim a refund (MCL 206.1 *et seq.;* MSA 7.557[101] *et seq.).*

3. TAXATION — INCOME TAX ACT — COMBINED REPORTING — LIMITATION OF ACTIONS — REFUNDS.

Submission by plaintiff corporate taxpayers of an amended combined report to the tax commissioner more than three years after they filed separate returns must be construed as a claim for a refund for purposes of the statute of limitations of the Income Tax Act of 1967 (MCL 206.335, 206.441[2]; MSA 7.557[1335], 7.557[1441][2]).

4. TAXATION — INCOME TAX ACT — LIMITATION OF ACTIONS — TOLLING PROVISIONS — REFUNDS.

A claim in 1975 by plaintiff corporate taxpayers of a refund for 1971 was timely where an audit and litigation of the 1971 federal tax return of the plaintiffs' parent corporation had tolled the three-year statute of limitations under the Michigan Income Tax Act of 1967; it is not necessary that the claimed state refund must "flow" from the federal action for the tolling provision to operate (MCL 206.325, 206.411[2], 206.441[2]; MSA 7.557[1325], 7.557[1411][2], 7.557[1441][2]).

DISSENTING OPINION BY FITZGERALD, J.

5. TAXATION — INCOME TAX ACT — CORPORATIONS — COMBINED REPORTING.

*The tax commissioner had the discretion, under the Michigan Income Tax Act of 1967, to permit the election of combined reporting by two or more corporate taxpayers; inherent in the discretionary language of the statute is the authority to make combined reporting a prospective election only, or to give it limited retroactive effect (MCL 206.335; MSA 7.557[1335]).*

6. TAXATION — INCOME TAX ACT — CORPORATIONS — COMBINED REPORTING.

*That plaintiff corporate taxpayers were permitted to retroactively utilize combined reporting for certain years does not nullify the discretionary power of the tax commissioner, under the Income Tax Act of 1967, to reject the plaintiffs' belated combined report for an earlier year (MCL 206.335; MSA 7.557[1335]).*

7. TAXATION — INCOME TAX ACT — COMBINED REPORTING — DISCRETION.

*It is not controlling that the tax commissioner used a three-year statute of limitations as a guideline in assessing belated requests to file combined reports under the Michigan Income Tax Act of 1967; combined reporting is a unique discretionary matter outside the scope of the statute of limitations for refunds and the tolling provisions (MCL 206.335, 206.411[2], 206.441[2]; MSA 7.557[1335], 7.557[1411][2], 7.557[1441][2]).*

8. TAXATION — INCOME TAX ACT — COMBINED REPORTING — REFUNDS — INTEREST.

*It was within the discretionary authority of the tax commissioner, under the Michigan Income Tax Act of 1967, to accept amended combined reports from plaintiff subsidiary corporations, who had originally filed separate reports, and to grant refunds for those years, but until that determination was made, the plaintiffs were not entitled to any refunds and,* a fortiori, *were not entitled to any interest (MCL 206.335; MSA 7.557[1335]).*

*Miller, Canfield, Paddock & Stone* (by *Samuel J. McKim, III,* and *Kenneth E. Konop)* for plaintiffs.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard R.*

*Roesch,* Assistant Attorney General, for defendants.

RYAN, J. The facts of this case are accurately stated in Justice FITZGERALD'S opinion. We agree with his view that the tax commissioner has broad discretionary power to require or permit combined reporting. Consequently, we agree that plaintiffs' right to interest on the refunds generated by the 1972 and 1973 amended returns extends only from the time the tax commissioner accepted those amended returns.

However, we do not agree that "[c]ombined reporting is a unique matter outside the scope of the statute of limitations and the tolling provisions". MCL 206.411; MSA 7.557(1411) and MCL 206.441; MSA 7.557(1441) unambiguously indicate a legislative decision to place time limits on the state's right to claim a tax deficiency and on the taxpayer's right to claim a refund. The submission of a combined report more than three years after filing the initial returns cannot, in this instance, be logically construed as anything other than a claim for a refund.

We cannot agree that the tax commissioner's announcement that "the year 1971 is already beyond the three-year statute of limitations" justifies his refusal to accept the 1971 amended return.

It is apparent from his statement above quoted that the commissioner felt bound by the three-year limitations period of § 441 for claiming refunds. The federal audit and litigation with respect to the 1971 consolidated return of plaintiffs' parent corporation triggered the tolling provisions of MCL 206.411(2); MSA 7.557(1411)(2), with the result that the plaintiffs' refund claim for 1971 was made within the statutorily prescribed period. Subsec-

tion 2 refers to MCL 206.325; MSA 7.557(1325), which imposes a notice requirement on a taxpayer whenever federal intervention causes a change in state tax liability. Section 325 is clearly applicable to both refund and deficiency claims, thus implicating the three-year tolling provision of § 411(2) for both deficiency and refund claims. Furthermore, we do not agree with the apparent view of the Court of Appeals in *Clarke-Gravely Corp v Dep't of Treasury,* 89 Mich App 732; 282 NW2d 202 (1979), that the claimed state refund must "flow" from the federal intervention. Nowhere in the portion of § 411(2) which describes the first tolling event is there language to support such a conclusion. To so read § 411(2) would render the third announced tolling event of that subsection—whenever notice is required under § 325—redundant.

In concluding that he was bound by the three-year limitations period on refund claims, the tax commissioner was in error. Section 411(2) tolled the running of the period in this case.

Accordingly, we remand to the tax commissioner for a determination whether, in the exercise of his discretion, there exists any rational basis to refuse to accept the taxpayers' 1971 amended return, in light of the applicability of the tolling provision of § 411(2). If none exists, the refund shall be paid with interest from the date of the commissioner's original refusal to accept the 1971 amended return.

COLEMAN, C.J., and KAVANAGH, LEVIN, and BLAIR MOODY, JR., JJ., concurred with RYAN, J.

FITZGERALD, J. Although this case involves rather sophisticated tax concepts, the underlying factual considerations are relatively simple.

The dispute involves the tax years 1971, 1972 and 1973. Plaintiffs, subsidiaries of Studebaker-Worthington, Inc., conducted business in Michigan during that period and thus were subject to the Income Tax Act of 1967, as amended.[1] For federal income tax purposes, Studebaker-Worthington regularly filed a consolidated return for approximately 40 subsidiaries, including plaintiffs.

A brief account of the years preceding 1971 will aid an understanding of the controversy. In 1968, when the Michigan income tax took effect, plaintiffs began filing state returns on an individual basis. Certain of the plaintiffs were notified in 1970 that a tax deficiency existed for the years 1968 and 1969. An agreement subsequently was worked out with the Michigan Department of Treasury whereby plaintiffs filed amended returns for 1968, 1969 and 1970 on a combined basis, pursuant to § 335 of the Income Tax Act.[2] This action eliminated the deficiency and, in fact, resulted in a slight refund.

According to plaintiffs, Studebaker-Worthington learned sometime in 1975 that its Michigan subsidiaries also had filed individual returns for 1971, 1972 and 1973, resulting in a substantially greater tax liability than had they filed on a combined basis. Plaintiffs, therefore, submitted amended (combined) reports on September 12, 1975.

On September 30, 1975, defendant Treasury Department notified plaintiffs that the amended returns for 1972 and 1973 had been accepted, and

[1] 1967 PA 281, MCL 206.1 *et seq.;* MSA 7.557(101) *et seq.,* included an income tax on corporations effective January 1, 1968. The corporate income tax was repealed by 1975 PA 233, and replaced by the single business tax, 1975 PA 228, MCL 208.1 *et seq.;* MSA 7.558(1) *et seq.*

[2] MCL 206.335; MSA 7.557(1335). This section was repealed by 1975 PA 233. Combined reporting now falls under the Single Business Tax Act, specifically MCL 208.77; MSA 7.558(77).

that a total refund of $251,654.28 was being processed.[3] No interest was to be allowed, however. The department further informed plaintiffs that the 1971 amended return had not been accepted because "the year 1971 is already beyond the three-year statute of limitations".[4]

Following a formal demand for acceptance of the amended 1971 return and interest on refunds for all three years, plaintiffs brought suit in Ingham Circuit Court. Plaintiffs contend that they are entitled to a refund for 1971 because the three-year statute of limitations was tolled by a pending audit and litigation involving Studebaker-Worthington's 1971 federal consolidated return.[5] Plaintiffs further assert that they are entitled to interest based on Michigan case law and § 441 of the Income Tax Act.[6]

The case was decided on cross-motions for summary judgment. The circuit court agreed with defendant Treasury Department that no refund for 1971 should be allowed, apparently reasoning that the tolling provisions applied only to deficiencies,

[3] The $251,654.28 refund was paid October 8, 1975.

[4] Plaintiffs had filed their individual income tax returns for 1971 on April 17, 1972. The amended report, in which plaintiffs claimed a refund of $74,449, was submitted on September 12, 1975, some three years and five months later.

[5] Plaintiffs rely on the tolling provisions of MCL 206.411(2); MSA 7.557(1411)(2). That section provides:

"The running of the statute of limitations shall be suspended for the period pending final determination of litigation of or hearing on a taxpayer's federal income tax return or of the return required by this act, or in the event any notice is required under the provisions of [MCL 206.325; MSA 7.557(1325)], and for 1 year thereafter."

[6] "Any taxpayer who has paid a tax which he claims was not due under this act may, on or before the expiration date of 3 years from the date set for the filing of the annual or final return for such year or the date the tax was paid, whichever is later, and not after, petition the department in writing to refund the amount so paid. If the annual return reflects an overpayment or credits in excess of the tax, the declaration thereof on the return constitutes a claim for refund." MCL 206.441(2); MSA 7.557(1441)(2).

not refunds. The court rejected defendants' contention that no interest was due on the 1972 and 1973 returns. However, the court held that interest was to be computed from the date plaintiffs submitted their amended reports, not the date the initial returns were filed. Plaintiffs appealed both rulings.

The Court of Appeals affirmed, but disagreed with the circuit court's rationale on the refund issue.[7] A motion for rehearing was denied.

This Court granted plaintiffs' application for leave to appeal, directing the parties to include among the issues to be briefed:

"[D]oes § 411(2) of the Michigan Income Tax Act, MCL 206.411(2); MSA 7.557(1411)(2), which provides for the tolling of the three-year period of limitations for refunds as set forth in § 441(2) of said act, MCL 206.441(2); MSA 7.557(1441)(2), apply when the corporate claimant of the refund, who originally filed an individual income tax return, more than three years later filed a combined return as provided in § 335, MCL 206.335; MSA 7.557(1335), of said act?"

## THE 1971 REFUND

We affirm the lower courts' conclusion that plaintiffs are not entitled to a refund for 1971. However, because we do not agree with the reasoning, it is necessary to discuss briefly the foundation upon which our decision rests.

The pivotal section is 335 of the Michigan Income Tax Act.[8] That section provides in pertinent part:

"In the discretion of the commissioner, any taxpayer

[7] *Clarke-Gravely Corp v Dep't of Treasury*, 89 Mich App 732; 282 NW2d 202 (1979).

[8] See fn 2.

which owns or controls either directly or indirectly substantially all the capital stock of 1 or more other corporations, or substantially all the capital stock of which is owned or controlled either directly or indirectly by 1 or more other corporations, or by interests which own or control either directly or indirectly substantially all the capital stock of 1 or more corporations may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the commissioner may require. In addition, a combined report may be made at the election of any 2 or more taxpayers provided the ownership or control requirements contained in the preceding sentence are satisfied and such report sets forth such information as the commissioner may require."

The discretionary power of the tax commissioner is at the heart of § 335. That discretion is explicit in the first sentence, which authorizes the commissioner to *require* or *permit* combined reporting, to decide whether certain "control" criteria have been met, and to request additional information before making a determination.

The commissioner's discretion remains implicitly intact in the second sentence, which refers back to the first sentence in setting out conditions under which two or more taxpayers may elect to submit a combined report.

Inherent in the discretionary language of § 335 is the commissioner's authority to make combined reporting a prospective election only, or to give it limited retroactive effect. The fact that plaintiffs were permitted for some years to retroactively utilize the combined reporting technique does not nullify the commissioner's discretionary power for the year at issue. Nor is it controlling that the commissioner had used a three-year statute of limitations as a guideline in assessing belated

requests to file combined reports. Combined reporting is a unique matter outside the scope of the statute of limitations and the tolling provisions.[9]

Our conclusion that the tax commissioner was empowered under § 335 to reject plaintiffs' belated 1971 combined report makes it unnecessary to address the other sections of the Income Tax Act cited by plaintiffs as to the refund issue.

## INTEREST ON REFUNDS

Our decision that plaintiffs are not entitled to a refund for 1971 renders moot the discussion of interest for that year. However, the issue of interest for 1972 and 1973 remains to be resolved.

The trial court allowed interest from the date the amended returns were filed, on September 12, 1975. The Court of Appeals affirmed. We agree.

Once again, the pivotal section is 335 of the Income Tax Act.[10] The wide discretionary power of the tax commissioner under § 335 was discussed above in reference to the refund issue. It was within the commissioner's authority to accept the amended returns for 1972 and 1973 and to grant refunds for those years. Until that discretionary determination was made, plaintiffs were not entitled to any refunds and, *a fortiori,* were not enti-

[9] The briefs of both parties were devoted in considerable part to distinguishing between the federal consolidated return and the state combined report. We agree with defendants that that distinction is not determinative of this case. However, because the Michigan Income Tax Act is modeled after the federal Internal Revenue Code, it is instructive to note that the regular statutes of limitations are not applicable to the federal election to consolidate or to discontinue filing on a consolidated basis. The initial election to consolidate must be made before the return is due. The decision to discontinue consolidated reporting must be made at least 90 days before the return is due, and is contingent upon a finding by the revenue commissioner of "good cause". Treas Reg § 1.1502-75.

[10] See fn 2.

tled to any interest. It would be inherently contradictory to hold that permission to file a belated combined report is within the tax commissioner's discretion, but that once permission is granted, interest automatically is awarded from the date the initial individual returns were submitted. The discretionary power at the center of § 335 is not so narrow.

No costs, a public question being involved.

WILLIAMS, J., concurred with FITZGERALD, J.

IRVAN v BORMAN'S, INC

Docket No. 64928. Argued June 2, 1981 (Calendar No. 6).—Decided February 1, 1982.

David Irvan, a part-time employee of Farmer Jack Markets, a division of Borman's, Inc., was injured in the course of his employment and totally incapacitated for work. His employer continued to pay his average wage of $28 a week. The Workers' Compensation Appeal Board decided that the correct rate of compensation for the plaintiff is $78 a week, the rate of compensation for a claimant with no dependents as adjusted for 1976 by the Director of the Bureau of Workers' Disability Compensation. The Court of Appeals, M. F. Cavanagh, P.J., and DeWitt, J. (M. J. Kelly, J., dissenting), reversed on the ground that the Worker's Disability Compensation Act also prohibits payment of compensation exceeding the employee's average weekly wage at the time of the injury (Docket No. 43233). The plaintiff apppeals.

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

Compensation may not be less than the statutory minimum when the incapacity is total. The prohibition in the Worker's Disability Compensation Act against payments exceeding the employee's average weekly wage applies only when the disability is partial.

1. The plaintiff here was totally incapacitated after his injury. The amount of compensation payable to a totally disabled employee is determined under § 351 of the Worker's Disability Compensation Act. Nothing in the language of that provision shows an intent of the Legislature to limit the payment of the minimum compensation to full-time employees.

2. The primary goal of the Worker's Disability Compensation

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REFERENCES FOR POINTS IN HEADNOTES

[1-3, 5] 82 Am Jur 2d, Workmen's Compensation §§ 338, 340.
[2] 82 Am Jur 2d, Workmen's Compensation §§ 368, 369.
[3] 81 Am Jur 2d, Workmen's Compensation § 29.
[4] 81 Am Jur 2d, Workmen's Compensation § 2.
[5] 82 Am Jur 2d, Workmen's Compensation § 347.
[6] 81 Am Jur 2d, Workmen's Compensation § 110.
82 Am Jur 2d, Workmen's Compensation § 347.

Act is to compensate injured employees for loss of earning capacity, not merely lost wages. It also seeks to avoid the payment of windfalls to those who are still able to work. Section 371 differentiates between full- and part-time employees, while § 351 does not. The language of § 371 implicitly deals with partial disability, whereas § 351 is clear in its use of the word "total" incapacity for work. Implicit in the language "wage earning capacity after the injury" of the limiting provision in § 371 is the requisite that the worker have *some* earning capacity after the injury. A partially disabled worker may have his or her working capacity diminished only slightly and payment of the statutory minimum benefit in that case would create a windfall, which the operation of § 371 avoids. A totally incapacitated person, having *no* earning capacity, cannot reap such a windfall. Those persons being unable to undertake substitute employment would fall under the rule of § 351. The moment such a worker takes any type of substitute work, he or she would no longer be "totally incapacitated" and benefits would be limited under § 371.

3. The emphasis should be on earning capacity, not on hours worked or wages earned. Where an injured worker's disability is total, as here, the loss of earning capacity is total and he or she is entitled to the statutory minimum. There would be no logic in limiting one who is out of the job market, suffering an employment-related injury, to a fraction of minimum disability benefits merely because at the moment of injury his working time was inconsistent with his capacity. Such a result is incorrect and inhumane.

4. In accordance with a case recently decided by the Court the plaintiff is entitled to the minimum benefits set out in § 351 of the statute, rather than the amount as adjusted by the Director of the Bureau of Workers' Disability Compensation. Therefore, the matter is remanded to the Workers' Compensation Appeal Board for recomputation of benefits in accord with the statute.

Reversed.

96 Mich App 232; 292 NW2d 183 (1980) reversed.

1. WORKERS' COMPENSATION — MINIMUM BENEFIT — TOTAL DISABILITY.

Compensation under the Worker's Disability Compensation Act may not be less than the statutory minimum when the incapacity is total (MCL 418.351; MSA 17.237[351]).

2. WORKERS' COMPENSATION — MINIMUM BENEFIT — PARTIAL DISABILITY.

The prohibition in the Worker's Disability Compensation Act against payments exceeding the employee's average weekly wage applies only when the disability is partial (MCL 418.371[1]; MSA 17.237[371][1]).

3. WORKERS' COMPENSATION — MINIMUM BENEFIT — TOTAL DISABILITY — STATUTES.

Nothing in the language of the provision of the Worker's Disability Compensation Act which determines the compensation payable to a totally disabled employee shows an intent of the Legislature to limit the payment of the minimum compensation to full-time employees (MCL 418.351; MSA 17.237[351]).

4. WORKERS' COMPENSATION — STATUTES — LEGISLATIVE INTENT.

The primary goal of the Worker's Disability Compensation Act is to compensate injured employees for loss of earning capacity, not merely lost wages; it also seeks to avoid the payment of windfalls to those who are still able to work (MCL 418.101 *et seq.;* MSA 17.237[101] *et seq.).*

5. WORKERS' COMPENSATION — MINIMUM BENEFIT — EARNING CAPACITY — TOTAL DISABILITY.

Where an injured worker's disability is total, the loss of earning capacity is total and the worker is entitled to the statutory minimum workers' compensation benefit; the emphasis should be on earning capacity, not on hours worked or wages earned (MCL 418.351; MSA 17.237[351]).

6. WORKERS' COMPENSATION — MINIMUM BENEFIT — EARNING CAPACITY — TOTAL DISABILITY.

There would be no logic in limiting a part-time employee, suffering an employment-related injury, to a fraction of the minimum workers' compensation benefit merely because at the moment of injury his working time was inconsistent with his capacity; the employer for whom he was working should shoulder the burden of the compensatory minimum provided by the statute (MCL 418.351; MSA 17.237[351]).

*Michael J. Kingsley* and *Brian J. Kingsley* for plaintiff.

*Sommers, Schwartz, Silver & Schwartz, P.C.* (by

*Robert F. Auld* and *Richard D. Toth),* for defendant.

KAVANAGH, J. This case involves the question of whether compensation for injury under the Worker's Disability Compensation Act[1] may be less than the minimum prescribed in § 351 (MCL 418.351; MSA 17.237[351]) when the average weekly wage of the injured employee is less than the statutory minimum.

We hold that it may not, reverse the decision of the Court of Appeals, and reinstate the award of the Workers' Compensation Appeal Board.

At the time of his injury, plaintiff was a part-time employee of the defendant, earning an average weekly wage of $28. Following the injury, defendant continued to pay plaintiff $28 a week. Plaintiff filed a petition for hearing in November, 1976.

On March 7, 1978, the Administrative Law Judge found that the correct rate of weekly compensation was the statutory minimum, $78.[2] Defendant appealed and the appeal board affirmed. The Court of Appeals reversed and remanded for entry of an order consistent with their finding that plaintiff was not entitled to the statutory minimum.

The Court of Appeals panel in this case held that the minimum provided in § 351 applies only

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

[2] Prior to our recent decision in *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 (1981), the minimum compensation provided for in § 351 of the act had been adjusted upward each year in accordance with the increase in the average weekly wage in covered employment.

In 1976, the minimum for an individual with no dependents was $78 weekly. In *Gusler* we held the upward adjustment to be erroneous. The minimum for an employee with no dependents is $27 weekly as mandated by the Legislature.

to full-time employees, refusing to follow the decision of another panel in *Keyzer v Christian Rest Home,* 32 Mich App 286; 188 NW2d 672 (1971), *lv den* 385 Mich 758 (1971). They based their decision on our holding in *Lahay v Hastings Lodge No 1965 BPOE,* 398 Mich 467; 247 NW2d 817 (1976), and *Gasparick v H C Price Construction Co,* 398 Mich 483; 247 NW2d 824 (1976).

We are satisfied that the cases are distinguishable.

In *Lahay* the employee worked full-time for one employer and part-time for another. He was injured in his part-time employment and was totally incapacitated for such work. His injury did not affect his full-time work, however, and he continued in that employment.

We held there that a part-time employee's right to compensation was unaffected by earnings in contemporaneous full-time employment, and that his full-time employment should not be a factor in computing the employee's average weekly wage. The question presented here—whether a part-time employee is entitled to the statutory minimum of compensation—was not implicated in *Lahay.*

Likewise *Gasparick.* There the injured employee was engaged in seasonal work and the issue was the correct method of computing his average weekly wage in that circumstance under § 371. Entitlement to the statutory minimum was not involved.

There is no dispute here over the computation of this employee's average weekly wage. Plaintiff was employed specifically as a part-time worker, and his average weekly wage of $28 was determined by multiplying his hourly rate by the average number of hours worked.[3]

[3] See MCL 418.371(3); MSA 17.237(371)(3).

Defendant claims that the concluding sentence of § 371(1) prohibits payment to plaintiff of an amount exceeding plaintiff's average weekly earnings. The Court of Appeals majority agreed, stating that to do so would emasculate the last sentence of § 371(1):

"The compensation payable, when added to his wage earning capacity after the injury in the same or another employment, shall not exceed his average weekly earnings at the time of such injury."[4]

We are not persuaded that our holding today will render ineffective the prohibition in § 371, as that section applies only tangentially to this factual context. A reading of § 371(1) in conjunction with § 351(1) discloses that the former applies only when the disability is partial. Implicit in the language "wage earning capacity after the injury in the same or another employment" is the requisite that the worker have *some* earning capacity after the injury.

Plaintiff here was totally incapacitated after his injury. The amount of compensation payable to a totally disabled employee is determined under § 351 of the act. That section stated in pertinent part:

"While the incapacity for work resulting from the injury is *total,* the employer shall pay or cause to be paid as hereinafter provided, to the injured employee, a weekly compensation of 2/3 of his average weekly

[4] Minor changes in language were made by 1980 PA 357, but the substance of the sentence was unchanged.

This section has been interpreted to mean earning capacity in the same employment or in other employment taken in place of the job in which claimant was injured. It does not apply to the concurrent employment situation. See *Lahay v Hastings Lodge,* 398 Mich 467, 474; 247 NW2d 817 (1976); *Bowles v James Lumber Co,* 345 Mich 292, 294; 75 NW2d 822 (1956).

wages * * *. Weekly payments shall not be less than $27.00 if there are no dependents * * *". (Emphasis supplied.)

Nothing in the language reveals an intent by the Legislature to limit the payment of minimum compensation to full-time employees. *Keyzer v Christian Rest Home,* 32 Mich App 286, 288 (1971).

Section 371 differentiates between full- and part-time employees while no such distinction exists in § 351. Additionally, the language of § 371(1) implicitly deals with partial disability, whereas § 351 is clear in its use of the word "total". As stated in *Keyzer, supra:*

> "The words employed clearly apply to both full-time and part-time employees. Had the Legislature desired to effect the interpretation now placed upon the act by defendant, it could easily have done so in simple language. It is not for this Court to add language to a clear and explicit statute." 32 Mich App 286, 288.

The primary function of the Worker's Disability Compensation Act is to compensate employees for loss of "earning capacity" and not merely lost wages. See *Lahay v Hastings Lodge,* 398 Mich 467; *Sims v R D Brooks, Inc,* 389 Mich 91; 204 NW2d 139 (1973); *Gasparick v H C Price Construction Co,* 398 Mich 483; *Frammolino v Richmond Products Co,* 79 Mich App 18; 260 NW2d 908 (1977). At the same time the act seeks to avoid windfalls to those still able to work. A partially disabled worker may have his or her working capacity diminished only slightly, and still be able to remain in the work force earning close or equal to his or her pre-injury salary. Payment of the statutory minimum in this situation would net the worker more than

his or her pre-injury wages. This situation the act seeks to avoid, and § 371(1) accomplishes that goal.

"Totally incapacitated" persons, having *no* earning capacity, cannot reap such a windfall. These persons, being unable to undertake substitute employment, would fall under the rule of § 351. The moment such a worker takes any type of substitute work, he or she would no longer be "totally incapacitated" and benefits would be limited under § 371(1).

We agree with the reasoning of Judge KELLY's dissent where he stated:

> "The emphasis should be on earning capacity, not on hours worked or wages earned. Part-time employment may be undertaken for any number of reasons unrelated to capacity.
>
> "I would hold that where an injured worker's disability is total, as here, where we have an uncontested temporary total disability from unskilled labor, he or she is entitled to the statutory minimum. The loss of earning capacity is total. What would be the logic in limiting one who is out of the job market, suffering an employment-related injury, to a penurious fraction of minimum disability benefits merely because at the moment of injury his working time was inconsistent with his capacity? Such a result is incorrect and inhumane." *Irvan v Borman's, Inc,* 96 Mich App 232, 249; 292 NW2d 183 (1980).

The consequence which defendant seeks to avoid was recognized by this Court in *Gasparick* where we stated:

> "Consequently, although designed to compensate an employee and not to punish an employer, the act itself reveals a legislative determination to require some employers in certain instances to bear the burden of their employees' incapacitating injuries despite the fact that, at times, the compensation paid will be in excess

of the amount of actual wages that would have been earned by an employee." *Gasparick v H C Price Construction Co,* 398 Mich 483, 490. See also *Keyzer v Christian Rest Home,* 32 Mich App 286, 288.

When a part-time employee is totally incapacitated the employer for whom he was working at the time of the disabling injury should shoulder the burden by being required to pay the compensatory minimum provided for in the act.

Though we find plaintiff is entitled to the minimum found in § 351 of the act, that amount has been modified by our recent decision in *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 (1981). Remanded to the WCAB for computation of benefits in accord with *Gusler.*

COLEMAN, C.J., and WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with KAVANAGH, J.

LEE v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE

Docket No. 63019. Argued June 3, 1980 (Calendar No. 1).—Decided February 1, 1982.

Warren Lee, an employee of the United States Postal Service, injured his back while unloading a government-owned mail truck and collected federal workers' compensation benefits. He then brought an action against the Detroit Automobile Inter-Insurance Exchange, claiming personal injury protection benefits under the no-fault insurance policy on his own vehicle. The Macomb Circuit Court, Edward J. Gallagher, J., granted the defendant's motion for summary judgment on the ground that the no-fault insurance act does not apply to vehicles owned by the United States, which are not subject to registration by the Secretary of State in Michigan. The Court of Appeals, Allen, P.J., and R. B. Burns and N. J. Kaufman, JJ., affirmed in an unpublished opinion per curiam (Docket No. 78-2712). The plaintiff appeals.

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

It is the policy of the no-fault insurance act that persons, not motor vehicles, are insured against loss. The term "motor vehicle" used in the section of the statute making personal protection insurance benefits payable for injury arising out of the use of a motor vehicle as a motor vehicle does not mean only a "registered", or "insured", or "covered" vehicle. The insured may be entitled to benefits under his own no-fault insurance policy.

1. In reaching its decision, the Court of Appeals relied on an earlier case in which it declared that for an insurer to incur

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REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Automobile Insurance § 352.

Validity and construction of "no-fault" automobile insurance plans. 42 ALR3d 229.

[2, 4] 7 Am Jur 2d, Automobile Insurance §§ 23, 354.

[3-6] 7 Am Jur 2d, Automobile Insurance §§ 34, 353.

What constitutes a "motor vehicle" covered under no-fault insurance. 60 ALR3d 651.

[7] 7 Am Jur 2d, Automobile Insurance §§ 23, 340.

liability under the no-fault act there must, at a minimum, be an accident involving a vehicle intended to be covered by the statute. The error in that analysis is that it reads into the no-fault act a more restrictive meaning of the expression "motor vehicle" than was adopted by the Legislature. The sections of the no-fault act which the Court of Appeals has held must be read together actually speak to separate and distinct subjects. One section declares what the expression "motor vehicle" means when used as a term of art throughout the statute. The other section, however, provides what category of persons is required to carry no-fault coverage and for what duration.

2. The no-fault act declares that entitlement to benefits depends, in part, on use of a motor vehicle "as a motor vehicle". There is no requirement that the motor vehicle be insured or covered. The motor vehicle involved must merely be used, maintained, operated, or owned as a motor vehicle. The meaning of the expression motor vehicle is explicitly declared by the no-fault act, and there is no language limiting the definition to a vehicle required to be registered in the state or for which no-fault security must be maintained.

3. The terms of a no-fault insurance policy cannot supersede the language of the no-fault act, but it is instructive that the defendant, in its insurance policy, has agreed to pay the plaintiff benefits for injury arising out of the use of a motor vehicle without the qualification that the vehicle must be registered or insured. The term "insured motor vehicle" is explicitly defined elsewhere in the insurance policy, so it is not as though the defendant intended the term motor vehicle, standing alone, to mean one which was insured.

4. Other provisions of the no-fault act suggest strongly that the Legislature intended that benefits be provided whenever an insured is injured in a motor vehicle accident and that the injured person's own insurer stand primarily liable for the benefits. In stating that the Legislature never intended a system in which insurers compensated persons where no insured vehicle was involved in the accident, and that potential payment is tied to registered vehicles, the Court of Appeals has misapprehended the Legislature's intention.

Reversed.

*Shoemaker v National Ben Franklin Ins Co,* 78 Mich App 175; 259 NW2d 414 (1977), overruled.

1. AUTOMOBILES — NO-FAULT INSURANCE — REGISTRATION.

A person injured in a motor vehicle accident involving a motor vehicle owned by the United States and not required to be

registered in Michigan may be entitled to no-fault insurance benefits from his own insurer (MCL 257.216, 500.3101, 500.3105; MSA 9.1916, 24.13101, 24.13105).

2. AUTOMOBILES — NO-FAULT INSURANCE — STATUTES — LEGISLATIVE POLICY.

It is the policy of the no-fault insurance act that persons, not motor vehicles, are insured against loss (MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.).*

3. AUTOMOBILES — NO-FAULT INSURANCE — STATUTES.

A decision that for an insurer to incur liability under the no-fault act there must, at a minimum, be an accident involving a vehicle intended to be covered by the statute is erroneous because it reads into the no-fault act a more restrictive meaning of the expression "motor vehicle" than was adopted by the Legislature (MCL 500.3101, 500.3105; MSA 24.13101, 24.13105).

4. AUTOMOBILES — NO-FAULT INSURANCE — STATUTES.

The provision of the no-fault insurance act which declares what the expression "motor vehicle" means when used as a term of art throughout the statute and that which provides what category of persons is required to carry no-fault coverage and for what duration are concerned with entirely different aspects of the applicability of the no-fault act (MCL 500.3101, 500.3105; MSA 24.13101, 24.13105).

5. AUTOMOBILES — NO-FAULT INSURANCE — BENEFITS.

The no-fault insurance act declares that entitlement to benefits depends, in part, on the use of a motor vehicle "as a motor vehicle"; there is no requirement that the motor vehicle involved be insured or covered by no-fault insurance (MCL 500.3101, 500.3105; MSA 24.13101, 24.13105).

6. AUTOMOBILES — NO-FAULT INSURANCE — STATUTES.

The meaning of the expression motor vehicle is explicitly declared by the no-fault insurance act; there is no language limiting the definition to a vehicle required to be registered by the Secretary of State in Michigan or a vehicle for which no-fault security must be maintained (MCL 500.3101[2][c]; MSA 24.13101[2][c]).

7. AUTOMOBILES — NO-FAULT INSURANCE — LEGISLATIVE POLICY — BENEFITS.

The provisions of the no-fault insurance act suggest strongly that the Legislature intended that benefits be provided whenever an insured is injured in a motor vehicle accident and that the

injured person's own insurer stand primarily liable for the benefits (MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.).*

*Frank R. Langton & Associates, P.C.* (by *Barry Sigman),* for plaintiff.

*Glime, Daoust, Wilds, Rusing & Widlak* (by *Denis R. LeDuc)* for defendant.

RYAN, J. In December, 1974, while employed by the United States Postal Service, Warren Lee injured his back unloading the mail from a government-owned mail truck. After collecting benefits authorized by the federal workers' compensation act,[1] he filed suit against appellee, Detroit Automobile Inter-Insurance Exchange (DAIIE), seeking personal injury protection benefits under the no-fault insurance policy covering his personal vehicle. DAIIE denied the claim on the basis that it was "not the insurer of the vehicle furnished by [Lee's] employer" and moved for summary judgment pursuant to GCR 1963, 117.2, subds (1) and (3).

The trial court granted the motion, holding that appellant was not entitled to benefits because "the no-fault act applies only to those vehicles required to be registered with the state".[2]

The Court of Appeals agreed.

We granted leave to appeal, 407 Mich 945 (1979), in order to answer the question whether "a person injured in a motor vehicle accident involving a motor vehicle not required to be registered [in the

[1] Federal Employees' Compensation Act, 5 USC 8101 *et seq.*

[2] MCL 257.216; MSA 9.1916 provides:

"Every motor vehicle, trailer coach, trailer, semitrailer, and pole trailer, when driven or moved upon a highway shall be subject to the registration and certificate of title provisions of this act except:

"(f) Any type subject to registration owned by the government of the United States."

State of Michigan may] claim no-fault insurance benefits from his own insurer".

We hold that such an insured may be entitled to benefits under his own policy and we reverse the judgment of the Court of Appeals.

## I

Our decision in this case rests, in the last analysis, upon our recognition that it is the policy of the no-fault act that persons, not motor vehicles, are insured against loss.[3]

The circuit court and the Court of Appeals were of the view and the appellee contends here that in a single-vehicle accident, no-fault benefits are not payable by the insurer of the individual injured unless the vehicle is one required to be registered with the State of Michigan and covered under a no-fault insurance policy.

The appellant contends, on the other hand, that one who is injured in a single-vehicle accident involving a vehicle not registered in the State of Michigan or covered under a no-fault insurance policy is nevertheless entitled to benefits from his personal no-fault insurer providing only that the injury arose "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle".

Two distinct provisions of the no-fault act are implicated in the issue joined in this case: MCL 500.3101(1); MSA 24.13101(1), which declares who must obtain no-fault insurance for how long, and MCL 500.3105; MSA 24.13105, which defines the scope of personal injury protection benefits. The Court of Appeals panel below held that the two

[3] *State Farm Fire & Casualty Co v Citizens Ins Co,* 100 Mich App 168; 298 NW2d 651 (1980), to the contrary notwithstanding.

sections must be read together as mutually dependent in the sense that the only motor vehicle accident in which an injured person may collect no-fault benefits under § 3105 is one involving a "motor vehicle required to be registered in this state" under § 3101. The appellant contends that in the context of the facts of this case, § 3105 alone establishes the liability of an insurer to pay such benefits and there is no requirement that there be involved a motor vehicle registered in this state having no-fault insurance coverage.

Section 3105 establishes the circumstances under which personal protection benefits, such as are sought here, are payable:

"(1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter."

Appellee claims that the "motor vehicle" to which the foregoing section refers must be a motor vehicle registered in this state with respect to which no-fault insurance coverage is required to be maintained:

"Since in the plaintiff-appellant's case he was injured while using a non-registered motor vehicle, the no-fault act does not apply and no personal injury protection benefits are payable." Appellee's Brief, p 8.

The Court of Appeals panel below was of the same view, although it stated the proposition differently:

"The Legislature never intended a system in which insurers compensated persons where no insured vehicle was ever involved in the accident."

In reaching that conclusion, the Court of Appeals relied upon its earlier decision in *Shoemaker v National Ben Franklin Ins Co,* 78 Mich App 175; 259 NW2d 414 (1977), in which it declared:

"For an insurer to incur liability under MCL 500.3105; MSA 24.13105, there must at a minimum be an accident involving a vehicle intended to be covered by MCL 500.3101(1); MSA 24.13101(1)."

In that case a motorcycle being operated by the plaintiff struck a tractor pulling a manure spreader on a public highway. The *Shoemaker* Court observed that "[n]either the motorcycle nor the tractor is a 'motor vehicle' to which the no-fault act applies". The Court reached that conclusion because a motorcycle is specifically excluded from the definition of a "motor vehicle" in § 3101(2)(c) and a tractor is not required to be registered for no-fault coverage under the act because "[w]e regard the tractor and manure spreader as 'implements of husbandry', excepted from [the] registration [requirement] by MCL 257.216(c); MSA 9.1916(c), and MCL 257.21; MSA 9.1821".

We disagree with that analysis, overrule the rule stated in *Shoemaker* and reverse the Court of Appeals below.

## II

The error in the *Shoemaker* analysis and that of the panel below, we think, is in reading into § 3101(2)(c) of the statute a more restrictive meaning to the expression "motor vehicle" than was adopted by the Legislature and then, as a result, attributing to the lawmakers the intention to limit a no-fault insurer's obligation to pay personal

protection insurance benefits to cases in which at least one of the motor vehicles involved in an accident is registered in Michigan and covered by a no-fault insurance policy. The two sections of the no-fault act which both the *Shoemaker* Court and the panel below have held must be read together actually speak to separate and distinct subjects. Section 3101(2)(c) declares what the expression "motor vehicle" means when used as a term of art throughout the statute. Section 3101(1), on the other hand, is not a definitional section at all and speaks to the wholly different subject of the category of persons required to carry no-fault coverage and for what duration. While both sections deal with the applicability of the no-fault law, they are concerned with entirely different aspects of its applicability.

In this case the plaintiff seeks personal protection insurance benefits under § 3105(1). That section describes the character of the injury-causing incident which triggers the obligation of a no-fault insurer to pay benefits to an injured person. The section, we repeat, provides:

> "(1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter."

It is noteworthy that the section declares that entitlement to benefits depends, in part, upon "use of a motor vehicle as a motor vehicle". There is no language qualifying the right to benefits or the insurer's duty to pay them with a requirement that such motor vehicle be a "registered", "insured", or "covered" motor vehicle as indeed might easily have been done had the Legislature

so intended. The requirement is merely that the vehicle involved be a "motor vehicle" used, maintained, operated or owned "as a motor vehicle".

We are not left to speculate about whether the Legislature intended the expression "motor vehicle" to mean a covered or registered or insured motor vehicle when it used those words as an expression of art throughout the statute. The meaning of that expression is explicitly set down in the definitional section of the act, § 3101(2), in which, in subsection (c) the Legislature declared:

" 'Motor vehicle' means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels. Motor vehicle does not include a motorcycle or a moped as defined in section 32b of Act No. 300 of the Public Acts of 1949." 1980 PA 445.

Conspicuously absent is any language limiting "motor vehicle" to one required to be registered in the state or for which no-fault security must be maintained.[4]

## III

While it is not, as a matter of law, a controlling factor in the case, it is instructive that the appellee, in its policy issued to Mr. Lee, has agreed to pay him benefits for injury "arising out of * * *

[4] It is interesting to note that while mopeds, like other categories of vehicles including any vehicle owned by the federal government, are not required to be no-fault covered because under MCL 257.216; MSA 9.1916 they are not required to be registered in the State of Michigan, the section defining "motor vehicle" in the no-fault act, § 3101(2)(c), specifically and separately excludes motorcycles and mopeds but not the others. That fact, we think, adds further weight to the point that the Legislature intended that the kinds of vehicles which constitute "motor vehicles" under the benefit payment provisions of the act and the kinds of vehicles which must be registered and covered under a no-fault policy are separate subjects.

use of a motor vehicle as a motor vehicle" without qualification that the vehicle must be a registered or covered motor vehicle. It is not as though the appellee intended that the expression "motor vehicle", as used in its policy, be read to mean insured, registered or covered vehicle because it troubled to define "insured motor vehicle" in explicit detail elsewhere in the policy.[5]

[5] The "Michigan no-fault insurance endorsement" issued by the defendant as part of its policy provides:

"DIVISION 2—Personal Protection Insurance (Michigan Personal Injury Protection)

"To pay to or for the benefit of an injured person (or, in the case of his death, to or for the benefit of his dependent survivors), who sustains bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle:

* * *

"(a) Medical Benefits Coverage (Allowable Expenses)

* * *

"(b) Work Loss Benefits Coverage

* * *

"Definitions—Division 2 and Division 3

"When used in reference to this insurance:

* * *

"(g) *'insured motor vehicle'* means:

"(1) A motor vehicle with respect to which

"(i) the liability insurance of the policy to which this endorsement is attached applies and for which a specific premium is charged, and

"(ii) the named insured is required to maintain security under the provisions of Chapter 31 of the Michigan Insurance Code; or

"(2) a motor vehicle operated by the named insured or a relative which vehicle is not owned by such named insured or relative and to which the liability insurance of the policy to which this endorsement is attached applies, provided such motor vehicle does not have the security required by Chapter 31 of the Michigan Insurance Code; or

"(3) a trailer owned or used by the named insured or any relative which has more than two wheels and is designed for use with a private passenger automobile provided such trailer does not have the security required by Chapter 31 of the Michigan Insurance Code, or,

"(4) for the purposes of Medical Benefits Coverage only 'insured motor vehicle' shall also include a trailer with less than three wheels designed for use with a private passenger automobile;

"(h) *'motor vehicle'* means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than two wheels * * *." (Emphasis added.)

## IV

Reference to other provisions of the no-fault act not directly implicated in the issue before us, particularly §§ 3114 and 3115, suggests strongly that the Legislature, in its broader purpose, intended to provide benefits whenever, as a general proposition, an insured is injured in a motor vehicle accident, whether or not a registered or covered motor vehicle is involved; and in its narrower purpose intended that an injured person's personal insurer stand primarily liable for such benefits whether or not its policy covers the motor vehicle involved and even if the involved vehicle is covered by a policy issued by another no-fault insurer.

Section 3114 provides that, except in situations not involved in this case,[6] the insurer of a person injured in a motor vehicle accident is liable for payment of benefits to its insured without qualifying language that a covered motor vehicle be involved in the accident. It states:

"Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy * * * if the injury arises from a motor vehicle accident." 1980 PA 445.

Moreover, by reason of the first clause of §§ 3114(4) and 3115, which are concerned respectively with occupants and non-occupants who are injured in motor vehicle accidents, insurers of owners or operators of covered vehicles involved in

We do not wish to be understood as suggesting that the terms of a no-fault insurance policy can supersede the language of the no-fault act.

[6] Section 3114(2): operators or passengers of motor vehicles transporting passengers, § 3114(3): an employee occupying an employer's covered vehicle, and § 3114(5): a motorcycle operator or passenger.

the accident are not obligated to pay benefits to an injured person who has his own no-fault policy.

Those sections provide:

§ 3114(4). "*Except as provided in subsections* (1) * * *, a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

"(a) The insurer of the owner or registrant of the vehicle occupied.

"(b) The insurer of the operator of the vehicle occupied." (Emphasis added.)

§ 3115. "(1) *Except as provided in subsection (1) of section 3114,* a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

"(a) Insurers of owners or registrants of motor vehicles involved in the accident.

"(b) Insurers of operators of motor vehicles involved in the accident." (Emphasis added.)

Sections 3114(4) and 3115 are concerned, of course, with priorities among personal protection insurers of owners and operators of motor vehicles and, in this case, there is no insurer of the owner of the post office vehicle. The point to be made, however, is that by reason of the combined effect of § 3114(1) and the first clause of both §§ 3114(4) and 3115 ("except as provided in subsection [1] of section 3114"), the personal insurer of an injured claimant may stand liable for benefits despite the fact that it has written no coverage respecting any vehicle involved in the accident and indeed that no vehicle involved in the accident has any coverage whatever.

Consequently, we think that on the facts of this

case, in stating that "[t]he Legislature never intended a system in which insurers compensated persons where no insured vehicle was involved in the accident", *supra,* and that "potential payment is tied to registered vehicles", the Court of Appeals misapprehended the Legislature's intention.

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand the case to the trial court for entry of an order setting aside the summary judgment.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred with RYAN, J.

PEOPLE v PAINTMAN

PEOPLE v CONKLIN

Docket Nos. 63894, 62908. Argued March 3, 1981 (Calendar Nos. 4, 5). —Decided February 1, 1982. Certiorari denied as to *Paintman* by the Supreme Court of the United States on May 24, 1982.

Norman Paintman was convicted by a jury in Oakland Circuit Court, William John Beer, J., of first-degree murder. The trial court had granted the defendant's pretrial motion to suppress a statement he gave to the police, three days after his arrest and after he twice unsuccessfully asserted his right to counsel, on the ground that it was involuntary; however, the Court of Appeals, in an interlocutory appeal by the prosecuting attorney, reversed the order to suppress and the statement was introduced in evidence. The Court of Appeals, Danhof, C.J., and V. J. Brennan and Carroll, JJ., affirmed the defendant's conviction on the ground that its interlocutory order controlled the admissibility of the statement (Docket No. 77-3436). The defendant appeals.

Raymond Conklin, Jr., was convicted by a jury in Monroe Circuit Court, James J. Kelley, Jr., J., of armed robbery. The trial court denied the defendant's pretrial motion to suppress a confession he gave sheriff's officers nine days after his arrest and initial request for the assistance of counsel and seven days after his arraignment, although the officers knew that defendant was represented by counsel at the time he confessed but did not contact the attorney. The Court of Appeals, R. B. Burns, P.J., and D. F. Walsh and Clements, JJ., affirmed in an unpublished per curiam opinion (Docket No. 77-688). The defendant appeals.

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

The defendants' convictions are reversed and remanded for

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REFERENCES FOR POINTS IN HEADNOTES

[1-6] 21A Am Jur 2d, Criminal Law §§ 758-763, 788-803, 974, 988-992.

What constitutes "custodial interrogation" within rule of Miranda v Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

[6] 29 Am Jur 2d, Evidence §§ 545-549, 555-557.

new trials, at which the statements made without the requested assistance of counsel may not be admitted.

1. The Supreme Court of the United States has emphasized the importance of the right to counsel during custodial interrogation. Although the accused may waive such rights, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel. An accused who has expressed the desire to invoke the right to counsel is not subject to further interrogation by the police until counsel has been made available, unless the accused himself initiates further communication, exchanges, or conversations with the police.

2. Waivers of counsel must not only be voluntary, but must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. The two questions are discrete inquiries, and a valid waiver cannot be established merely by showing that an accused who has asked for an attorney responded to further custodial interrogation initiated by the police even after he has been advised of his rights. The lawyer is the protector of the rights of the accused in his dealings with the police and courts. Therefore, the Supreme Court of the United States has fashioned the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring all interrogation to cease.

3. In these cases, the defendants requested counsel when they were questioned by the police after their arrests. They again asked for attorneys when they were arraigned. A tape-recorded statement by an alleged accomplice was played for Paintman before he confessed, and Conklin was placed in a room with his younger alleged accomplice before his statement; he had discussed with the sheriff's officers the possibility of leniency for the accomplice. Paintman was a heroin addict who suffered withdrawal symptoms in the days preceding his statement. He was the target of derisive comments from inmates and employees of the jail because one of the victims was a young child, and there was testimony about his suicidal mood. He also told employees of the jail that he did not wish to talk to the police. Conklin was placed in a line-up the day after his arrest and spent most of his time in solitary confinement following his request for an attorney until after he confessed.

4. The Fifth and Fourteenth Amendments require a clear demonstration of waiver of the right to counsel. Such clarity is not apparent when an accused's request for counsel is met by silence or inaction for a matter of days, or when the request is followed by a move to solitary confinement, no matter what the reason. The facts of these cases do not fulfill the spirit or

comport with the policies of the decisions of the Supreme Court of the United States. Neither Paintman nor Conklin initiated the conversations from which their inculpatory remarks emerged. The statements came after the defendants expressly requested counsel and were subjected to custodial interrogation. It is inconsistent with the case law for the police to instigate interrogation of an accused in custody who has clearly asserted the right to counsel. The sheriff's officers were aware that counsel had been appointed to represent Conklin and had filed an appearance. Paintman had expressed his desire to speak with an attorney in response to a question by the chief assistant prosecutor, who then left, but the police continued to talk with the defendant. The use of the confessions against the defendants at trial violated their rights under the Fifth and Fourteenth Amendments; therefore, the convictions are reversed and the cases are remanded for new trials.

Reversed and remanded.

92 Mich App 412; 285 NW2d 206 (1979) reversed.

1. CRIMINAL LAW — ASSISTANCE OF COUNSEL — WAIVER — CUSTODIAL INTERROGATION.

An accused may waive his constitutional rights during custodial interrogation, but the Supreme Court of the United States has strongly indicated that additional safeguards are necessary when the accused asks for counsel (US Const, Ams V, XIV).

2. CRIMINAL LAW — ASSISTANCE OF COUNSEL — CUSTODIAL INTERROGATION — WAIVER.

An accused who has expressed the desire to invoke the right to counsel is not subject to further interrogation by the police until counsel has been made available, unless the accused himself initiates further communication, exchanges, or conversations with the police (US Const, Ams V, XIV).

3. CRIMINAL LAW — ASSISTANCE OF COUNSEL — WAIVER — CUSTODIAL INTERROGATION.

Waivers of counsel must not only be voluntary, but must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege; the two questions are discrete inquiries, and a valid waiver cannot be established merely by showing that an accused who asked for an attorney responded to further custodial interrogation initiated by police officers even after he had been advised of his rights (US Const, Ams V, XIV).

4. CRIMINAL LAW — ASSISTANCE OF COUNSEL — CUSTODIAL INTERROGATION.

The lawyer is the protector of the rights of the accused in his dealings with the police and courts; therefore, the Supreme Court of the United States has fashioned the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring all interrogation to cease (US Const, Ams V, XIV).

5. CRIMINAL LAW — ASSISTANCE OF COUNSEL — WAIVER — CUSTODIAL INTERROGATION.

The Fifth and Fourteenth Amendments require a clear demonstration of waiver of the right to counsel once an accused has asked for it, and such clarity is not apparent when an accused's request for counsel is met by silence or inaction for a matter of days; nor does it exist when a defendant's request is followed by a move to solitary confinement, no matter what the reason (US Const, Ams V, XIV).

6. CRIMINAL LAW — ASSISTANCE OF COUNSEL — WAIVER — CUSTODIAL INTERROGATION.

Use of confessions against defendants who had expressly requested counsel and were subjected to custodial interrogation without the assistance of counsel violated their rights under the Fifth and Fourteenth Amendments where neither defendant initiated the conversations from which their inculpatory remarks emerged, the police were aware that counsel had been appointed to represent one defendant and had filed an appearance, and the other defendant had expressed his desire to speak with an attorney to the chief assistant prosecutor, who then left, after which the police continued to talk with the defendant (US Const, Ams V, XIV).

*Frank J. Kelley,* Attorney General, and *Robert A. Derengoski,* Solicitor General, for the people.

*L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Lawrence J. Bunting,* Assistant Prosecuting Attorney, for the people in *Paintman.*

*Michael W. LaBeau,* Prosecuting Attorney, and

*James G. Petrangelo,* Assistant Prosecuting Attorney, for the people in *Conklin.*

State Appellate Defender (by *P. E. Bennett* and *Karla Kendall,* Assistant Defender, for defendant Paintman and *Norris J. Thomas, Jr.,* Chief Deputy Defender, for defendant Conklin).

FITZGERALD, J. We are asked in these two cases to consider the admissibility of a statement made by an accused in police custody who had asked for an attorney. Each defendant had requested counsel at least twice after being arrested and advised of his *Miranda*[1] rights, and each later made inculpatory statements without having conferred with an attorney.[2]

We reverse the convictions and remand for new trials, at which the statements may not be admitted.

I

Defendant Paintman was sentenced to mandatory concurrent terms of life imprisonment after a jury convicted him of four counts of first-degree murder.[3] The case involved the fatal shootings of three adults and a child at an apartment in Southfield.

Prior to trial, defendant moved to suppress a

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] The record of the *Walker* hearing (fn 5, *infra)* in the case of defendant Conklin contains an ambiguous reference to a conversation between defendant and an attorney. Defendant was asked by his attorney whether "your attorney ever advised you with regard to the giving of any statements?" Defendant replied, "Yes, he told me not to give any." It is unclear as to where, when and by whom that advice was offered.

[3] MCL 750.316; MSA 28.548.

statement he allegedly[4] gave police on March 1, 1976, three days after his arrest. The trial court ruled, following a *Walker*[5] hearing, that the statement should be excluded because it was involuntary. The Court of Appeals reversed, stating, "[W]e are left with a definite and firm conviction that the statements of defendant-appellee of March 1, 1976 were voluntarily given and may be admitted at trial." The Court cited *People v McGillen #1,* 392 Mich 251; 220 NW2d 677 (1974). Defendant's motion for rehearing was granted, but the Court of Appeals affirmed its prior order. This Court denied defendant's application for leave to appeal the interlocutory order.[6]

Following his convictions, Paintman appealed as of right to the Court of Appeals, which affirmed. The Court refused to consider the admissibility of the statement, saying that the question had been addressed in the interlocutory appeal and that that ruling "is the law of the case and is controlling".[7] This Court granted leave to appeal.[8]

Defendant Conklin was sentenced to life in prison after a jury convicted him of the armed robbery[9] of a gasoline station in Monroe. Prior to trial, a *Walker*[10] hearing was held in response to defendant's motion to suppress a confession he gave sheriff's officers on July 22, 1976, nine days after his arrest.

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[4] A police lieutenant prepared the statement from memory following the conversation with defendant Paintman. Defendant disputed its contents.

[5] *People v Walker (On Rehearing),* 374 Mich 331; 132 NW2d 87 (1965).

[6] 397 Mich 885 (1976). Chief Justice THOMAS G. KAVANAGH and Justice LEVIN would have granted leave to appeal.

[7] *People v Paintman,* 92 Mich App 412, 416; 285 NW2d 206 (1979).

[8] *People v Paintman,* 408 Mich 896 (1980).

[9] MCL 750.529; MSA 28.797.

[10] See fn 5.

The trial court denied defendant's motion, holding that the statement had been made voluntarily and in compliance with *Miranda.* The confession subsequently was admitted at trial. The Court of Appeals affirmed defendant's conviction in an unpublished per curiam opinion. Rehearing was denied. This Court granted defendant's delayed application for leave to appeal.[11]

II

The basic rights to be afforded an accused in police custody were spelled out by the United States Supreme Court in *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). These rights were further refined in subsequent opinions.[12] The most recent explication of *Miranda* and its progeny is *Edwards v Arizona,* 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981). In *Edwards,* the Court re-emphasized the importance of the right to counsel during custodial interrogation.

Edwards was arrested on charges of murder, robbery and burglary, and was taken to the police station and advised of his *Miranda* rights. After the defendant indicated that he understood his rights and was willing to submit to questioning, he was told he had been implicated by another suspect. The defendant denied involvement, presented an alibi and sought to make a "deal". He subsequently said he wanted to talk with an attorney and questioning ceased. However, police detectives appeared at the county jail the next day to see

[11] *People v Conklin,* 408 Mich 958 (1980).

[12] See, for example, *Rhode Island v Innis,* 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *Fare v Michael C,* 442 US 707; 99 S Ct 2560; 61 L Ed 2d 197 (1979); *North Carolina v Butler,* 441 US 369; 99 S Ct 1755; 60 L Ed 2d 286 (1979); *Brewer v Williams,* 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977); *Michigan v Mosley,* 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975).

Edwards. Defendant said that he didn't want to talk with the officers, but was told by a jail guard that "he had" to do so.

After the detectives advised Edwards of his *Miranda* rights, defendant indicated that he was willing to talk if he first could hear the tape-recorded statement of his alleged accomplice. After listening to the statement for a few minutes, defendant said he would talk as long as his own remarks were not taped. Edwards thereafter implicated himself.

The Arizona Supreme Court said that Edwards had invoked his right to remain silent and his right to counsel, but subsequently had waived both. The court concluded that the confession and waiver were voluntarily and knowingly made.

The United States Supreme Court reversed, holding that the use of the confession at trial violated Edwards' rights under the Fifth and Fourteenth Amendments. The Court noted that although it had held in previous cases that an accused may waive *Miranda* rights, "the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel * * *." *Edwards,* p 484. The Court then set down the rule governing the waiver of the right to counsel once it has been invoked:

> "[A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel *has been made available* to him, *unless the accused himself initiates* further communication, exchanges or conversations with the police." *Id.* (Emphasis added.)

The Court said that the Arizona courts had applied an erroneous standard in determining

whether there had been a valid waiver. "[W]aivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Id.,* p 482. The question of "voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries", the Court said. *Id.,* p 484.

A valid waiver cannot be established merely by showing that an accused who has asked for an attorney "responded to further *police-initiated custodial interrogation* even if he has been advised of his rights", the Court said. (Emphasis added.)

We hold that *Edwards* is controlling in the cases at bar and mandates reversal of the convictions.

III

The facts of *Paintman* and *Conklin* are strikingly similar to the facts of *Edwards* and even more dramatic.

Edwards requested counsel when questioned by police following his arrest, as did Paintman and Conklin. However, the latter two defendants again asked for attorneys when arraigned; Edwards' confession apparently preceded his arraignment. Paintman's statement came three days after he twice asserted his right to counsel. Conklin's statement came nine days after his arrest and initial request for counsel, and seven days after his arraignment. In addition, officers were aware at the time Conklin confessed that he was represented by counsel, but did not contact the attorney. "I'm not required to" was the deputy sheriff's response when asked about the failure to alert counsel.

Alleged accomplices were involved in both *Paintman* and *Conklin,* as was the situation in *Edwards.*

Taped statements by the accomplices were played to both Edwards and Paintman prior to their confessions. In *Conklin,* defendant was placed in a room with his younger alleged accomplice to "clear things up" just prior to defendant's statement. There was testimony that before confessing, Conklin had discussed with officers the possibility of leniency for the accomplice.

The Supreme Court has recognized the inherent pressures on an accused undergoing custodial interrogation and the critical role that counsel plays in guarding against erosion of Fifth Amendment rights.

> "Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." *Fare v Michael C,* 442 US 707, 719; 99 S Ct 2560; 61 L Ed 2d 197 (1979).

The pressure on Edwards seemingly was of less intensity and of shorter duration than that on Paintman and Conklin.

Paintman was an admitted heroin addict with a $60 to $80 daily habit. He suffered withdrawal symptoms in the days preceding his statement. He was the target of derisive comments such as "baby killer" from both inmates and jail personnel because one of his alleged victims was a young child. There also was testimony about Paintman's suicidal mood. Further, as was the case in *Edwards,* Paintman told jail personnel prior to making his statement that he didn't wish to talk with police.

That desire was answered by detectives appearing at the jail later in the day.

Conklin was placed in a line-up the day after his arrest and spent most of his time in solitary confinement following his request for an attorney. He was taken out of the maximum security area after he confessed. There was testimony that the transfers were administrative in nature and unrelated to his initial refusal to talk with officers or his subsequent confession.

The *Edwards* Court did not hold that once an accused has asked for counsel the right cannot be abandoned without an attorney first being involved, nor do we. What we do hold is that the Fifth and Fourteenth Amendments require a clear demonstration of waiver. Such clarity is not apparent when an accused's request for counsel is met by silence or inaction for a matter of days. Nor does it exist when a defendant's request is followed by a move to solitary confinement, no matter what the reason for the transfer.

The facts adduced at the trials of these two cases do not fulfill the spirit of *Miranda* nor comport with the policies articulated in *Edwards.*

Neither Paintman nor Conklin *initiated* the conversations from which their inculpatory remarks emerged. The statements came after defendants expressly requested counsel when confronted by officers and questioned. There is no doubt that both Paintman and Conklin were subjected to custodial interrogation within the meaning of *Miranda.* Were that not the case, there would be no need to reach the question of waiver.[13]

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a

[13] *Rhode Island v Innis,* 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 444.

Paintman specifically had informed police officers prior to their arrival at the jail that he didn't wish to talk. Nonetheless, officers had him brought to an interview room. Conklin was taken out of solitary confinement and placed in a room with his younger alleged accomplice prior to his statement.

The United States Supreme Court has recognized that custodial interrogation by police may take different forms: "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v Innis,* 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

The *Edwards* Court emphasized, and we hold, that it is inconsistent with *Miranda* and its progeny for authorities to instigate a reinterrogation of an accused in custody who has clearly asserted the right to counsel. There is little doubt that both Paintman and Conklin clearly asserted their rights to counsel. In fact, their resistance to questioning continued unabated for a period of days.

In Conklin's case, authorities were not only aware that he had requested counsel, but that counsel had been appointed and had filed an appearance. In Paintman's case, he first indicated his desire to speak with an attorney in response to a direct question by the chief assistant prosecutor.[14] The prosecutor then left, but police continued to talk with defendant.

Of what significance is invocation of a cherished

[14] A tape-recorded statement by Paintman's alleged accomplice was played for defendant in the prosecutor's office. During a break in the playing, defendant was asked if he wished to speak with an attorney. "Certainly I want to talk to a lawyer", defendant replied.

constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim.

*Miranda* becomes meaningless rhetoric in the face of a request for counsel that matures only in form but not in substance.

"Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda,* 476.

## IV

The *Edwards* Court took pains to establish that it was not announcing new law, but only clarifying further the dictates of existing law.

"Because the use of Edwards' confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments *as construed* in *Miranda v Arizona, supra,* we reverse the judgment * * *." (Emphasis added.) *Edwards,* 480.

The Court later recited a parade of cases that supported the proposition of *Miranda* that "the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present' ".

The Court concluded the discussion by noting that "[w]e reconfirm these views and to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at

their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel". *Id.,* 485.

Thus, it is unnecessary to analyze the question of retroactivity under traditional standards.

In view of our decision to reverse the defendants' convictions and remand these cases for new trials, we do not decide the other issues raised.

Reversed and remanded.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, RYAN, and BLAIR MOODY, JR., JJ., concurred with FITZGERALD, J.

## IN THE MATTER OF HAGUE

Docket No. 65348. Argued November 17, 1980 (Calendar No. 12).—Decided February 1, 1982. Rehearing denied 413 Mich 1106.

The Judicial Tenure Commission found William C. Hague, a judge of the Recorder's Court of Detroit in the Traffic and Ordinance Division, guilty of judicial misconduct, and recommended that he be suspended from judicial office for 60 days without pay. The respondent was found to have disobeyed valid orders of superintending control from the Wayne Circuit Court concerning his dismissal of prostitution cases initiated by "appearance" or traffic ticket forms, refused to follow the decisions of the Court of Appeals on the constitutionality of the City of Detroit's gun-control ordinance, abused the contempt power, and improperly excluded attorneys from his courtroom. The respondent appeals.

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

The respondent is guilty of the misconduct charged and his behavior has been so clearly prejudicial to the administration of justice that he is suspended from judicial office for 60 days without pay.

1. The issue is not whether the orders of superintending control were correctly issued by the Wayne Circuit Court to stop Judge Hague's dismissal of the complaints, but whether he was bound to obey them. An order entered by a court with proper jurisdiction must be obeyed even if it is clearly incor-

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REFERENCES FOR POINTS IN HEADNOTES

[1-6] 20 Am Jur 2d, Courts §§ 111-117.
[7, 10] 20 Am Jur 2d, Courts §§ 186, 187.
[8] 20 Am Jur 2d, Courts §§ 1, 12, 64 *et seq.*
[9] 20 Am Jur 2d, Courts § 183 *et seq.*
[11-15] 7 Am Jur 2d, Attorneys at Law § 41 *et seq.*
17 Am Jur 2d, Contempt §§ 62-76, 115.
20 Am Jur 2d, Courts § 39.
63 Am Jur 2d, Prosecuting Attorneys § 25 *et seq.*
[16] 7 Am Jur 2d, Attorneys at Law § 88.
[17] 20 Am Jur 2d, Courts § 65.
46 Am Jur 2d, Judges § 188.

rect. The General Court Rules of 1963 confer authority on the Wayne Circuit Court to issue orders of superintending control to the Traffic and Ordinance Division of Recorder's Court, which is indisputably a "lower court" to the circuit court. The availability of an appeal in the individual case does not preclude superintending control when appeal does not provide adequate relief. A superior court always has jurisdiction to issue an order of superintending control; the inadequacy of the appeal is not a jurisdictional test but merely a procedural requirement to be met before relief can be granted. The case-by-case appeal of the hundreds of prostitution cases dismissed by Judge Hague would not have been a practical, efficient, or commonsense remedy for his persistent, wholesale dismissal of such cases during his service as presiding judge because of the delay and expense inherent in such a large number of appeals.

2. Judge Hague contends that he did not violate the orders because none of them clearly and unambiguously forbade dismissal of the cases for the specific reasons he announced. The record shows that the respondent made no serious good-faith attempt to obey the orders from the Wayne Circuit Court or the Court of Appeals. The thrust of the orders was to enjoin Judge Hague from dismissing the prostitution cases on a wholesale basis for the use of the printed traffic form as the charging document, no matter what other procedural reason he might give. Judge Hague knew or should have known that he was directly violating the import and spirit, as well as the substance, of the orders of superintending control. The maintenance of public confidence in the integrity of the judiciary required Judge Hague to avoid even the appearance of defiance of valid judicial orders. If he wished to question in good faith the precise meaning of the orders, he should have sought clarification and guidance from the superior courts.

3. There is no doubt that Judge Hague understood clearly that he had been ordered by the circuit court to end his practice of dismissing prostitution cases for reasons of form and procedure and that he disobeyed the orders nevertheless. Intentional disobedience of valid orders of superintending control necessarily constitutes judicial misconduct; public confidence, integrity, and impartiality of the judiciary can only be eroded by the spectacle of a judge refusing to follow the law.

4. Failure to follow the rule of stare decisis is not per se judicial misconduct. The Judicial Tenure Commission would be an inappropriate forum in which to correct erroneous judicial decisions made in good faith; it may not function as an appellate body. However, a judge is not free to willfully refuse to

enforce the law. The judiciary must strive to create and preserve the image of the judicial system as an independent, impartial source of reasoned actions and decisions. The decision of Judge Hague not to enforce the City of Detroit's gun-control ordinance was directly contrary to precedent of which he was aware and obviously based on his widely publicized personal belief about what the law should be rather than what it is. He also disagreed with the wisdom and constitutionality of the mandatory minimum sentences of the prostitution and gun-control ordinances. When a panel of the Court of Appeals, as it did in the precedential cases, has jurisdiction and declares a law to be valid and enforceable, a trial judge is bound by that decision until another panel of the Court of Appeals or the Supreme Court rules otherwise. Judge Hague not only disregarded binding precedent, he publicly declared his refusal, saying that the Court of Appeals does not make the law in this state. The respondent's dismissal of gun-control cases was not the result of reasoned judgment but the product of his personal prejudices. His lack of enforcement of the ordinance and willful disregard of the law violated his oath of office, engendered disrespect for the law and improperly interfered with the proper administration of justice.

5. The decision whether to initiate proceedings under the prostitution ordinance belongs to the prosecutor, not the trial judge. Therefore, the order by Judge Hague from the bench that he would hold the Assistant Corporation Counsel for Detroit, or the police, in contempt merely for initiating the prosecution of prostitution cases under the Detroit ordinance was improper. The power of contempt is awesome and must be used with the utmost restraint. The completely unjustified threat of contempt was conduct prejudicial to the administration of justice and an abuse of the court's power of contempt which constitutes judicial misconduct warranting discipline.

6. A court should use the least possible sanction adequate to achieve the proper end sought, and it necessarily has the inherent power to preserve or restore order by temporarily ejecting from the courtroom disruptive and disorderly persons, including attorneys. However, the power to remove disruptive attorneys may not be used as an artifice or guise to eject counsel with whom a judge has a personal or professional disagreement, whose presence inhibits the court, or toward whom the judge entertains a personal animosity but who is not, in fact, disruptive or disorderly. It is evident from the record that Judge Hague barred attorneys representing the City of

Detroit from his courtroom because of their roles in obtaining the orders of superintending control against him. The power to discipline members of the State Bar, except a proper adjudication of contempt, particularly the power to limit or preclude an attorney from practicing law, is reserved to the Supreme Court. On the facts of this case, ejecting attorneys and permanently barring them from practicing law in his courtroom was unwarranted, unjustified, and an abuse of the powers of his office.

7. The respondent's instruction to an assistant prosecuting attorney not to authorize certain warrants for the statutory offense of driving while the defendant's license is suspended was not coupled with a threat of contempt. While the instruction was beyond the respondent's authority, it was not equivalent to action on a matter before the court and the respondent is not charged with improperly dismissing such cases. Gratuitous advice to officers of the executive department not to prosecute certain cases is not a violation of the constitutional doctrine of separation of powers and is not an abuse of judicial authority.

8. The respondent in this case is at ideological war with local prosecuting authorities over the enforcement of non-traffic ordinances with which he does not agree. The depth of his conviction has blinded him to the limits of his adjudicative role, moved him to deny the authority of higher courts, and ultimately led him to disobey orders of those courts because he did not agree with them. In the process he abused the power of contempt and attempted to usurp the authority of the Supreme Court. The respondent's inability to separate the authority of the judicial office he holds from his personal convictions led to willful misconduct designed solely to frustrate enforcement of laws he was bound by oath to uphold. The misconduct was repeated and defiant, and, because of the widespread publicity given to it, can only have seriously damaged public esteem for the judiciary, engendered disrespect for the law, exposed the courts to obloquy, contempt, censure and reproach, and brought ridicule on Judge Hague as a judicial officer.

Judge Hague is suspended without pay from his judicial duties and administrative responsibilities for 60 days.

1. SUPERINTENDING CONTROL — JUDGES.

A judge must obey an order of superintending control entered by a court with proper jurisdiction even if it is clearly incorrect (GCR 1963, 711).

2. SUPERINTENDING CONTROL — RECORDER'S COURT — TRAFFIC AND ORDINANCE DIVISION.

The General Court Rules of 1963 confer authority on the Wayne

Circuit Court to issue orders of superintending control to the Traffic and Ordinance Division of Recorder's Court of Detroit, which is indisputably a "lower court" to the circuit court (GCR 1963, 711).

3. SUPERINTENDING CONTROL — JURISDICTION — APPEAL.

The availability of an appeal in the individual case does not preclude superintending control when appeal does not provide adequate relief; a superior court always has jurisdiction to issue an order of superintending control, and the inadequacy of the appeal is not a jurisdictional test but merely a procedural requirement to be met before relief can be granted (GCR 1963, 711).

4. JUDGES — SUPERINTENDING CONTROL — JURISDICTION — APPEAL.

A judge of the Recorder's Court of Detroit in the Traffic and Ordinance Division was bound to obey orders of superintending control issued by the Wayne Circuit Court to stop his dismissal of prostitution cases initiated by "appearance" or traffic ticket forms where the case-by-case appeal of the hundreds of cases dismissed by him would not have been a practical, efficient, or commonsense remedy for his persistent, wholesale dismissal of such cases (Code of Judicial Conduct, Canon 2; GCR 1963, 711).

5. JUDGES — SUPERINTENDING CONTROL — MISCONDUCT.

The maintenance of public confidence in the integrity of the judiciary requires a judge to avoid even the appearance of defiance of valid judicial orders; if he wishes to question in good faith the precise meaning of orders of superintending control, he should seek clarification and guidance from the superior courts (Code of Judicial Conduct, Canon 2).

6. JUDGES — SUPERINTENDING CONTROL — MISCONDUCT.

Intentional disobedience of valid orders of superintending control necessarily constitutes judicial misconduct; public confidence, integrity, and impartiality of the judiciary can only be eroded by the spectacle of a judge refusing to follow the law (Code of Judicial Conduct, Canon 2).

7. JUDGES — COMMON LAW — STARE DECISIS — MISCONDUCT.

Failure to follow the rule of stare decisis is not per se judicial misconduct; however, a judge is not free to willfully refuse to enforce the law (Code of Judicial Conduct, Canons 2, 3).

8. JUDGES — COMMON LAW — JURISPRUDENCE.

The judiciary must strive to create and preserve the image of the

judicial system as an independent, impartial source of reasoned actions and decisions (Code of Judicial Conduct, Canons 2, 3).

9. JUDGES — STARE DECISIS — MISCONDUCT.

A decision of a Recorder's Court Judge in the Traffic and Ordinance Division not to enforce the City of Detroit's gun-control ordinance violated his oath of office, engendered disrespect for the law and improperly interfered with the proper administration of justice where it was directly contrary to precedent of which he was aware and obviously based on his widely publicized personal belief about what the law should be rather than what it is, and the judge publicly declared his refusal to follow precedent, saying that the Court of Appeals does not make the law in this state (Const 1963, art 11, § 1; Code of Judicial Conduct, Canon 2; GCR 1963, 953[1]).

10. JUDGES — STARE DECISIS — COURT OF APPEALS.

When a panel of the Court of Appeals has jurisdiction and declares a law to be valid and enforceable, a trial judge is bound by that decision until another panel of the Court of Appeals or the Supreme Court rules otherwise; whatever his contrary personal view of appellate authority, a judge is not free to disregard it (Code of Judicial Conduct, Canon 3; GCR 1963, 912).

11. JUDGES — CONTEMPT — PROSECUTING ATTORNEYS — MISCONDUCT.

The decision whether to initiate proceedings under the prostitution ordinance of the City of Detroit belongs to the prosecuting attorney, not the trial judge; therefore, an order from the bench that he would hold the Assistant Corporation Counsel for Detroit, or the police, in contempt merely for initiating the prosecution of prostitution cases under the Detroit ordinance was improper.

12. JUDGES — CONTEMPT — MISCONDUCT.

The power of contempt is awesome and must be used with the utmost restraint; a completely unjustified threat of contempt is conduct prejudicial to the administration of justice and abuse of the court's power of contempt which constitutes judicial misconduct warranting discipline (GCR 1963, 932.4[b][iv]; GCR 1963, 953[1]; Code of Professional Responsibility and Canons, DR 1-102[A][5]).

13. JUDGES — ATTORNEYS — DISRUPTIVE CONDUCT — INHERENT POWER.

A court should use the least possible sanction adequate to achieve the proper end sought, and it necessarily has the inherent

power to preserve or restore order by temporarily ejecting from the courtroom disruptive and disorderly persons, including attorneys (Code of Judicial Conduct, Canon 3).

14. JUDGES — ATTORNEYS — DISRUPTIVE CONDUCT — INHERENT POWER.

The power to remove disruptive attorneys from the courtroom may not be used as an artifice or guise to eject counsel with whom a judge has a personal or professional disagreement, whose presence inhibits the court, or toward whom the judge entertains a personal animosity but who is not, in fact, disruptive or disorderly (Code of Judicial Conduct, Canon 3).

15. JUDGES — ATTORNEYS — DISCIPLINE.

Ejecting attorneys and permanently barring them from practicing law in a judge's courtroom is unwarranted, unjustified and an abuse by the judge of the powers of his office where the attorneys were not ejected because of any disruptive or disorderly conduct, but because of their roles in obtaining orders of superintending control against the judge (Code of Judicial Conduct, Canon 3).

16. ATTORNEY AND CLIENT — DISCIPLINE — PRACTICE OF LAW — COURTS.

The power to discipline members of the State Bar, except a proper adjudication of contempt, particularly the power to limit or preclude an attorney from practicing law, is reserved to the Supreme Court (Const 1963, art 6, § 5; MCL 600.904; MSA 27A.904).

17. JUDGES — MISCONDUCT — PROSECUTING ATTORNEYS — SEPARATION OF POWERS.

Gratuitous advice by a trial judge to officers of the executive department not to prosecute certain cases is not a violation of the constitutional doctrine of separation of powers and is not an abuse of judicial authority (Const 1963, art 3, § 2).

*Joseph F. Regnier,* Executive Director and General Counsel, *Thomas L. Prowse,* Co-Examiner, and *Stanley T. Dobry* and *Thomas A. Hallin,* Staff Attorneys, for the Judicial Tenure Commission.

*Joseph Earl Jackson* for respondent.

RYAN, J. This is a judicial discipline proceeding in which Judge William C. Hague of the Record-

er's Court, Traffic and Ordinance Division,[1] is charged with four general categories of misconduct:

I. Disobedience of valid orders entered by superior courts,

II. Refusal to follow the decisions of higher courts,

III. Abuse of the contempt power, and

IV. Improperly excluding attorneys from his courtroom.

Upon *de novo* review of the record, we are convinced that respondent is guilty of misconduct in each of the four categories and that his behavior has been so clearly prejudicial to the administration of justice,[2] that we adopt the recommendation of the Judicial Tenure Commission that he be suspended from judicial office for a period of 60 days without pay.

## I. DISOBEDIENCE OF VALID ORDERS ENTERED BY SUPERIOR COURTS

The Detroit prostitution ordinance,[3] so called, was amended in December, 1977 to provide for a mandatory jail sentence of 20 days upon conviction for accosting and soliciting for purposes of prostitution, under certain circumstances. The three judges of the Traffic and Ordinance Division of the Recorder's Court, in which such cases were heard, regularly rotated duty as presiding judge for two-week periods. The duties of presiding judge included conducting arraignments on non-traffic ordinance violations, accepting guilty pleas in such

[1] The Traffic and Ordinance Division of the Recorder's Court was abolished on September 1, 1981, and its jurisdiction vested in the newly created 36th District Court. See MCL 600.9941; MSA 27A.9941.

[2] Const 1963, art 6, § 30; GCR 1963, 932.4(b)(iv).

[3] Detroit City Code, § 39-1-52.

cases, and apportioning the work of the court to the other two judges and nine referees. On February 6, 1978, Judge Hague began his regularly scheduled two-week assignment as presiding judge and immediately began systematically dismissing prostitution cases for the stated reason that the preprinted citation or ticket forms which had been issued to defendants as the charging document could not be used to initiate non-traffic ordinance violation cases.

These same "appearance" or "traffic ticket" type forms had been used in the Traffic and Ordinance Division for many years to initiate prostitution ordinance violation cases. After Judge Hague had dismissed a substantial number of such cases, attorneys for the City of Detroit filed a complaint for a writ of superintending control in the Third Judicial Circuit Court (Wayne County) requesting that respondent be ordered to cease dismissing prostitution cases for the reasons he had been giving. On February 17, 1978, Chief Judge Richard Dunn issued a temporary order of superintending control directed to respondent which ordered, in pertinent part, that:

> "Judge Hague cease dismissing non-traffic ordinance complaints, as are presently being used, or any other complaints based upon objection to their form until further order of this court."

Despite the superintending control order, Judge Hague continued to dismiss prostitution cases. At least 47 such cases were dismissed between March 20 and 23 while the February 17 superintending control order was in effect. Of that number, 18 cases were dismissed with no reason being given, while 27 were dismissed for a lack of an arrest warrant in the file. Again, the City of Detroit

sought an order of superintending control in order to preclude further dismissals for the claimed procedural deficiency Judge Hague was asserting. On March 24, 1978, after a hearing, Chief Judge Dunn issued a permanent order of superintending control in which it was specifically found that the procedure employed by the Detroit Police Department and the Law Department of the City of Detroit in bringing the prostitution cases to court was proper and in compliance with all statutory requirements. The order declared that the dismissals had been "improper", and directed that:

"Judge Hague absolutely cease and desist from dismissing non-traffic ordinance complaints, as are presently being used, or any other complaints based upon objection to their form or the procedure employed for presenting said complaints to his court."[4]

Respondent continued, however, to dismiss "non-traffic ordinance complaints", including at least 92 prostitution cases, during March 25 through May 2, most of them for the announced reason that there was no arrest warrant in the file.

On May 3, 1978, upon the petition of the City of Detroit, Judge Dunn issued a third superintending control order denominated "Order of Clarification". It ordered Judge Hague

"(1) to accept pleas of guilty in City of Detroit ordi-

[4] Judge Dunn deleted the following language from the proposed order:

"[A]nd more specifically, refrain from adjourning or dismissing said complaints based on objection to their form, the procedure employed, or the necessity of obtaining a warrant."

Counsel for the Judicial Tenure Commission suggests that the reason the stricken language was deleted was because it was essentially repetitious of the remaining language of the order. While that explanation is plausible, we do not consider it necessary to make a finding on the point in order to resolve the issues before the Court.

nance violation cases where appearance tickets have been filed with the court; and (2) to order further proceedings, once a sworn complaint or appearance ticket is filed with the court, in said cases, where the accused pleads not guilty or stands mute."

The next day, May 4, 1978, Judge Hague responded by *sua sponte* issuing a document entitled "Order of Compliance", to be effective May 8, which required the City of Detroit to prosecute non-traffic ordinance violations with a formal complaint and warrant rather than the "ticket" form of complaint specifically approved in Judge Dunn's orders of superintending control and threatened contempt of court for failure to comply with his order. It provided in pertinent part:

"It is hereby ordered that the City of Detroit Law Department and the City of Detroit Police Department prepare non-traffic ordinance violations on form C.D. 104 WA(73) thereby submitting the court a complaint and warrant incorporating said complaint therein effective May 8, 1978, at 9:00 a.m.

"Failure to comply with this order will result in a citation for contempt of court."

The order was immediately vacated by Judge Dunn.

Judge Hague continued the wholesale dismissal of prostitution cases. Evidence produced before the Master appointed by this Court discloses that at least 26 cases were dismissed during the week of May 4-11, in direct violation of the May 3 superintending circuit court order of clarification.

The respondent's persistent dismissal of prostitution cases, in spite of three separate orders of superintending control, resulted in a May 25, 1978

order of the circuit court finding him in contempt[5] followed by a fourth superintending control order on May 30, 1978, essentially reiterating and clarifying the substance of the three previous orders. When, despite four orders of superintending control, Judge Hague continued to dismiss virtually all the prostitution cases being brought to the court, an order was issued by Chief Judge Dunn on June 15, 1978 directing Judge Hague to show cause why he should not be held in contempt of court. Upon appeal by Judge Hague to the Court of Appeals, the show cause proceeding was ordered stayed by that Court by its order of June 22, 1978, which provided in part:

> "It is further ordered on the court's own motion that no cases involving non-traffic ordinance violations shall be referred to the Honorable William C. Hague for hearing in the Recorder's Court, Traffic and Ordinance Division, until the further order of this court."

Despite the Court of Appeals order and while his appeal to that Court was pending, Judge Hague accepted referral of and dismissed 11 more prostitution cases.

The factual background developed above is essentially undisputed. The dispositive legal issues are whether the circuit court's superintending control orders were valid; if so, whether Judge Hague's behavior violated the terms of the orders; and, if so, whether that action amounted to judicial misconduct for which discipline is warranted.

[5] The May 25 order denominated "Order and Finding of Contempt" apparently was not in fact an actual adjudication of contempt but a finding by the circuit court that Judge Hague had violated the May 3 superintending control order by dismissing certain listed prostitution cases. No penalty was imposed.

A

Much of Judge Hague's argument to this Court is devoted to the proposition that the superintending control orders issued by the circuit court were improper and not binding upon him.[6] In addition, he argues that the City of Detroit prostitution and gun-control ordinances are invalid; that the procedures utilized to initiate ordinance cases are unconstitutional; that the equitable writ of superintending control should have been denied for lack of "clean hands"; that another adequate remedy was available; and that even if he was wrong, he was not guilty of "such an abuse of discretion as would amount to a failure to perform a clear legal duty". *People v Flint Municipal Judge,* 383 Mich 429; 175 NW2d 750 (1970).

These arguments, except for the last of them, are, in a word, irrelevant in this judicial discipline case, but they cast considerable light upon the real basis for the behavior of Judge Hague which precipitated these proceedings. The issue before this Court, in this first of the four areas of misconduct charged, is solely whether Judge Hague was bound to obey the orders of superintending control.

An order entered by a court without jurisdiction "is absolutely void", *Fox v Board of Regents of the University of Michigan,* 375 Mich 238, 242; 134 NW2d 146 (1965). As in the law of contempt, Judge Hague was free to disregard an order void for lack of jurisdiction. *Cf. United States v United Mine Workers of America,* 330 US 258, 293; 67 S Ct 677; 91 L Ed 884 (1947); *Walker v City of Birmingham,* 388 US 307, 320-321; 87 S Ct 1824;

[6] Although not controlling here, the validity of the May 30, 1978 order was upheld in *Detroit v Recorder's Court Judge, Traffic & Ordinance Division,* 85 Mich App 284; 271 NW2d 202 (1978), *lv den* 404 Mich 808 (1978).

18 L Ed 2d 1210 (1967). In contrast, an order entered by a court with proper jurisdiction must be obeyed even if the order is clearly incorrect. *State Bar of Michigan v Cramer,* 399 Mich 116, 125; 249 NW2d 1 (1976), and cases cited therein. See also *City of Troy v Holcomb,* 362 Mich 163; 106 NW2d 762 (1961); *Lester v Sheriff of Oakland County,* 84 Mich App 689, 697-698; 270 NW2d 493 (1978).

Respondent was obligated to obey the orders of superintending control unless the Third Judicial Circuit Court was without jurisdiction in issuing them.

The circuit courts have general superintending control over all inferior courts, subject to rules of the Supreme Court. MCL 600.615; MSA 27A.615; Const 1963, art 6, § 13. This Court has limited, by court rule, the extraordinary writ of superintending control by providing that a complaint may not be filed if another adequate remedy is available and, if an appeal is available, the complaint for superintending control must be dismissed. GCR 1963, 711.2, 711.4(b). The City of Detroit acknowledged that it could have appealed each of the hundreds of prostitution and gun-control cases dismissed by Judge Hague. MCL 770.12; MSA 28.1109; GCR 1963, 806; GCR 1963, 703. The respondent relies upon the language of GCR 711.4(b), amended in 1977, requiring dismissal if an appeal is available, considers the catchline heading "Jurisdiction" of 711.4 and concludes that if an appeal is available, jurisdiction to entertain the superintending control action does not exist.

The rule provides:

"Rule 711. Superintending Control.

* * *

".2 Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See GCR 1963, 701.1(b); 711.4(b); 862.5(a).

* * *

".4 Jurisdiction.

"(a) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts and tribunals.

"(b) When an appeal in the Supreme Court, the Court of Appeals or the circuit court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed."

While Judge Hague's jurisdictional argument is not without arguable merit, it focuses upon 711.4(b) of the rule and ignores the straightforward text of 711.4(a) which confers authority upon the Third Judicial Circuit Court to issue orders of superintending control to the Traffic and Ordinance Division, indisputably a "lower court" to the circuit court. Further, it must be noted that the catchline heading, "Jurisdiction", cannot be considered as part of the text or an aid in construing the rule. GCR 1963, 15. It is clear from this Court's opinion in *Cahill v Fifteenth District Judge,* 393 Mich 137; 224 NW2d 24 (1974), that availability of an appeal in the individual case does not preclude superintending relief when that procedure does not provide an adequate remedy.[7] Implicit in *Cahill* is the idea that a superior court always has jurisdiction to issue an order of superintending control and that adequacy of the appeal remedy is not a jurisdictional test but merely a

[7] We reject respondent's contention that superintending control can only apply to the general practices of an entire bench. While that was the case in *Cahill, supra,* nothing in GCR 1963, 711 suggests any such limitation.

procedural requirement to be met before relief can be granted.

It is apparent to us, however, that the case-by-case appeal to the Court of Appeals of the hundreds of prostitution cases dismissed by Judge Hague would not have been a practical, efficient or commonsense remedy for his persistent, wholesale dismissal of all prostitution cases prosecuted in the City of Detroit during his service as presiding judge. The delay and expense inherent in the appeal of dozens upon dozens of such cases, while during their pendency Judge Hague continued to refuse to enforce the ordinance, suggests persuasively that, in the circumstances, case-by-case appeal was neither an adequate nor realistic remedy.

B

Judge Hague admits, and the record confirms, that he continued to dismiss prostitution ordinance cases after the entry of the superintending control orders of February 17, 1978; March 24, 1978; May 3, 1978; May 30, 1978 and the order to show cause of June 22, 1978. He contends, however, that he did not violate the orders, since none of them clearly and unambiguously forbade him to dismiss the cases for the specific reasons announced.[8]

A reading of the immensely voluminous record of thousands of pages leaves us with the abiding conviction that Judge Hague knew exactly what the superintending control orders forbade him to do, and did so anyway. The record reveals that the

[8] The circuit court issued a total of five orders, including four orders of superintending control, the May 3 order denominated "Order of Clarification" and one order to show cause. Judge Hague appeared before Judge Dunn in connection with these matters on at least two occasions.

respondent made no serious good-faith attempt to obey the various orders from superior courts, either the circuit court or the Court of Appeals. He stated on the record, from the bench in his courtroom:

"Do you understand that circuit court has no jurisdiction over me? Do you understand that?"

As to the circuit court orders, Judge Hague wrote:

"We have had a number of orders that have needed repeated clarification. I neither wrote them *nor read them.*" (Emphasis added.)

Again, he stated:

"Judge Dunn is not big enough to make me do that, and he'll find out in the long run."

Judge Hague had this to say, on the record, from the bench, about the Court of Appeals:

"Do you know that the Court of Appeals doesn't establish the law in this state?"

"I'm throwing the gun cases out.

* * *

"Tell them [the Michigan Court of Appeals] what I'm doing. * * * I don't have to jump through a hoop for the Court of Appeals. I'm an elected judge."

We agree with the Judicial Tenure Commission that the thrust of the superintending control orders and the Court of Appeals stay order was to enjoin Judge Hague from dismissing prostitution cases on a wholesale basis for objection to the use of the "appearance" or "traffic ticket" type printed form as the charging document, no matter what

other procedural reason he might assign. The evidence produced before the Master is compelling that Judge Hague knew or should have known that he was in direct violation of all four orders of superintending control. *In the Matter of Bennett,* 403 Mich 178, 188; 267 NW2d 914 (1978).

The maintenance of public confidence in the integrity of the judiciary required Judge Hague to avoid even the *appearance* of defiance of valid judicial orders. If he wished to question in good faith the precise meaning of the superintending control orders, he should have taken the initiative in seeking clarification and guidance from the superior court. Similarly, when the Court of Appeals ordered on June 22, 1978 that no cases involving non-traffic ordinance violations be "referred" to Judge Hague and he had any question whether he could continue to hear such cases, he should have resolved the question not in favor of apparent defiance, but by a request for clarification.

From a careful examination of the orders in question, together with Judge Hague's testimony before the Master concerning his controversy with the circuit court, and upon consideration of the record evidence of the respondent's long history of publicly announced disapproval of the prostitution ordinance, we have no doubt that he understood clearly that he had been ordered by the circuit court to end his practice of dismissing prostitution cases for reasons of form and procedure, and that he disobeyed the orders nevertheless.

It seems clear beyond peradventure that, in this case, Judge Hague's intentional disobedience of valid orders constitutes judicial misconduct. Public confidence in the integrity and impartiality of the judiciary can only be eroded by the spectacle of a

judge refusing to follow the law. Code of Judicial Conduct, Canon 2(B). This Court held in *In the Matter of Bennett, supra,* 188-189, that violation of a valid superintending control order "necessarily hinders the administration of justice".

## II. REFUSAL TO FOLLOW THE DECISIONS OF HIGHER COURTS

Several years prior to the events here involved, Detroit adopted its gun-control ordinance[9] which provided for a mandatory minimum penalty upon conviction of a $400 fine and "a term of imprisonment" if, at the time of the violation, the firearm is loaded.

Shortly thereafter, Judge Hague held this ordinance to be unconstitutional for the reasons, *inter alia,* that the state had preempted the firearm-control field.

The City of Detroit sought and obtained a writ of superintending control in the circuit court. The circuit judge ruled in a written opinion that the state had not preempted the gun-control field and that the ordinance was valid. Judge Hague appealed to the Court of Appeals which affirmed the circuit court, declaring:

> "We therefore conclude that the State of Michigan has not preempted firearms control. The circuit court order of superintending control is affirmed." *Detroit v Recorder's Court Judge, Traffic & Ordinance Division,* 56 Mich App 224; 223 NW2d 722 (1974).

Judge Hague continued to dismiss gun-control cases at the arraignment or, upon trial, finding defendants not guilty for the announced reason

[9] Detroit City Code, §§ 66-4-2, 66-5-1.

that the ordinance violates the constitutional right to bear arms and that the city is without authority to legislate a mandatory minimum sentence.

Once again the city sought and obtained a writ of superintending control from the circuit court. The circuit judge held the ordinance to be valid and declared Judge Hague to be in error with respect to both of the grounds upon which he was holding the ordinance to be unconstitutional. Again, Judge Hague appealed to the Court of Appeals, which affirmed the circuit court and specifically held that the ordinance did not violate the constitutional right to bear arms and that the mandatory minimum sentence provision was valid, concluding with the statement:

> "The ordinance is constitutionally sound." *Detroit v Recorder's Court Judge, Traffic & Ordinance Division,* 71 Mich App 414; 248 NW2d 566 (1976).

Notwithstanding the foregoing decisions of the Court of Appeals in 1974 and 1976 which affirmed issuance of writs of superintending control, Judge Hague continued, on at least eight occasions, from September, 1977 through October, 1978, to dismiss gun-control cases at the arraignment stage or found defendants not guilty after trial, or partial trial, citing precisely the same theories of unconstitutionality the Court of Appeals had rejected.

On these facts the commission found judicial misconduct in Judge Hague's intentional failure to follow stare decisis. Failure to follow stare decisis is not per se judicial misconduct. The Judicial Tenure Commission would be a singularly inappropriate forum in which to correct erroneous judicial decisions made in good faith. It may not function as an appellate body, Rule 1, Administrative Rules of the Judicial Tenure Commission, and to our knowledge has not undertaken to do so.

However, a judge is not free to willfully refuse to enforce the law. Code of Judicial Conduct, Canons 2, 3. In *Bennett,* p 199, we reminded the judiciary that it must

> "strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decisions."

Where, as here, a judge's decision striking down a law as unconstitutional is directly contrary to appellate precedent of which he is aware and obviously based upon his widely publicized personal belief about what the law should be rather than what it is, the public perception of impartiality of the justice system is seriously harmed. Code of Judicial Conduct, Canon 2(B). In addition to his announced view that the gun-control ordinance is unconstitutional, despite appellate decision to the contrary, Judge Hague disagrees with the wisdom and the constitutionality of the mandatory minimum jail sentences required by both the prostitution and gun ordinances. On March 31, 1978, he announced from the bench his refusal to honor the sentencing provisions of both ordinances, stating: "I'm not going to impose any mandatory penalty."

When a panel of the Court of Appeals, having jurisdiction of a matter as it did in this case, declares a law to be valid and enforceable, a trial judge is bound by that decision until another panel of the Court of Appeals or this Court rules otherwise, whether he agrees with the decision or not. See *Hackett v Ferndale City Clerk,* 1 Mich App 6; 133 NW2d 221 (1965). A judge who may disagree with the appellate authority must, nevertheless, lay aside his own opinion of the validity of the law and dispose of the cases before him in accordance with the precedent. Whatever his contrary per-

sonal view of appellate authority, a judge is not free to disregard it. Code of Judicial Conduct, Canon 3(C); GCR 1963, 912. A judge must be "faithful to the law". Code of Judicial Conduct, Canon 3(A)(1).

Judge Hague not only disregarded the binding precedent announced by the Court of Appeals with respect to the constitutionality of the gun-control ordinance, he publicly declared his refusal to follow it, saying, as the record discloses:

"Do you know that the Court of Appeals doesn't establish the law in this state?

* * *

"That decision I'm telling you—and you can communicate it to the judge who made it—is not binding on me. I don't have to follow that decision. The Court of Appeals doesn't make the law in this state.

* * *

"The Court of Appeals can't substitute their judgment for me.

* * *

"The Supreme Court makes the law in this state.

* * *

"I'm going to give you another chance to go to the Court of Appeals. I sustain the finding of not guilty on all of the theories raised by the defendant: the preemption; that the offense did not take place in a public place; that the mandatory penalty violates the defendant's constitutional rights and that the mandatory penalty is inconsistent with the state statute which delegated the authority to enact penalties to the city, and that delegation the state said that the city could enact ordinances and provide for confinement and punishment, both in the discretion of the court.

"A mandatory penalty divests the court of its discretion."

We agree with the commission that in this case

respondent's dismissal of gun-control cases was not the result of reasoned judgment but the product of his personal prejudices. By his lack of reasoned enforcement of the ordinance in question and willful disregard of the law as enunciated by the Court of Appeals, Judge Hague violated his oath of office, engendered disrespect for the law and improperly interfered with the proper administration of justice. Const 1963, art 11, § 1; Code of Judicial Conduct, Canon 2(B); GCR 1963, 953(1).

## III. ABUSE OF THE CONTEMPT POWER

On September 11, 1978, from the bench and while court was in session, Judge Hague threatened Detroit Assistant Corporation Counsel Alfred Sawaya with contempt of court if he continued to bring prostitution cases into his courtroom for prosecution:

"*[Judge Hague]:* It is the order of this court that no further prostitution cases be brought into this courtroom, and they can be tried before a referee or any other judge in this court. Now whatever you want to do with them, that's your privilege.

"Mr. Representative of the Detroit Police Department and Officer, don't bring them in this courtroom anymore; that's an order of the court. If you do, I'm going to cite you for contempt of court the minute you walk through the court with the prostitutes; do you understand?

"*Mr. Sawaya:* I understand very clearly, your Honor."

The respondent does not deny this incident but suggests that the threat was in some way justified by the city corporation counsel's office continuing to bring such cases even after it was obvious that Judge Hague would simply dismiss them. Plainly, the decision whether to initiate proceedings under

the prostitution ordinance belongs to the prosecutor, not the trial judge. On that basis alone, to say nothing of the history of the matter as we have detailed it herein, we reject the assertion that the prosecutor could possibly be contemptuous merely for initiating the prosecution of prostitution cases under the Detroit ordinance.

The contempt power is awesome and must be used with the utmost restraint. See *People v Matish,* 384 Mich 568, 572; 184 NW2d 915 (1971). Abuse of the contempt power, including unjustified threats to hold persons in contempt, constitutes misconduct warranting discipline. *In re Del Rio,* 400 Mich 665; 256 NW2d 727 (1977), *app dis* 434 US 1029 (1978). The completely unjustified threat of contempt described above was "conduct prejudicial to the administration of justice" and an abuse of the court's contempt power warranting discipline. GCR 1963, 932.4(b)(iv); GCR 1963, 953(1); Code of Professional Responsibility and Canons, DR 1-102(A)(5).

## IV. IMPROPERLY EXCLUDING ATTORNEYS FROM THE COURTROOM

The Judicial Tenure Commission found that respondent infringed upon the authority of the Supreme Court to discipline and regulate members of the State Bar by ordering certain attorneys out of his courtroom in 1976 and 1978. Const 1963, art 6, § 5; GCR 1963, 957.1.

### A

Robert Horvath, an Assistant Corporation Counsel for the City of Detroit, had been assigned by his superiors to appear from time to time on behalf of the City of Detroit before Judge Hague in

connection with the prosecution of prostitution and gun-control ordinance cases. When the decision was made by his superiors in the Law Department of the City of Detroit to seek an order of superintending control, Mr. Horvath was assigned to appear and participate on behalf of the city. When he attempted to resume his representation of the city before Judge Hague on May 8, 1978, on the prosecution of ordinance matters unrelated to prostitution cases, he was ordered by the respondent to leave the courtroom. Evidence on the point includes the following transcript of the proceeding before Judge Hague:

"*Court Clerk:* Case Number Z-223105, People versus * * *. Charge is leaving the scene of an injury accident without identifying self, your Honor. Today is the date for a motion for a discovery and order for discovery motion to be heard today.

"*The Court:* Mr. Horvath, I think the propriety of this court and the order of this court is going to require me to relieve you of your assignment in here. You report back to your superiors. Do you understand that?

"*Mr. Robert Horvath:* Why is that, your Honor?

"*The Court:* I said because of the propriety of the court. I think in the best interests of the orderly procedure that you return to your courtroom—to your chief. I will excuse you from assignments in this court.

"*Mr. Horvath:* Very well, your Honor.

"*The Court:* Leave the arena of the law. I am excusing you.

"*Mr. Horvath:* I am just getting—

"*The Court: (Interposing)* Get your stuff together and leave."

On May 11, 1978, Judge Hague again refused to allow Mr. Horvath to practice law in his courtroom and informed him that the order was a standing one. On June 13, 1978, Mr. Horvath

entered Judge Hague's courtroom for the purpose of determining the disposition of certain cases. Judge Hague immediately and without any stated reason ordered his court officer to remove Mr. Horvath.

George Matish, Deputy Corporation Counsel for the City of Detroit, entered respondent's courtroom on May 8, 1978. It appears from the record that Mr. Matish interrupted the proceedings to register an objection on behalf of the city as to the manner in which respondent was conducting an arraignment of a defendant charged with a city ordinance violation. Respondent advised Mr. Matish that he would be permitted to remain in the courtroom to represent the city in the case previously called. Mr. Matish indicated that he did not intend to do so, continued to address the court concerning the general procedure being employed by respondent and refused to be seated when ordered by Judge Hague to do so. Respondent then ordered Mr. Matish from the courtroom. Like the Master, we think respondent was well within his authority to eject Mr. Matish in the circumstances.

Two days later, however, when Mr. Matish appeared in the courtroom to represent the city in scheduled matters, respondent stated:

> "I don't intend to try the case that's before Judge Dunn in this courtroom. Are you listening to what I'm saying? You are a principal prosecutor in that case against me. Therefore, I am inhibited by your presence here. I'll not permit you to represent the People in this courtroom."

Mr. Matish declared that he was there to represent the City of Detroit in scheduled matters in which he believed the city had a right to be heard; that he was not being contemptuous and was not

there to litigate the "Judge Dunn case", and that he was not trying to inhibit the court in any way. Still, respondent ordered Mr. Matish to leave the courtroom. He did so.

On May 21, 1976, Gill S. Stevens, a sightless attorney employed by the City of Detroit as an Assistant Corporation Counsel, was representing the city in respondent's courtroom. After his matters were concluded and he was leaving the courtroom, Mr. Stevens was called back to the bench by Judge Hague and requested to "approve" a number of orders for the return, to certain defendants, of fingerprint records, arrest cards and related documents. Stevens indicated a reluctance to do so and requested permission to call his superiors. Respondent denied the request and told Mr. Stevens:

"You get somebody to read them to you if you don't know what's in them, all right?"

When Mr. Stevens asked who would read the proposed orders to him, respondent immediately declared that he found Mr. Stevens to be in contempt of court, announced a sentence of $100 fine or 30 days in jail and ordered Mr. Stevens placed in the prisoners' box. Shortly thereafter, Mr. Stevens was taken from the prisoners' box in the courtroom to the detention room which is a large cell or "bullpen".

Later, upon advice of his superiors, Stevens approved the proposed orders and was released. Respondent then ordered Mr. Stevens never to come into his courtroom again. The lawyer has complied with that order.

Counsel for the commission asserts in his brief that:

"MCL 600.1701; MSA 27A.1701 limits the power of courts to punish for contemptuous acts to either imposition of a fine or imprisonment.

"Absent a finding of contempt, a trial court cannot impose sanctions against an attorney on the basis of the court's 'inherent power'." Brief in Support of Commission's Findings, p 18.

To the extent that statement may suggest that a trial court may not eject an attorney from the courtroom for any reason absent an adjudication of contempt under MCL 600.1701; MSA 27A.1701, we reject it.

Since, as we have said, the contempt power is to be exercised with great restraint, *Matish, supra,* and a court should use the least possible sanction adequate to achieve the proper end sought, *People v Kurz,* 35 Mich App 643; 192 NW2d 594 (1971) (LEVIN, J.), *lv den* 387 Mich 756 (1972), a court necessarily has the inherent power to preserve or restore order by temporarily ejecting from the courtroom disruptive and disorderly persons, including attorneys. See Code of Judicial Conduct, Canon 3(A), subds (2) and (3). Every attorney or party has a full right to be heard. *Id.,* Canon 3(A)(4).

However, the power to remove disruptive attorneys may not be used as an artifice or guise to eject counsel with whom a judge has a personal or professional disagreement, whose presence "inhibits" the court, or toward whom the judge entertains a personal animosity but who is not, in fact, disruptive or disorderly.

It is evident from the record that Judge Hague barred Mr. Horvath from the courtroom on the occasions described and Mr. Matish on May 10, 1978 not because of any disruptive or disorderly conduct, but because of their respective roles on

behalf of the city in obtaining issuance of the orders of superintending control against respondent.

The power to discipline members of the State Bar, save a proper adjudication of contempt, particularly the power to limit or preclude an attorney from practicing law in any courtroom of the state, is reserved to the Supreme Court. Const 1963, art 6, § 5. See *In re Schlossberg v State Bar Grievance Board,* 388 Mich 389; 200 NW2d 219 (1972). See also MCL 600.904; MSA 27A.904.[10]

We find, as did the Master and the Judicial Tenure Commission, that, on the facts of record, the ejection of Attorneys Horvath on May 8 and 11, and June 13, 1978; Matish on May 10, 1978; and Stevens on May 21, 1976, with explicit orders to Horvath and Stevens that they were permanently barred from practicing law in respondent's courtroom, was unwarranted and unjustified and an abuse by the respondent of the powers of his office.

B

The commission charges, and the Master and commission found, that respondent was guilty of misconduct for having "instructed" Assistant Prosecuting Attorney Thomas Smith in October, 1978, not "to authorize warrants for the statutory offenses of driving while license suspended if they were based on the defendants' failure to appear for prior moving violations". It appears that in re-

[10] "The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar."

sponse to that "instruction", Assistant Prosecutor Smith denied 16 warrant requests on October 26 and 27, 1978.

Counsel for the commission characterizes respondent's instruction to Assistant Prosecutor Smith as "a violation of the constitutional principle of separation of powers".

The commission found that respondent's conduct in that respect "violated the constitutional doctrine of separation of powers and [constituted an abuse of] the power of contempt inherent in respondent's office".

We disagree.

There is no evidence that Judge Hague's instruction to Assistant Prosecutor Smith was coupled with a threat of contempt. Further, the "instruction" to Mr. Smith, while beyond the respondent's authority, was not equivalent to action upon a matter before the court. Respondent is not charged with improperly dismissing such cases and there is no evidence he did so. Gratuitous advice to the law enforcement authorities of the executive department not to prosecute certain cases, adopted by those authorities without threat of contempt or other sanction, is not a "violation of the constitutional doctrine of separation of powers" and is not an abuse of judicial authority.

## V. CONCLUSION

The tale which unfolds upon a reading of the hundreds of pages of testimony, exhibits, briefs, and findings of fact and conclusions of law, is of a trial judge at ideological war with local prosecuting authorities over enforcement of non-traffic ordinances with the substance of which he does not agree. His longstanding and outspoken public op-

position to the mandatory minimum penalties of the City of Detroit prostitution and gun-control ordinances led him to frustrate enforcement of this ordinance with every means at his disposal during his periodic two-week term as presiding judge. His depth of conviction that the ordinance penalties are unjust blinded him to an appreciation of the limits of his adjudicative role in the criminal justice process, and moved him to deny the authority of higher courts who declared he was in error and ultimately led him to disobey those orders because he did not agree with them. In the process he abused the contempt power of his office by threatening punishment to those who, in accordance with their own oath of office, attempted to follow and enforce the law he opposed. When that failed he attempted to usurp the authority of the Supreme Court by improperly denying three attorneys their right to practice law in the courtroom in which they, like he, were assigned to serve.

It was in his inability to separate the authority of the judicial office he holds from his personal convictions that Judge Hague lost his way. In the particulars described, unable to see that he was the servant of the law and not its embodiment, he set himself above it.

As a sister court declared recently:

"An intoxication with judicial power which would ignore basic constitutional precepts is a wholly unacceptable syndrome that cannot be tolerated * * *. To brook it in a single courtroom would not only degrade the courts in general, but would affront the vast majority of * * * judges who perceive their courtrooms as 'place[s] of justice', rather than arenas for exhibitionism by display, before an intimidated audience, of naked and illegal judicial power." *In the Matter of Yengo,* 72 NJ 425, 450; 371 A2d 41, 57 (1977).

Judge Hague's disobedience of superior court orders, refusal to follow settled and binding case precedent, abuse of the contempt powers and unjustified exclusion of attorneys from the courtroom is a mosaic of willful misconduct designed solely to frustrate enforcement of laws he was oath-bound to uphold. It was repeated and defiant and, because of the widespread publicity given it within the courtroom and in the community at large, can only have seriously damaged public esteem for the judiciary in general, engendered disrespect for the law, exposed the courts to obloquy, contempt, censure and reproach and brought ridicule upon Judge Hague as a judicial officer.

We conclude that in all four types of misconduct detailed hereinbefore,[11] the respondent failed to uphold his oath to faithfully discharge the duties of his office, Const 1963, art 11, § 1; undermined the "integrity and independence of the judiciary", Code of Judicial Conduct, Canon 1; created "impropriety and the appearance of impropriety", *id.*, Canon 2; failed to maintain the integrity of the legal profession, Code of Professional Responsibility and Canons, Canon 1; engaged in conduct prejudicial to the proper administration of justice, Code of Professional Responsibility and Canons, DR 1-102(A)(5), GCR 1963, 953(1) and 932.4(b)(iv); exposed the courts to "obloquy, contempt, censure and reproach", GCR 1963, 953(2); and therefore failed to conform his behavior to the applicable standards of conduct, GCR 1963, 952.1 and 953(4).

We adopt the recommendation of the Judicial

[11] The supplemental complaint to Formal Complaint No. 23 is the sole basis for the Court's decision in this case. Although a motion was made and opposed to supplement the record before the commission, it appears that the opinion was issued without accepting any supplemental information. All allegations of judicial misconduct not contained in this record must be raised, if at all, in another formal complaint.

Tenure Commission and order Judge William C. Hague be suspended without pay from the discharge of all his judicial duties or administrative responsibility for a period of 60 days.[12] Final process to effectuate this order of suspension shall issue immediately upon release of this opinion.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred with RYAN, J.

[12] We recognize that the judicial duties and responsibilities from which we suspend respondent are those of a judge of the Recorder's Court, the Traffic and Ordinance Division of that court having been abolished. See fn 1.

PEOPLE v SHELTON

Docket No. 66974. Decided February 1, 1982. On request by the defendant for review of the record the Supreme Court, in lieu of granting leave to appeal, vacated the defendant's conviction of being an habitual offender, and remanded for sentencing on the underlying felony conviction. Rehearing denied 413 Mich 1108.

Oddie Shelton was convicted in the Kent Circuit Court, Roman J. Snow, J., of breaking and entering with intent to commit larceny and of being an habitual offender. The habitual offender charge was brought by the filing of a supplemental information on the first day of trial on the main charge, just before the selection of the jury. After conviction by the jury on the main charge, the defendant was arraigned on the supplemental information and convicted in a bench trial. The defendant appealed, contending that case law, which requires that the prosecutor "promptly proceed" on the habitual offender charge, meant that the supplemental information must be filed at the same time as the information charging the underlying felony. The Court of Appeals, Allen, P.J., and D. F. Walsh and G. R. McDonald, JJ., affirmed the conviction in an unpublished opinion per curiam (Docket No. 46671). The defendant requests review of the record.

In a unanimous opinion per curiam, the Supreme Court *held:*

"Promptly" means that the prosecutor must file the supplemental information, if at all, not more than 14 days after the defendant is arraigned in the circuit court (or has waived arraignment) on the information charging the underlying felony, or before trial if the defendant is tried within that 14-day period.

1. The purpose of requiring a prosecutor to proceed "promptly" to file the supplemental information is to provide the accused notice, at an early stage of the proceedings, of the potential consequences should the accused be convicted of the underlying offense. A standard which would find filing on the day of trial to suffice is inadequate. While any "rule" established is subject to the criticism that it is arbitrary, it is preferable to the ad hoc decision-making which has been the practice. The 14-day rule allows the prosecutor sufficient time

to make a decision regarding supplementation while at the same time providing notice to the defendant at an early stage of the proceedings.

2. The prosecutor is not foreclosed from proceeding against an habitual offender after conviction when he is unaware of the prior felony record until after conviction, nor when the delay is due to the need to verify out-of-state felony convictions based on the "rap sheet".

3. The decision in this case shall apply to all cases in which the defendant is arraigned in the circuit court on the information charging the underlying felony after the date of its release.

4. In this case the prosecutor did not file the supplemental information until the first day of trial. The conviction of being an habitual offender is vacated, and the case remanded to the circuit court for sentencing on the underlying conviction.

Oddie Shelton, *in propria persona.*

PER CURIAM. The issue in this case is whether our decision in *People v Fountain,* 407 Mich 96; 282 NW2d 168 (1979), requires that a prosecutor who intends to file a supplemental information charging a defendant with being an habitual offender must do so at the same time at which the information on the underlying felony is filed or must only proceed "promptly" to do so. We hold that a prosecutor must proceed "promptly" to file the supplemental information and we define the term "promptly" to mean that the prosecutor must file the supplemental information, if at all, not more than 14 days after the defendant is arraigned in circuit court (or has waived arraignment) on the information charging the underlying felony, or before trial if the defendant is tried within that 14-day period.

I

The defendant was charged with breaking and

entering with intent to commit larceny[1] in an information filed on February 15, 1979. In addition, on the first day of trial,[2] just prior to the selection of the jury, the prosecutor filed a supplemental information charging the defendant with being an habitual offender.[3]

The jury convicted the defendant of breaking and entering with intent to commit larceny. The defendant was immediately thereafter arraigned on the supplemental information in which he was charged with having committed two prior felonies. A bench trial was conducted and the defendant was found guilty as charged. On June 14, 1979, the defendant was sentenced to a term of 5 to 20 years in prison.

The defendant appealed to the Court of Appeals. He contended that this Court's decision in *Fountain* required that the prosecutor file the supplemental information at the same time as he filed the information charging the underlying felony. The Court of Appeals affirmed in an unpublished per curiam opinion.

## II

In *Fountain* we stated:

"A prosecutor who knows a person has a prior felony record must promptly proceed, if at all, against the person as an habitual offender. *People v Hatt,* 384 Mich

[1] MCL 750.110; MSA 28.305.

[2] The record reveals that the prosecuting attorney "submitted" the supplemental information to the court, without defense objection, prior to the selection of the jury. However, the supplemental information was not actually filed in the sense of being placed in the court file until the following day. We deem this distinction to be of no significance in this case but we caution that a prosecutor's notice of intent to file a supplemental information will not suffice as a substitute for the actual filing of such an information.

[3] MCL 769.13; MSA 28.1085.

302; 181 NW2d 912 (1970), *People v Stratton,* 13 Mich App 350; 164 NW2d 555 (1968). The prosecutor is not foreclosed from proceeding against a person as an habitual offender after conviction on the current offense provided he is unaware of a prior felony record until after conviction. MCL 769.13; MSA 28.1085. The only recognized exception to this rule is when the delay is due to the need to verify out-of-state felony convictions based on the 'rap sheet'. *People v Hendrick,* 398 Mich 410; 247 NW2d 840 (1976).

"Here the prosecutors must be presumed to have known of the defendants' prior felony records because their respective offices prosecuted the prior felonies. The habitual offender charges should have been filed with the information which charged the last felony to provide fair notice to the accused and avoid an appearance of prosecutorial impropriety." 407 Mich 98-99.

The Court of Appeals has split[4] on the question whether *Fountain* requires "simultaneous" filing or "prompt" filing of the supplemental information, and those panels opting for the latter standard have found various factual situations to constitute "prompt" filing.

Our decision in *Fountain* requires that prosecutors "must promptly proceed, if at all, against the person as an habitual offender". While the simultaneous filing of both the information charging the underlying offense and the supplemental information obviously provides the greatest possible notice to the defendant, we decline to require a simultaneous filing.

We must still decide whether the prosecutor in this case proceeded "promptly" to file the supple-

[4] Court of Appeals decisions requiring simultaneous filing include: *People v Reese,* 97 Mich App 785; 296 NW2d 172 (1980); *People v Stein,* 99 Mich App 781; 298 NW2d 638 (1980).

Court of Appeals decisions requiring "prompt" filing include: *People v Mohead,* 98 Mich App 612; 295 NW2d 910 (1980); *People v Martin,* 100 Mich App 447; 298 NW2d 900 (1980).

mental information. The purpose of requiring a prosecutor to proceed "promptly" to file the supplemental information is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense. We conclude that a standard which would find a filing on the day of trial to suffice is an inadequate one. We recognize that any "rule" which we might establish is subject to the criticism that it is arbitrary. However, we believe that the imposition of a "rule" is preferable to the ad hoc decision-making which has been the practice heretofore.

Accordingly, we hold that a supplemental information is filed "promptly" if it is filed not more than 14 days after the defendant is arraigned in circuit court (or has waived arraignment) on the information charging the underlying felony, or before trial if the defendant is tried within that 14-day period. We believe that such a rule allows the prosecutor sufficient time to make a decision concerning supplementation while at the same time providing notice at an early stage of the proceedings to the defendant of the potential consequences of conviction of the underlying felony.

We further note that, as we said in *Fountain:*

> "The prosecutor is not foreclosed from proceeding against a person as an habitual offender after conviction on the current offense provided he is unaware of a prior felony record until after the conviction. MCL 769.13; MSA 28.1085. The only recognized exception to this rule is when the delay is due to the need to verify out-of-state felony convictions based on the 'rap sheet'." 407 Mich 98-99.

Finally, we hold that this decision shall apply to cases in which the defendant is arraigned in cir-

cuit court on the information charging the underlying felony after the date of the release of this opinion.

In this case the prosecutor did not file the supplemental information until the first day of trial. Accordingly, we treat the defendant's request for review as an application for leave to appeal. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the defendant's habitual-offender conviction, and remand the case to the Kent Circuit Court for sentencing on the underlying conviction of breaking and entering with intent to commit larceny.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

SOCIALIST WORKERS PARTY v SECRETARY OF STATE

Docket No. 65466. Argued January 8, 1981 (Calendar No. 11).—Decided March 1, 1982.

The Socialist Workers Party, and one of its members, Andrew Walden, who is a prospective candidate for political office, and three voters who are not affiliated with the party brought an action against the Secretary of State for a declaratory judgment that an amendment to the Election Law which requires a new political party both to file a petition meeting certain requirements and to receive a minimum vote in the primary election in order to qualify for a place on the general election ballot, violates the First and Fourteenth Amendments of the United States Constitution and the state Constitution. The Wayne Circuit Court, Robert J. Colombo, J., granted the defendant's motion for accelerated judgment on the ground of res judicata, because in 1976 the United States District Court for the Eastern District of Michigan had decided, in an action which included the Socialist Workers Party as a plaintiff, that the statute did not violate the federal constitution. The plaintiffs appeal prior to decision of the Court of Appeals.

In an opinion by Justice Fitzgerald, joined by Justices Kavanagh, Levin, Ryan, and Moody, the Supreme Court *held:*

The plaintiffs' action is not precluded by the doctrine of res judicata; the statute violates the First and Fourteenth Amendments to the United States Constitution and the Equal Protection Clause of the state Constitution, and exceeds the constitu-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4-6, 8-15, 18] 16A Am Jur 2d, Constitutional Law § 545.
25 Am Jur 2d, Elections §§ 117, 128, 130, 175.
[2] 46 Am Jur 2d, Judgments §§ 438, 444.
[3,4] 46 Am Jur 2d, Judgments §§ 402, 438.
[4] 26 Am Jur 2d, Elections §§ 253, 357.
[5] 25 Am Jur 2d, Elections § 5.
[7] 16 Am Jur 2d, Constitutional Law § 253.
[16-18] 20 Am Jur 2d, Courts §§ 193, 201.
Binding effect upon state courts of opinion of United States Supreme Court supported by less than all its members. 65 ALR3d 504.

tional authority of the Legislature to enact election laws because it imposes unreasonable and unnecessary restrictions on access to the general election ballot.

1. Relitigation of an issue of law in a subsequent action between the same parties is not precluded by the doctrine of res judicata where a new determination is warranted to take account of an intervening change in the applicable law or to avoid inequitable administration of the laws. A rule of law declared in an action between two parties should not be binding on them for all times, especially as to claims arising after the first proceeding, when other litigants are free to urge that the rule should be rejected. The preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants.

2. The issue previously decided in the federal case was one of law; since then the Supreme Court of the United States has declared that the state's interest in effective regulation of elections must be balanced against the public's interest in the dissemination of ideas by minor political parties. The federal district court did not balance those interests. When the federal court made its decision in 1976, it found that more new political parties sought to qualify by the petition method that it was possible for voting machines to handle, and that most precincts in Michigan were using voting machines. The precincts which use electronic voting (punch cards), which can accommodate any number of political parties, now outnumber those which use voting machines. To the extent that the federal court relied on the large number of precincts using voting machines, that ground for its decision has been eroded. Moreover, in this case the plaintiffs challenge the statute on the ground that it is unconstitutional "as applied" during the elections of 1978 and 1980, an issue reserved by the federal district court in its 1976 decision. The factual posture of the federal case did not present an "as applied" situation. Therefore, the doctrine of res judicata should not be applied in this case.

3. In determining whether a statute restricting access to the general election ballot violates the First and Fourteenth Amendments, the Court must examine the character of the classification in question, the importance of the individual interests at stake, and the state's interests asserted in support of the classification. The statute challenged in this case distinguishes between new political parties and parties entitled to automatic placement on the general election ballot. Both the

rights of individuals to associate for the advancement of political beliefs and of qualified voters to cast their votes effectively are basic to effective political expression and merit strong constitutional protection. Restrictions on access to the ballot burden those fundamental rights directly, and the effect is heightened where the restrictions work to eliminate political and ideological alternatives at the primary election when the candidates for the major parties are selected and before campaigning has identified and sharpened the issues facing the voters.

4. In 1980, the Socialist Workers Party was excluded from the general election ballot by operation of the statutory requirement of obtaining a certain number of votes in the primary to qualify as a new political party. The plaintiff party and a party member claim a denial of their right to associate; the other plaintiffs seek relief as voters denied effective expression of political preference. In an equal protection challenge to a statute which restricts access to the ballot the plaintiffs have the burden of demonstrating a discrimination of some substance before the test of a compelling state interest applies. The plaintiffs have met that burden.

5. The state has a compelling interest in the protection of the integrity of its election process. Regulation of elections by effectively restricting access to the ballot is constitutionally permissible. Prevention of the clogging of the state's election machinery and avoidance of confusion of the voters are legitimate objects of regulation. However, even when pursuing that legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty; in addition, it is required to adopt the least drastic means to achieve the end.

6. The defendant argues that legitimate state interests in prevention of clogging of the election machinery and avoidance of confusion of the voters are furthered if no more than nine parties with straight-ticket voting are allowed on the general election ballot, the limit of voting machines. However, the statute has operated to eliminate four new parties from the 1978 and 1980 general election before the nine-party capacity of the voting machine was reached. The premature elimination of parties is inconsistent with the claimed legislative judgment about when the evils sought to be prevented should be addressed. It follows immediately that the statute, as it has been applied, does not use the least drastic means to avoid unreasonable burdens on the plaintiffs' constitutionally protected liberty. Further, because the statute does not rule out the possibility of more than nine parties qualifying for the general elec-

tion, the restriction imposed is not necessary to serve the claimed interest.

7. In sum, the statute misses the mark; the integrity of the election process is therefore not furthered by the requirement. By operation of the statute, the plaintiff Socialist Workers Party did not appear on the general election ballot in 1978 and 1980. The plaintiffs Socialist Workers Party and the party member, Walden, were thereby denied their right to associate in violation of the First and Fourteenth Amendments. The right of the other three plaintiffs to vote was also impermissibly impaired in violation of the First and Fourteenth Amendments.

8. The Legislature has the constitutional authority to enact laws to preserve the purity of elections; any statute which adversely affects that purity is constitutionally infirm. One of the primary goals of election procedures is to achieve equality of treatment for all candidates whose names appear on the ballot. It would be anomalous to require that equality and not to limit the Legislature's ability to block access to the ballot. The purity of elections unmistakably requires fairness and evenhandedness in the election laws of the state.

9. Equality for all candidates whose names appear on the ballot would be a hollow right if the Court were to allow unfair restrictions indirectly to deny the plaintiffs placement on the ballot. The primary voting procedure in this case imparts a substantial unfair advantage to political parties entitled to automatic placement on the general election ballot. Such parties need not expend valuable time and resources on educating the voters on how to cast an effective vote in the primary. The names of their candidates appear on the primary ballot, unlike the names of the candidates of the new parties, and they are free to devote all of their energies to their political messages. Therefore, the election procedure created by the statute is inconsistent with the constitutional goal of equality of treatment of parties and candidates seeking access to the general election ballot and violates the constitutional "purity of elections" clause.

10. The statute violates the Equal Protection Clause of the Michigan Constitution for the same reasons that it violates the federal constitution.

Reversed and remanded for further proceedings.

Chief Justice Coleman, joined by Justice Williams, dissented. The summary affirmance by the Supreme Court of the United States in the 1976 federal case in which the Socialist Workers

Party was a plaintiff is a precedent binding on the Supreme Court of Michigan, and forecloses review of the federal constitutional issue. The Supreme Court of the United States has said repeatedly that summary affirmances or dismissals for want of a substantial federal question are decisions on the merits and must be given weight as precedent. Such summary dispositions reject the specific challenges presented in the statement of jurisdiction and leave undisturbed the judgment appealed from. They prevent lower courts from coming to opposite conclusions on the precise issues necessarily decided by those actions. The federal constitutional issue necessarily decided by summary affirmance in the 1976 federal case is the precise issue in this case. The jurisdictional statement in the federal case shows that the attack was on the election statute both "on its face" and "as applied". While the appellants contend that a new issue, an "as applied" attack, is raised in this case, the analysis by the Court in this case is "facial", and both grounds were raised in the prior federal case.

OPINION OF THE COURT

1. ELECTIONS — CONSTITUTIONAL LAW — POLITICAL PARTIES — QUALIFICATIONS — STATUTES.

The provision of the Election Law which requires a new political party to file a petition meeting certain requirements and to obtain a minimum vote in the primary election before it may qualify for a place on the general election ballot violates the First and Fourteenth Amendments to the United States Constitution and the Equal Protection Clause of the Michigan Constitution, and exceeds the constitutional authority of the Legislature to enact election laws (US Const, Ams I, XIV; Const 1963, art 1, § 2; art 2, § 4; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685).

2. JUDGMENTS — RES JUDICATA — ISSUES OF LAW.

Relitigation of an issue of law in a subsequent action between the same parties is not precluded by the doctrine of res judicata where a new determination is warranted to take account of an intervening change in the applicable law or to avoid inequitable administration of the laws.

3. JUDGMENTS — RES JUDICATA — ISSUES OF LAW.

A rule of law declared in an action between two parties should not be binding on them for all times, especially as to claims arising after the first proceeding, when other litigants are free to urge that the rule should be rejected.

4. ELECTIONS — CONSTITUTIONAL LAW — STATUTES — JUDGMENTS — RES JUDICATA.

The doctrine of res judicata does not preclude an action to challenge a provision of the Election Law as unconstitutionally restricting the access of new political parties to the general election ballot where the decision in a prior action between the same parties did not consider the public's interest in the dissemination of ideas by minor political parties, but relied on then-existing number of precincts using voting machines which can accommodate only a limited number of political parties, and reserved the question, raised in the subsequent action, of the constitutionality of the statute as it applied to the plaintiffs in subsequent elections (MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685).

5. ELECTIONS — CONSTITUTIONAL LAW — FIRST AMENDMENT — FOURTEENTH AMENDMENT — STATUTES.

To determine whether a statute restricting access to the general election ballot violates the First and Fourteenth Amendments, the court must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification (US Const, Ams I, XIV).

6. ELECTIONS — CONSTITUTIONAL LAW — CIVIL RIGHTS.

The rights of individuals to associate for the advancement of political beliefs and of qualified voters to cast their votes effectively both are basic to effective political expression and merit strong constitutional protection; restrictions on access to the ballot burden those fundamental rights directly (US Const, Ams I, XIV).

7. ELECTIONS — CONSTITUTIONAL LAW — EQUAL PROTECTION — STATUTES.

Plaintiffs challenging a statute which restricts access to the ballot on the ground that it violates the Equal Protection Clause have the burden of demonstrating a discrimination of some substance before the state must establish that the statutory classification is necessary to serve a compelling state interest (US Const, Am XIV; Const 1963, art 1, § 2).

8. ELECTIONS — CONSTITUTIONAL LAW — EQUAL PROTECTION — STATUTES.

A plaintiff political party which was excluded from the general election ballot in 1980 by operation of the statutory requirement that a new political party must file a petition meeting

certain requirements and must obtain a certain number of votes in the primary election, a member of the political party who claims a denial of the right to associate, and other plaintiffs who seek relief as voters denied effective expression of political preference, have demonstrated sufficient discrimination so that the state must establish that the statutory classification is necessary to serve a compelling state interest (US Const, Ams I, XIV; Const 1963, art 1, § 2; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685).

9. ELECTIONS — CONSTITUTIONAL LAW — EQUAL PROTECTION — STATUTES.

The state has a compelling interest in the protection of the integrity of its election process; regulation of elections by effectively restricting access to the ballot is constitutionally permissible, and prevention of the clogging of the state's election machinery and avoidance of confusion of the voters are legitimate objects of regulation (US Const, Ams I, XIV; Const 1963, art 1, § 2).

10. ELECTIONS — CONSTITUTIONAL LAW — EQUAL PROTECTION — STATUTES.

A state may not choose means that unnecessarily restrict constitutionally protected liberty even when pursuing a compelling interest in protecting the integrity of its elections; it is required to adopt the least drastic means to achieve the end (US Const, Ams I, XIV; Const 1963, art 1, § 2).

11. ELECTIONS — CONSTITUTIONAL LAW — INTEGRITY OF ELECTIONS.

Restrictions on access of new political parties to the general election ballot in order to limit the number of parties to the capacity of voting machines, nine parties, were not the least drastic means to further the state's interest in the integrity of elections where the restrictions operated to eliminate new parties from the ballot before the nine-party capacity of the machines was reached, and were not rationally related to the interest where, because the restrictions were tied to success in the primary election and not to machine capacity, they did not rule out the possibility of more than nine parties qualifying for the general election (US Const, Ams I, XIV; Const 1963, art 1, § 2; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685).

12. ELECTIONS — CONSTITUTIONAL LAW — STATUTES — PURITY OF ELECTIONS.

The Legislature has the constitutional authority to enact laws to

preserve the purity of elections; any statute which adversely affects that purity is constitutionally infirm (Const 1963, art 2, § 4).

13. ELECTIONS — CONSTITUTIONAL LAW — STATUTES — PURITY OF ELECTIONS.

It would be anomalous for the constitution to require equality of treatment for all candidates whose names appear on the ballot and not to limit the Legislature's ability to block access to the ballot; the concept of purity of elections unmistakably requires fairness and evenhandedness in the election laws of the state (Const 1963, art 2, § 4).

14. ELECTIONS — CONSTITUTIONAL LAW — STATUTES — PURITY OF ELECTIONS.

The Legislature may regulate the ability or failure of a political party or candidate to gain access to the ballot; however, it may not use unfair restrictions indirectly to deny a political party or candidate placement on the ballot (Const 1963, art 2, § 4).

15. ELECTIONS — CONSTITUTIONAL LAW — STATUTES — PURITY OF ELECTIONS.

The provision of the Election Law which requires a new political party to file a petition meeting certain requirements and to obtain a minimum vote in the primary election before it may qualify for a place on the general ballot imparts a substantial unfair advantage to political parties entitled to automatic placement on the general election ballot; therefore, the statute violates the constitutional authority of the Legislature to enact election laws (Const 1963, art 2, § 4; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685).

DISSENTING OPINION BY COLEMAN, C.J.

16. COURTS — SUPREME COURT OF THE UNITED STATES — SUMMARY DISPOSITION — PRECEDENT.

*Summary affirmances or dismissals for want of a substantial federal question by the Supreme Court of the United States are decisions on the merits and must be given weight by all lower courts as precedents on the precise issues necessarily decided.*

17. COURTS — SUPREME COURT OF THE UNITED STATES — SUMMARY DISPOSITION — QUESTIONS DECIDED.

*A summary disposition by the Supreme Court of the United States rejects the specific challenges presented in the statement of jurisdiction filed under the Supreme Court Rules, and pre-*

*vents lower courts from coming to opposite conclusions on the precise issues necessarily decided.*

18. ELECTIONS — CONSTITUTIONAL LAW — EQUAL PROTECTION — STATUTES.

*Summary affirmance by the Supreme Court of the United States of a decision by a three-judge panel of a United States District Court that the provisions of the Michigan Election Law relating to requirements for a new political party to be put on the ballot are not unconstitutional necessarily decided the issue of constitutionality, both "facial" and "as applied", where the jurisdictional statement filed by the appellants shows that both "facial" and "as applied" constitutionality was challenged, and that decision is precedent binding on the Supreme Court of Michigan (US Const, Ams I, XIV; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685).*

*Reosti & Papakhian* and *Margaret Winter* for plaintiffs.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Jann Ryan Baugh* and *Gary P. Gordon,* Assistants Attorney General, for defendant.

Amicus Curiae:

*Maurice Kelman* for Metropolitan Detroit Branch, American Civil Liberties Union of Michigan.

FITZGERALD, J. This is an appeal from a circuit court order granting defendant's motion for accelerated judgment on the ground of res judicata. Plaintiffs'[1] complaint presented both federal and state constitutional challenges to the statute by which candidates for political office qualify for the general election ballot.

[1] Plaintiffs are a minority political party, the Socialist Workers Party, a party member and prospective candidate for political office (Walden) and three Michigan voters who are not affiliated with the party (Lafferty, Moore and Reed).

I

In 1976 PA 94,[2] the Legislature amended Michigan's election law. In part, that act directs a new political party[3] to meet both a petition requirement[4] and a minimum primary vote requirement of 3/10 of 1% of the total votes cast[5] before it may qualify for a place on the general election ballot. Prior to 1976 PA 94, a new political party qualified for the general election ballot merely by satisfying a petition requirement substantially identical to that now required for placement on the primary election ballot.[6] 1976 PA 94 also specifies that new political parties appear on the primary election ballot in a separate column or row,[7] that the names of the new political parties follow the statement, "I desire that the party indicated shall have its name, party vignette, and candidates listed on the next general election ballot",[8] and that voters may vote for the candidates of one political party only or for the appearance of one new political party on the general election ballot.[9] The Legislature provided that the act take effect immediately. The act was approved on April 22, 1976.

[2] 1976 PA 94 amends MCL 168.685; MSA 6.1685 and adds MCL 168.560a and 168.560b; MSA 6.1560(1) and 6.1560(2).

[3] A new political party is defined as a party whose principal candidate "received a vote equal to less than 1% of the total number of votes cast for the successful candidate for the office of secretary of state at the last preceding election in which a secretary of state was elected". MCL 168.685(3); MSA 6.1685(3). 1976 PA 94 did not substantively change the statutory definition of new political party. Such a definition is appropriate for both newly formed and previously existing (as is the Socialist Workers Party) political parties.

[4] MCL 168.685(1); MSA 6.1685(1).

[5] MCL 168.560b(4); MSA 6.1560(2)(4).

[6] 1973 PA 28, MCL 168.685; MSA 6.1685.

[7] MCL 168.560b(1); MSA 6.1560(2)(1).

[8] MCL 168.560b(2); MSA 6.1560(2)(2).

[9] MCL 168.560b(3); MSA 6.1560(2)(3).

In 1976, after the passage of 1976 PA 94, several individuals and political parties (including plaintiff Socialist Workers Party) filed suit in federal district court alleging that the addition of the primary vote requirement violated the First and Fourteenth Amendments. The court in *Hudler v Austin,* 419 F Supp 1002 (ED Mich, 1976), *aff'd sub nom Allen v Austin,* 430 US 924; 97 S Ct 1541; 51 L Ed 2d 769 (1977), held that the act did not violate the federal constitution, Judge John Feikens dissenting. Nevertheless, the court found that the act was passed too late to give the affected political parties time to gather additional primary support and ruled that "new" parties which had satisfied the petition requirement but not the primary vote requirement appear on the general election ballot. The United States Supreme Court affirmed summarily, with Justices Stewart, Blackmun, and Powell voting to give the case plenary consideration.[10]

In the case at bar, plaintiffs filed an action for declaratory judgment in Wayne Circuit Court on

[10] Plaintiffs' jurisdictional statement alleged facial and "as applied" unconstitutionality. However, the district court's order that the "new" parties appear on the 1976 ballot made moot, as a factual matter, the "as applied" challenge. The precise issue presented and necessarily decided by the summary affirmance was the facial constitutional question.

Furthermore, at the time the challenge was brought in the trial court, the primary vote requirement had not yet barred any political party from the ballot. Thus, the factual posture of the *Hudler* case in the federal district court did not present an "as applied" situation. Nor did the lower court's analysis directly and specifically address the as applied question other than in the narrow sense of determining that the act had been passed too late to give the affected parties sufficient time to adjust to its provisions. In contrast, this Court's current consideration of the constitutionality of PA 94 occurs against a background of two elections, in 1978 and 1980, in which several political parties were in fact denied ballot access because they failed to meet the primary vote requirement. Thus, the precedential effect of *Hudler* does not dispose of the "as applied" constitutionality challenge now raised in this Court.

April 22, 1980. Plaintiffs sought a declaration that 1976 PA 94 violates the First and Fourteenth Amendments and Const 1963, art 1, §§ 1, 3 and 5. An amended complaint added the allegations that the act violates Const 1963, art 1, § 2 and art 2, § 4.[11]

Defendant responded with a motion for accelerated judgment under GCR 1963, 116.1(5). Defendant's motion was premised on the theory that the prior judgment in *Hudler v Austin, supra,* precluded plaintiff's action. Judge Robert J. Colombo granted the motion from the bench on May 22, 1980, although expressing personal agreement with the reasoning in Judge Feikens' dissent.

We granted plaintiffs' application for leave to appeal prior to a decision by the Court of Appeals and the motion to file a brief amicus curiae by the Metropolitan Detroit Branch of the American Civil Liberties Union of Michigan. We directed the parties include among the issues to be briefed (1) whether the current federal constitutional challenge to 1976 PA 94, amending MCL 168.685; MSA

[11] Plaintiffs sought permanent and preliminary injunctive relief enjoining defendant Secretary of State from enforcing the provisions of 1976 PA 94 so as to exclude the Socialist Workers Party from the November 1980 general election ballot. Plaintiffs' brief to this Court, received on November 5, 1980, the day after the general election, understandably abandons the request for injunctive relief.

The fact that the election has taken place does not render moot this controversy. The challenged statutory classification will affect "new" political parties in future elections. Typically, these parties will raise the issue after a primary election in August. As here, they will rarely obtain appellate review before the general election takes place in early November. This, then, presents the classic situation where a controversy is " 'capable of repetition, yet evading review' ". *Storer v Brown,* 415 US 724, 737, fn 8; 94 S Ct 1274; 39 L Ed 2d 714 (1974), quoting *Rosario v Rockefeller,* 410 US 752, 756, fn 5; 93 S Ct 1245; 36 L Ed 2d 1 (1973); *Dunn v Blumstein,* 405 US 330, 333, fn 2; 92 S Ct 995; 31 L Ed 2d 274 (1972); *Moore v Ogilvie,* 394 US 814, 816; 89 S Ct 1493; 23 L Ed 2d 1 (1969); *Southern Pacific Terminal Co v Interstate Commerce Comm,* 219 US 498, 515; 31 S Ct 279; 55 L Ed 310 (1911).

6.1685 and adding MCL 168.560a and 168.560b; MSA 6.1560(1) and 6.1560(2), is precluded by *Hudler v Austin,* 419 F Supp 1002 (ED Mich, 1976), *aff'd sub nom Allen v Austin,* 430 US 924; 97 S Ct 1541; 51 L Ed 2d 769 (1977); (2) whether 1976 PA 94 infringes the First and Fourteenth Amendment rights of "new" political parties, their adherents and supporters, or the public in general; and (3) whether 1976 PA 94 violates rights guaranteed by the Michigan Constitution. 409 Mich 896 (1980).

We hold that plaintiffs' action is not precluded by the decision in *Hudler v Austin, supra.* We further hold that 1976 PA 94 violates the First and Fourteenth Amendments and Const 1963, art 1, § 2, and art 2, § 4. Accelerated judgment for defendant reversed and the matter remanded to the circuit court for proceedings in accordance with this opinion.

II

Judge Colombo granted defendant's motion for accelerated judgment on the ground of res judicata. Defendant argues that the motion was properly granted because plaintiff Socialist Workers Party, an unsuccessful party plaintiff in *Hudler,* is merely attempting to relitigate the identical issue addressed by the *Hudler* court: the constitutionality of 1976 PA 94.

The doctrine of res judicata operates to prevent the relitigation of facts and law between the same parties or their privies. *Gose v Monroe Auto Equipment Co,* 409 Mich 147, 161; 294 NW2d 165 (1980). The plea of res judicata applies to points previously litigated and decided as well as to points " 'which properly belonged to the subject of

litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time' ". *Gursten v Kenney,* 375 Mich 330, 335; 134 NW2d 764 (1965), quoting with approval from *Henderson v Henderson,* 3 Hare 100, 115; 67 Eng Rep 313 (1843).

There are exceptions to the doctrine, such as found in Restatement Judgments, 2d (Tentative Draft No 1, 1973), § 68.1, pp 170-171:

"Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances.

* * *

"(b) The issue is one of law and * * *

* * *

"(ii) A new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws * * *."

The purpose of this section is explained by the commentary:

"A rule of law declared in an action between two parties should not be binding on them for all time, especially as to claims arising after the first proceeding has been concluded, when other litigants are free to urge that the rule should be rejected. Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position."

See *Young v Detroit City Clerk,* 389 Mich 333; 207 NW2d 126 (1973).

The issue facing the *Hudler* court was one of law, the constitutionality of 1976 PA 94. Moreover, as plaintiffs and amicus ACLU correctly aver, the applicable legal context for the decision has changed. The *Hudler* court applied the "significant modicum of support" test, *Jenness v Fortson,* 403 US 431; 91 S Ct 1970; 29 L Ed 2d 554 (1971), in the following context:

"The facts and circumstances underlying the passage of Public Act 94 may be summarized as follows: (1) over a ten-year period, the petition requirement for ballot access, standing alone, proved to be an imprecise tool for measuring true voter support; and (2) in 1976, more new parties sought to qualify by the petition method than it was technically possible for the state's voting machines to handle. Of Michigan's 6,972 precincts, 4,322 are serviced by voting machines." *Hudler,* 419 F Supp 1008.

In upholding the constitutionality of the act, the *Hudler* court did not balance the state's interest in effective regulation of elections against the public's interest in the dissemination of ideas by minor political parties. *Illinois State Board of Elections v Socialist Workers Party,* 440 US 173; 99 S Ct 983; 59 L Ed 2d 230 (1979), since decided, establishes that the burden on the public's interest in the dissemination of ideas must also be assessed.

"The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. * * * Overbroad restrictions on ballot access jeopardize this form of political expression." 440 US 185-186.

In addition, electronic voting precincts, the so-called punch card precincts, now outnumber voting machine precincts 2,982 to 2,873. Like the old-fashioned paper ballots still in use in 573 precincts, the punch card ballots can physically accommodate any number of parties.[12] To the extent the *Hudler* court relied on the actual number of voting machine precincts in support of the compelling state interests alleged, such reliance has been eroded.

Finally, our reading of the decision in *Hudler* convinces us that the district court reserved an "as applied" challenge to the constitutionality of 1976 PA 94 when it noted:

> "It is impossible for this court or even the legislature to say in advance what the least drastic *effective* means of dealing with this problem would be. There is no one solution, and what works or doesn't work will always be a hindsight conclusion. The role of the court is not to tell the legislature how to do it, but only in a proper case to indicate whether the method actually chosen offends the Constitution." 419 F Supp 1015-1016.

In the present case, plaintiffs allege "as applied" unconstitutionality based on their experience with the operation of the act during the 1978 and 1980 elections.

We hold, therefore, that the doctrine of res judicata should not be applied in the present case. The elements of § 68.1(b)(ii) of the Restatement are

[12] The Secretary of State, Elections Division, reports that in 1980 there were 2,982 electronic voting (punch card) precincts, 2,873 voting machine precincts, 573 paper ballot precincts and 755 absent voter counting boards. *Michigan Precinct Reports by Counties: As Reported by Local Clerks* (1980). Howard McCowan, Election Specialist of the Secretary of State's Elections Division, says that approximately half of the absent voter counting boards are believed to use the electronic voting system. Memorandum from Howard McCowan, Elections Division, Secretary of State, to Jacqueline B. Morse, Deputy Clerk, Supreme Court, June 17, 1981.

satisfied and the policy of its commentary is promoted by allowing these plaintiffs the opportunity to challenge the constitutionality of 1976 PA 94. Moreover, plaintiffs challenge the act on "as applied" grounds, an issue distinctly reserved by the *Hudler* court. We thus reach the merits of plaintiffs' complaint.

III

Plaintiffs and amicus ACLU challenge the constitutionality of 1976 PA 94 by arguing that the act imposes both unreasonable and unnecessary restrictions on access to the general election ballot. We agree.

In determining whether a statute restricting general election ballot access violates the First and Fourteenth Amendments, "we must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification". *Illinois State Board of Elections v Socialist Workers Party,* 440 US 173, 183; 99 S Ct 983; 59 L Ed 2d 230 (1979).

The challenged act, 1976 PA 94, distinguishes between statutorily defined "new" political parties and those parties entitled to automatic placement on the general election ballot. Prior to the enactment of 1976 PA 94, "new" political parties could secure a place on the November ballot by complying with a petition requirement. The petition requirement has been continued. However, "new" parties must satisfy the additional requirement of a minimum primary vote equal to 3/10 of 1% of the total votes cast in the primary. The primary ballot provides a separate column for "new" par-

ties. Voters are instructed to vote for candidates of one political party only *or* for one "new" political party. We do not doubt that a distinction based on prior electoral performance is valid in restricting access to the general election ballot. This, however, does not resolve whether the additional requirement of primary electoral success imposed by 1976 PA 94 is a constitutionally permissible burden on the rights of plaintiffs.

Ballot access implicates two distinct fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively". *Williams v Rhodes,* 393 US 23, 30; 89 S Ct 5; 21 L Ed 2d 24 (1968). Although neither of these rights is expressly named in the constitution, both are basic to effective political expression and merit strong constitutional protection.

Restrictions on access burden these fundamental rights directly. A political party denied access to the ballot is not an effective device for advancing the ideas or political aspirations of its adherents. As a result, access restrictions operate to deter membership and participation in the excluded political association. Voters, faced with statutorily limited ballot choices, may find exercise of the right to vote a Hobson's choice and not an expression of political preference, the bedrock of self-governance. This effect is heightened where, as here, restrictions on access work to eliminate political and ideological alternatives at the time major party candidates are selected and before campaigning has identified and sharpened the issues facing the electorate.

In 1980, the Socialist Workers Party was excluded from the November ballot by operation of the primary vote requirement in 1976 PA 94. Plaintiffs Socialist Workers Party and party member Walden press their claims in the context of a denial of their right to associate. Plaintiffs Lafferty, Moore and Reed seek relief as voters denied effective expression of political preference. In an equal protection challenge to a ballot-restricting statute, plaintiffs have the burden of demonstrating a discrimination "of some substance" before the compelling state interest test is triggered. *American Party of Texas v White,* 415 US 767, 781; 94 S Ct 1296; 39 L Ed 2d 744 (1974). We conclude plaintiffs have met this burden.

Arrayed against the rights of individuals to vote and to associate effectively is the compelling interest of the state in the protection of the integrity of its election process. *American Party of Texas v White, supra,* 415 US 782, fn 14. Regulation of elections by restricting access to the ballot is constitutionally permissible. *Jenness v Fortson,* 403 US 431, 442; 91 S Ct 1970; 29 L Ed 2d 554 (1971). States may use means which are effective. *Storer v Brown,* 415 US 724, 736; 94 S Ct 1274; 39 L Ed 2d 714 (1974). Prevention of the clogging of a state's election machinery and avoidance of voter confusion are legitimate objects of state regulation on ballot access. *Bullock v Carter,* 405 US 134, 145; 92 S Ct 849; 31 L Ed 2d 92 (1972).

In *Illinois State Board of Elections v Socialist Workers Party, supra,* 440 US 184-185, the Court rearticulates the strict scrutiny standard of review in ballot access cases.

"When such vital individual rights are at stake, a

State must establish that its classification is necessary to serve a compelling interest. *American Party of Texas v White,* 415 US 767, 780-781 (1974); *Storer v Brown,* 415 US 724, 736 (1974); *Williams v Rhodes, supra,* 31." 440 US 184.

"[O]ur previous opinions have also emphasized that 'even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty,' *Kusper v Pontikes,* 414 US 51, 58-59 [94 S Ct 303; 38 L Ed 2d 260] (1973), and we have required that States adopt the least drastic means to achieve their ends. *Lubin v Panish,* [415 US 709, 716; 94 S Ct 1315; 39 L Ed 2d 702 (1974)]; *Williams v Rhodes, supra,* 31-33. This requirement is particularly important where restrictions on access to the ballot are involved." 440 US 185.

We note at the outset that plaintiffs characterize the legislative scheme in 1976 PA 94 as a mere administrative convenience based on the mechanical limitations inherent in Michigan's voting machines.[13] Plaintiffs contend that this is the only state interest involved here and argue that it, standing alone, does not rise to the level of a compelling state interest. By contrast, defendant argues, as in 1976, that voting machine limitations further a compelling state interest in maintaining the integrity of this state's election process, *American Party of Texas v White, supra* (by prevention of the clogging of the state's election machinery and by avoidance of voter confusion, *Bullock v*

[13] The voting machines in use in Michigan have a nine-party capacity if a straight-ticket voting option is provided. Otherwise, the machines have a theoretical 360-candidate capacity. There are no technical difficulties in changing from straight-ticket voting to non-straight-ticket voting. However, in 1964 Michigan voters rejected a referendum on 1964 PA 240 which would have allowed non-straight-ticket voting. Memorandum from Howard McCowan, Elections Division, Secretary of State, to Jacqueline B. Morse, Deputy Clerk, Supreme Court, October 14, 1981. See Michigan Manual 1965-1966, p 478.

*Carter, supra),* and are therefore a proper focus for state regulation.

Even if, as defendant argues, 1976 PA 94 is justifiable by reference to the *Bullock* state interests,[14] we are required to inquire further. We must determine whether the primary vote requirement for "new" political parties is necessary to further the claimed interests and, thus, does not unnecessarily restrict plaintiffs' constitutionally protected liberty. We must also determine whether the Legislature adopted the least drastic means to achieve its objective, thereby avoiding unreasonable burdens on plaintiffs.

Because we conclude that the primary vote requirement is not necessary to serve the claimed interests and that the Legislature did not choose the least drastic means, we hold 1976 PA 94 violates the First and Fourteenth Amendments without reaching the question whether voting machine limitations, however labelled, qualify as a compelling state interest.[15]

As stated, a new political party must meet, *inter alia,* both petition and primary vote requirements.

[14] While the *Bullock* Court spoke in terms of *legitimate* state interests, the Court in *Jenness, supra,* identified an "*important* state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding voter confusion, deception and even frustration of the democratic process at the general election". 403 US 442. In *American Party of Texas v White, supra,* the Court described "preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion" as compelling state interests. Thus, the interests identified by the defendant have been referred to in the context of legitimate, important, and compelling state interests. For the sake of consistency, we use the characterizations employed by the United States Supreme Court.

[15] It bears repeating that precincts using voting machines are now outnumbered by precincts capable of handling more than nine parties. However, we do not face, as did the *Hudler* court, assertions of the imminency of more than nine parties qualifying for the general election ballot.

This double requirement, defendant argues, represents the Legislature's judgment as to the most effective way to protect the integrity of this state's election process. The Legislature, defendant asserts, "enacted 1976 PA 94 to avoid the possibility, for example, of having so many parties and candidates that the voters would be unable to comprehend the ballots and the voting machines of the state would be physically unable to handle the sheer volume".[16]

Defendant thus argues that legitimate state interests in prevention of the clogging of this state's election machinery and in avoidance of voter confusion are furthered if no more than nine parties with straight-ticket voting are allowed.[17] Conceding for the sake of this argument that the limits of the capacity of voting machines do further these interests, a justifiable inference is that the evils sought to be addressed by the Legislature do not occur if nine *or fewer* parties are on the ballot. Significantly, there has been no allegation or showing to the contrary. Yet, the act operated to eliminate plaintiff political party from the 1980 general election ballot before the nine-party capacity of the voting machines was reached.[18] Such prema-

[16] Defendant's brief, p 11.

[17] This argument is tautologous, *i.e.,* defining a problem in terms of its solution. The "problems" are the prevention of the clogging of the election machinery and the avoidance of voter confusion. The "solution" is to equate the technological limitations of a machine with deterrence of the evils these legitimate state interests address. At the very least, such "machine logic" is intellectually unsatisfying.

[18] In the August 5, 1980 primary election, four "new" parties appeared on the party-qualification section of the ballot. The "votes" they received and the petition signatures they filed are shown.

| Party | Votes Received | Signatures Filed |
|---|---|---|
| Libertarian Party | 5,250 | 26,494 |
| Socialist Workers | 825 | 26,146 |
| Citizens Party | 5,162 | 29,000 |
| Anderson Coalition | 93,497 | 62,252 |

A total of 1,175,292 voters went to the polls that day. 3/10 of 1% of

ture elimination is inconsistent with the claimed legislative judgment about when the evils sought to be prevented should be addressed. It follows immediately that the act, as it has been applied, does not use the least drastic means to avoid unreasonable burdens on plaintiffs' constitutionally protected liberty.[19]

Nor is it plausible to argue that the additional restriction on access is necessary to further the interests claimed. The primary vote requirement is tied to ballot success (3/10 of 1% of the primary votes cast) and not to the machines whose capacity it is claimed prevents voter confusion and the

this number is 3,526. Three of the "new" parties qualified for the general election ballot. One, the Socialist Workers Party, did not.

NOTE: Data from memorandum from Howard McCowan to Jacqueline B. Morse, June 17, 1981.

Parenthetically, in the August 8, 1978, primary election, three "new" parties appeared on the party-qualification section of the ballot. The "votes" they received and the petition signatures they filed are shown.

| Party | Votes Received | Signatures Filed |
|---|---|---|
| Socialist Workers | 419 | 23,184 |
| Communist Labor | 329 | 38,524 |
| U. S. Labor | 525 | 29,100 |

A total of 1,239,464 voters went to the polls that day. 3/10 of 1% of this number is 3,719. None of the new parties qualified for the general election ballot. See Michigan Manual 1979-1980, pp 595, 597.

[19] We note, without passing on the constitutionality of the election procedure created, that State Representative Jeffrey D. Padden offered an amendment to Senate Bill 1323 (1976), which was, relatively speaking, less drastic. Had the amending language been adopted, the statute would have imposed a primary vote requirement *only* if more than nine parties qualified for the general election ballot by prior election performance (MCL 168.560a; MSA 6.1560[1]) and petition (MCL 168.685; MSA 6.1685). In addition, the amendment tried to minimize the impact of 3/10 of 1% primary vote requirement by providing:

"If less than 9 parties qualify to appear on the general election ballot, the party or parties receiving the greatest number of votes under 3/10 of 1% shall qualify so that no less than 9 parties appear on the general election ballot." 1 Michigan House J (1976), p 1043.

The result of Representative Padden's amendment would have been a five-party election ballot in 1978 and a six-party election ballot in 1980.

clogging of the state's election machinery. As a result, the act does not rule out the possibility of *more* than nine parties qualifying for the general election ballot. Although the likelihood of such an event is remote, given the apparent stability of the major political parties, a political climate conducive to splintering the electorate could well bring in its train the very evils the act was allegedly designed to avoid but is powerless to prevent. Thus, the primary vote requirement is not necessary for, does not achieve, and is not even rationally related to the claimed state interests.

In sum, 1976 PA 94 misses the mark. To be sure, the Legislature may understandably and properly seek to maintain the integrity of Michigan's election process, *American Party of Texas v White, supra,* by preventing the clogging of the election machinery and by avoiding voter confusion. *Bullock v Carter, supra.* When this concern finds expression in restrictions on access to the general election ballot, the restrictions must be reasonable and not exceed what the compelling state interest actually requires. *Illinois State Board of Elections v Socialist Workers Party, supra,* 440 US 184-185. To require less would be to impose both unnecessary and unreasonable burdens on plaintiffs' fundamental rights to associate and to vote. In addition, over-broad restrictions on access put at risk the educational benefit to society as a whole which third parties have traditionally rendered. *Illinois State Board of Elections v Socialist Workers Party, supra,* 440 US 185-186.

We find that the primary vote requirement is not rationally related, much less necessary, to achieve the claimed legitimate state interests of prevention of the clogging of the state's election machinery, and avoidance of voter confusion. The

integrity of the election process is therefore not furthered by this ballot access requirement. In addition, we find that elimination of "new" political parties from the general election ballot before the evils sought to be addressed actually arise violates the requirement that plaintiffs' constitutionally protected liberty be burdened in the least drastic way. By operation of 1976 PA 94, plaintiff Socialist Workers Party did not appear on the general election ballot in 1980. We hold that plaintiffs Socialist Workers Party and party member Walden were thereby denied their right to associate in violation of the First and Fourteenth Amendments. We hold further that the right to vote of plaintiffs Lafferty, Moore and Reed was also impermissibly impaired in violation of the First and Fourteenth Amendments.

## IV

Const 1963, art 2, § 4 vests the Legislature with the constitutional authority to enact election laws. Among its provisions is the so-called "purity of elections" clause:

> "The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. *The legislature shall enact laws to preserve the purity of elections,* to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames." (Emphasis added.)

Const 1963, art 1, § 2 is the Michigan equal protection clause. It provides, in pertinent part: "*No person shall be denied the equal protection of the laws* * * *."

Plaintiffs, through the adoption of the brief of amicus ACLU, argue the Legislature violated both in enacting 1976 PA 94.[20] We agree.

A

The "purity of elections" clause has been interpreted by this Court to embody two separate concepts: first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, "that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm". *Wells v Kent County Board of Election Comm'rs,* 382 Mich 112, 123; 168 NW2d 222 (1969). The *Wells* Court further stated:

> "The phrase, 'purity of elections,' is one of large dimensions. It has no single, precise meaning. The * * * cases demonstrate, however, that one of the primary goals of election procedures is to achieve equality of treatment for all candidates whose names appear upon the ballot." 382 Mich 123.

Plaintiffs argue that it is anomalous to require "equality of treatment for all candidates whose names appear upon the ballot" and not to limit the Legislature's ability to block access to the ballot. We agree with plaintiffs' analysis.

The "purity of elections" concept has been the *ratio decidendi* in a number of factually different

[20] Plaintiffs' brief to this Court does not discuss violations of Const 1963, art 1, §§ 1, 3 and 5 alleged in the complaint filed April 22, 1980. We, therefore, do not consider these alleged violations.

contexts. In *Wells v Kent County Board of Election Comm'rs, supra,* a statute which sanctioned ballot designation, as municipal or associate municipal judge, for elected incumbent municipal judges seeking election to the district court was ruled unconstitutional. This Court found that such a ballot designation gave the incumbent an unfair advantage over other candidates.

In *Elliott v Secretary of State,* 295 Mich 245; 294 NW 171 (1940), this Court held that it was the duty of election officials to rotate the names of candidates for Supreme Court Justice appearing on the non-partisan ballot for November 5, 1940. After noting that names which appear at the head of a list of candidates have "a distinct advantage", the Court stated:

> "It is not consistent with fairness or purity of elections or the avoidance of misuse of elective franchise for election officials to prepare ballots in such a condition as will afford one candidate or nominee an unfair advantage over rival candidates or nominees. Hence we think the conclusion is justified that, even in the absence of specific constitutional or statutory provision, it is the clear duty of election officials, when reasonably possible, to prepare ballots in such a manner as will most effectively comply with the constitutional mandate touching the preservation of the purity of elections and guarding against abuse or misuse of the elective franchise." 295 Mich 249-250.

In *Arvan v Wayne County Clerk,* 381 Mich 761; 160 NW2d 345 (1968), this Court, by order dated July 10, 1968, affirmed a circuit court ruling that a statute permitting the names of incumbents to appear first on the ballot was unconstitutional. The order cited, as authority, *Elliott v Secretary of State, supra,* and "the purity of elections requirement" of Const 1963, art 2, § 4.

Although the "purity of elections" concept has been applied in different factual settings, it unmistakably requires, as plaintiffs correctly argue, fairness and evenhandedness in the election laws of this state. Moreover, it has been applied in both the general election ballot context, *Elliott v Secretary of State, supra,* and the primary election ballot context, *Wells v Kent County Board of Election Comm'rs.*

The instant case does not involve a litigant who alleges unfair treatment on the ballot by the Legislature but rather unfair treatment which has prevented access to the ballot. We take cognizance of this argument as an art 2, § 4, issue for two reasons. First, the phrase, "The legislature shall enact laws to preserve the purity of elections", does not limit the term "elections" to any specific times or actions. Nor would this be expected when the sentence immediately preceding this clause mandates the Legislature to enact laws to regulate the time, place and manner of nominations and elections. Clearly, the Legislature was meant to be given constitutional authority to enact laws governing the entire election process. Just as clearly, the election process includes access or failure to gain access to the ballot. Second, since we have required "equality for all candidates whose names appear upon the ballot", *Wells v Kent County Board of Election Comm'rs, supra,* it would be a hollow right if we were to allow unfair restrictions to deny placement on the ballot. The Legislature could then do indirectly what art 2, § 4, forbids it from doing directly.

The touchstone for plaintiffs' argument that 1976 PA 94 violates Const 1963, art 2, § 4, is whether the election procedure created affords an unfair advantage to one party or its candidates

over a rival party or its candidates. We conclude that it does.

1976 PA 94 requires primary election voters to vote for the candidates of one political party only or for one new political party. Perforce, candidates of parties entitled to automatic ballot placement have an unfair advantage over "new" political party candidates whose names do not appear on the primary election ballot. The primary election procedure, thus, discounts candidate and issue identification for "new" political parties and their candidates.

In addition, this procedure forces a "new" party to divert scarce resources and time from its political message to voter education campaigns solely designed to teach the electorate to associate its issues and the names of its candidates with the name of a political party for which voters must cast their ballots. By contrast, political parties entitled to automatic general election ballot placement, and their candidates, face no similar burdens. All energies and resources may be concentrated on candidate and issue identification.

In sum, we find that the primary election voting procedure of 1976 PA 94 imparts a substantial unfair advantage to political parties entitled to automatic general election ballot placement. Such parties, as distinguished from "new" political parties, need not expend valuable time and resources educating the electorate on how to cast an effective primary vote. The names of the candidates of such parties appear on the primary ballot and the candidates are free to devote all their energies to their respective political messages. We hold, therefore, the election procedure created by 1976 PA 94 is inconsistent with the goal of "equality of treatment" of parties and their candidates seeking

access to the general election ballot in violation of the "purity of elections" clause, Const 1963, art 2, § 4.

B

Plaintiffs also argue 1976 PA 94 violates the Michigan equal protection clause, Const 1963, art 1, § 2. We agree and so hold, for the reasons stated in section III, *supra.*[21]

V

Accelerated judgment for defendant Secretary of State reversed and the matter remanded to Wayne Circuit Court for proceedings in accordance with this opinion.

No costs, a public question being involved.

KAVANAGH, LEVIN, RYAN, and BLAIR MOODY, JR., JJ., concurred with FITZGERALD, J.

COLEMAN, C.J. *(dissenting).* I respectfully dissent.

The majority opinion fails to address a focal and decisive point: the impact of the United States Supreme Court's summary affirmance in *Hudler v Austin, aff'd sub nom Allen v Austin,* 430 US 924; 97 S Ct 1541; 51 L Ed 2d 769 (1977), upon the ability of this Court to undertake an independent

[21] See *Governor v State Treasurer,* 390 Mich 389, 395; 212 NW2d 711 (1973), concurrence of T. G. KAVANAGH and LEVIN, JJ.

"In considering the Michigan constitutional question, we have been reminded of the frequent past expressions of this Court that the Michigan Constitution 'secures the same right of equal protection' as is secured by the Equal Protection Clause of the Fourteenth Amendment. *Fox v Employment Security Comm,* 379 Mich 579, 588; 153 NW2d 644 (1967); *Wolodzko v Wayne Circuit Judge,* 382 Mich 528, 534; 170 NW2d 9 (1969). We do not find it necessary here to determine the degree to which we follow the lead of the United States Supreme Court in analyzing an equal protection question asserted under our state Constitution."

examination of the merits of the present case and to arrive at a contrary conclusion on the federal constitutional question necessarily decided by *Allen.*

On the authority of *Hicks v Miranda,* 422 US 332; 95 S Ct 2281; 45 L Ed 2d 223 (1975) and *Mandel v Bradley,* 432 US 173; 97 S Ct 2238; 53 L Ed 2d 199 (1977), I would hold that *Allen* is precedent binding upon this Court, and thus forecloses this Court's review of the federal constitutional issue so extensively entertained by the majority.

## I

An overview of the development of this seemingly esoteric area concerning the precedential value of summary dispositions by the United States Supreme Court is helpful to an understanding of the posture taken by this dissent. In the mid-1970's, the United States Supreme Court in several decisions adverted to the proposition that its summary affirmances or dismissals for want of a substantial federal question are to be accepted as decisions on the merits of the case and accordingly are to be given weight as precedent. See, *e.g., Edelman v Jordan,* 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974); *Richardson v Ramirez,* 418 US 24; 94 S Ct 2655; 41 L Ed 2d 551 (1974).[1]

This is so, despite the fact that these types of summary actions are undertaken by the Supreme Court without its having afforded the case plenary consideration *(i.e.,* without conducting oral argument or obtaining exhaustive briefing of the perti-

[1] Earlier pronouncements on this subject exist, see, *e.g., Ohio ex rel Eaton v Price,* 360 US 246, 247; 79 S Ct 978; 3 L Ed 2d 1200 (1959).

nent issues).[2] The principle that summary actions are decisions on the merits and of precedential value was fully acknowledged in *Hicks, supra.* In *Hicks,* a three-judge federal district court refused to accord a prior United States Supreme Court summary dismissal for want of a substantial federal question status as controlling precedent. The United States Supreme Court chastised the lower court for ignoring its previous summary action, and in doing so, set forth some basic rules governing this area:

"A federal constitutional issue was properly presented [in the former case which was disposed of summarily], it was within our appellate jurisdiction under 28 USC 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. As Mr. Justice Brennan once observed, *'[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case * * *,' Ohio ex rel Eaton v Price,* 360 US 246, 247 (1959); *cf.* R. Stern & E. Gressman, Su-

[2] The absence of plenary consideration has been stated as a reason why the Supreme Court need not accord full precedential weight to its own summary dispositions, see Justice Brennan's dissent to the denial of certiorari in *Colorado Springs Amusements, Ltd v Rizzo,* 428 US 913, 916-917; 96 S Ct 3228; 49 L Ed 2d 1222 (1976). However, "[t]his description of disposition after cursory discussion is difficult to reconcile with the theory that each summary affirmance or dismissal for insubstantiality is a decision on the merits worthy of the deference of all lower courts." *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court After Hicks v Miranda and Mandel v Bradley,* 64 Va L Rev 117, 127 (1978) (hereinafter cited as *Precedential Effect).*

preme Court Practice 197 (4th ed, 1969) ('The Court is, however, deciding a case on the merits, when it dismisses for want of a *substantial* question * * *'); C. Wright, Law of Federal Courts 495 (2d ed, 1970) ('Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits'). The District Court should have followed the Second Circuit's advice, first, in *Port Authority Bondholders Protective Committee v Port of New York Authority,* 387 F2d 259, 263, fn 3 (1967), that 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise'; and, later, in *Doe v Hodgson,* 478 F2d 537, 539, *cert den sub nom Doe v Brennan,* 414 US 1096 (1973), that *the lower courts are bound by summary decisions by this Court* '"*until such time as the Court informs [them] that [they] are not.*"'" *Hicks, supra,* 344-345. (Emphasis added.)

While some criticism has been levelled at *Hicks* for not providing the lower courts with guidance with regard to their application of summary dispositions as precedent,[3] footnote 14 of Justice White's opinion in *Hicks* is instructive: the issues in the case treated summarily by the United States Supreme Court must be "sufficiently the same" as the issues presented in the case before the lower court, and the lower court is obliged "to ascertain what issues had been properly presented in [the case summarily affirmed or dismissed] and declared by this Court to be without substance". *Hicks, supra,* 345, fn 14.

*Mandel, supra,* further refines what was said by the *Hicks* Court and exists as an important state-

[3] *Precedential Effect, supra,* 122.

ment on how lower courts are to apply *Hicks.*[4] *Mandel* is notable on several counts: it not only reaffirms *Hicks,* but also provides explicit commentary of its own which is particularly significant to the instant case:

"Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel, supra,* 176.

Further, *Mandel* instructs that in evaluating the precedential import of a summary action, other courts must conscientiously examine the facts of the case before them and compare them to the facts of the case affirmed or dismissed in summary fashion by the United States Supreme Court.

Some judicial speculation has arisen that *Mandel* disavowed *Hicks,* and that more recent developments, *viz., Illinois State Board of Elections v Socialist Workers Party,* 440 US 173; 99 S Ct 983; 59 L Ed 2d 230 (1979), have eroded the utility of *Hicks,* see, *e.g., Lecates v Justice of Peace Court No 4,* 637 F2d 898, 902-903 (CA 3, 1980).[5]

[4] In *Mandel,* a three-judge federal district court faced with the question of the constitutionality of early filing deadlines for independent candidates in Maryland relied on the Supreme Court's summary affirmance in a case which had dealt with a similar Pennsylvania statute, and declined to reach the merits of the case. The Supreme Court remanded to the district court for consideration of the merits, largely because the facts of the Pennsylvania case were radically different from those presented in *Mandel;* moreover, critical dissimilarities between the pertinent election statutes worked to prevent the lower court from regarding the Pennsylvania case as controlling precedent.

[5] Justice Marshall, writing for the Court in *Illinois State Board, supra,* 180-181, stated:

"Appellant argues here, as it did below, that this Court's summary

To the contrary, *Hicks* continues to be good law, and *Illinois Board of Elections* does not operate to give this Court latitude to reconsider fully the federal constitutional issue before us. Significantly, the Supreme Court itself has continued to cite *Hicks* authoritatively, see, *e.g., Metromedia, Inc v San Diego,* 453 US 490, 499; 101 S Ct 2882; 69 L Ed 2d 800 (1981); see, also, Justice White's concurrence in a dismissal for want of a substantial federal question in *McKeesport Area School Dist v Pennsylvania Dep't of Education,* 446 US 970, 971; 100 S Ct 2953; 64 L Ed 2d 831 (1980); *Rome v United States,* 446 US 156, 212, fn 4; 100 S Ct 1548; 64 L Ed 2d 119 (1980) (Rehnquist, J., *dissenting).*

Additionally, the argument that *Illinois State Board* confers upon lower courts unfettered discretion to discard what the Supreme Court has dictated through its summary affirmances and dismissals rests upon a misunderstanding of what the Supreme Court means when it says that its summary dispositions do not carry the same weight as do full opinions issued after plenary consideration. Quite simply, the Supreme Court says that *it* need not accord full precedential value to its own summary actions, *not* that lower courts are free to do the same.

In so stating, the Supreme Court merely recog-

affirmance of *Jackson v Ogilvie, supra* [325 F Supp 864 (ND Ill, 1971), *aff'd* 403 US 925 (1971)], is dispositive of the equal protection challenge here. In analyzing this contention, we note at the outset that summary affirmances have considerably less precedential value than an opinion on the merits. See *Edelman v Jordan,* 415 US 651, 671 [94 S Ct 1347; 39 L Ed 2d 662] (1974). As Mr. Chief Justice Burger observed in *Fusari v Steinberg,* 419 US 379, 392 [95 S Ct 533; 42 L Ed 2d 521] (1975) (concurring opinion), 'upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.' See *Usery v Turner Elkhorn Mining Co,* 428 US 1, 14 [96 S Ct 2882; 49 L Ed 2d 752] (1976)."

nizes its place in the judicial hierarchy. This interpretation is fully substantiated by the Supreme Court's own statements. For example, in *Illinois State Board,* the case relied upon so heavily by the majority in its assessment of the constitutionality of 1976 PA 94, the Court's pronouncement that "summary affirmances have considerably less precedential value than an opinion on the merits" is immediately followed by a statement indicating that "the Court" itself has not been constrained to follow a rule which may appear to have been established by summary affirmances.[6]

Another example of the Supreme Court's intent to confine the "less-than-full-precedent" rule to its own bench is contained in a footnote in *Washington v Confederated Bands and Tribes of the Yakima Indian Nation,* 439 US 463, 476-477, fn 20; 99 S Ct 740; 58 L Ed 2d 740 (1979): "They [summary dismissals] do not, however, have the same precedential value *here* as does an opinion of this Court after briefing and oral argument on the merits." (Emphasis supplied.) Finally, in *Metromedia, supra,* p 500, the Court acknowledged the propriety of the California Supreme Court's reliance on one of its summary decisions, but added (I might point out, with citation to *Illinois State Board)* that "summary actions do not have the same authority *in this Court* as do decisions rendered after plenary consideration". (Emphasis supplied.) See, also, Stern & Gressman, Supreme Court Practice (5th ed, 1978), p 330; 12 Moore's Federal Practice (2d ed), ¶ 400.05-1.

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[6] Cases in which the Supreme Court has decided not to follow a line of past summary actions include: *Massachusetts Board of Retirement v Murgia,* 427 US 307; 96 S Ct 2562; 49 L Ed 2d 520 (1976); *Usery v Turner Elkhorn Mining Co,* 428 US 1; 96 S Ct 2882; 49 L Ed 2d 752 (1976).

## II

To recapitulate briefly the foregoing, summary affirmances or dismissals by the United States Supreme Court are decisions on the merits which are binding on other courts as precedent. The Supreme Court itself is not required to adhere strictly to that which seems to be established by one or many of its summary actions. However, lower state and federal courts are not given the same leeway. If the lower court is confronted with "precise issues presented and necessarily decided" by a United States Supreme Court summary disposition, it must treat the summary action as binding precedent. A primary task, then, for another court considering the effect of a Supreme Court summary disposition is to determine the reach of that disposition.

In the instant case, this Court is obliged to ascertain whether the Supreme Court "necessarily decided" by summarily affirming in *Allen, supra,* the "precise issue" before us here. I conclude that it did and therefore, that the majority errs in proceeding to decide the federal constitutional issue in a manner contrary to that which is dictated by *Allen.*

In *Hudler v Austin,* 419 F Supp 1002 (ED Mich, 1976), a three-judge district court (one judge dissenting) considered plaintiffs' challenge to 1976 PA 94 on First and Fourteenth Amendment (association and franchise) and equal protection grounds and concluded that the statute did not abridge these federal constitutional rights. However, the court did award plaintiffs limited relief by allowing them ballot access for the then-imminent November, 1976 election. Plaintiffs directly appealed

this judgment to the United States Supreme Court. The jurisdictional statement[7] supplied by plaintiffs delineated a single issue for consideration on appeal:

"Whether the Michigan Election Code, on its face and as applied, invidiously discriminates among political parties in violation of the equal protection clause of the Fourteenth Amendment and unnecessarily burdens political activity in violation of the First Amendment, by requiring new political parties who have qualified for the general election ballot by submitting the required number of petitions, to further qualify for the general election ballot by additionally receiving 0.3% of the votes cast at the primary election." 9085 Records and Briefs of the United States Supreme Court, No 76-1038, p 8.

The jurisdictional statement appears to state accurately the constitutional issue treated by the district court in *Hudler.* Rule 15.1(a) of the Supreme Court Rules specifies that "[o]nly the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court." It is therefore eminently clear that, in affirming *Hudler,* the Supreme Court necessarily considered the sole issue before it—the constitutionality of 1976 PA 94—and necessarily decided that the lower court's judgment with respect to that issue was correct.

III

The case at bar involves the identical statute and substantially the same parties as were before

[7] Required by Supreme Court Rule 12. See Supreme Court Rule 15.1 for a listing of the material to be included in a jurisdictional statement.

the United States Supreme Court in *Allen.* The federal constitutional issue "necessarily decided" by the summary affirmance in *Allen* is identical to that addressed by the majority here.

Appellants contend that a new constitutional issue—an "as applied" attack—is being raised here. This appears to mean that appellants claim the procedures used to implement 1976 PA 94 in a given election year were "unconstitutional in their impact upon the legislative scheme", *Dean v Austin,* 602 F2d 121, 123 (CA 6, 1979). However, the majority opinion is decidedly a "facial" analysis, and indeed, because of the procedural posture of this case, there is no evidence before the Court on just how 1976 PA 94 might be found unconstitutional "as applied".

Moreover, I note that the jurisdictional statement in *Allen* challenged the statute on both "facial" and "as applied" grounds.

## IV

Therefore, I would affirm the trial court's judgment with regard to the question of the constitutionality of 1976 PA 94 under the provisions of the United States Constitution, although for a different reason. Because the trial court has not been given the opportunity to develop a record on the question of how this legislation might abridge various provisions of the Michigan Constitution, I would remand the remaining issues to the trial court for its consideration.

WILLIAMS, J., concurred with COLEMAN, C.J.

DEPARTMENT OF CIVIL RIGHTS *ex rel* PARKS v GENERAL MOTORS CORPORATION

Docket No. 64141. Argued November 14, 1980 (Calendar No. 7).—Decided March 1, 1982.

Mary Parks brought a complaint before the Civil Rights Commission against General Motors Corporation under the State Fair Employment Practices Act, charging that the defendant had dismissed her from its employment because her religious beliefs, as a Seventh-day Adventist, conflicted with her assigned hours of work. The plaintiff's religion forbids work on the Sabbath, between sunset on Friday and sunset on Saturday. She was assigned to work the second shift at the defendant's Pontiac Fisher Body plant, from 4 p.m. until 12:30 a.m., and after telling her foreman on the day before each Friday that she could not work the following day because of her religious beliefs, she failed to report to work on three consecutive Fridays. The defendant admits that it terminated her employment without considering other action to accommodate her religious practice. The Civil Rights Commission found the defendant guilty of unlawful religious discrimination and ordered it to reinstate her with back pay and other benefits. The Oakland Circuit Court, Francis X. O'Brien, J., reversed the order on the

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REFERENCES FOR POINTS IN HEADNOTES

[1-4, 9-11, 14, 15, 19, 20] 15 Am Jur 2d, Civil Rights §§ 195, 196.
Fair employment statutes designed to eliminate racial, religious, or national origin discrimination in private employment. 44 ALR2d 1138.

[2] 1 Am Jur 2d, Administrative Law § 127.
2 Am Jur 2d, Administrative Law § 301.
16A Am Jur 2d, Constitutional Law § 490.

[3] 73 Am Jur 2d, Statutes § 145.

[5] 15 Am Jur 2d, Civil Rights § 318.

[6] 15 Am Jur 2d, Civil Rights § 194.

[7, 21] 15 Am Jur 2d, Civil Rights § 199.

[8] 15 Am Jur 2d, Civil Rights § 193.

[12, 13, 16] 2 Am Jur 2d, Administrative Law §§ 233, 234, 236.

[17-19] 16A Am Jur 2d, Constitutional Law § 466 *et seq.*
Supreme Court cases involving establishment and freedom of religion clauses of Federal Constitution. 37 L Ed 2d 1147.

ground that requiring the defendant to make the accommodation exceeded the authority of the Civil Rights Commission under the State Fair Employment Practices Act. The Court of Appeals, Beasley, P.J., and Allen and D. C. Riley, JJ., affirmed (Docket No. 78-1885). The Department of Civil Rights appeals.

In opinions by Justices Kavanagh, Levin, and Williams, the Supreme Court *held:*

The State Fair Employment Practices Act does not impose a duty on the employer to make reasonable accommodations to an employee's religious needs. However, there may be a finding of discrimination based on evidence that an employer failed to act affirmatively to avoid the discriminatory effect of a facially neutral practice, and the cause is remanded to the circuit court for further proceedings.

Justice Kavanagh, joined by Chief Justice Coleman and Justice Ryan, would affirm the decision of the Court of Appeals for the reasons set forth in that Court's opinion. They are:

1. The interpretive guidelines promulgated by the Civil Rights Commission, which construed the statute as imposing a duty on the employer to make reasonable accommodations to the religious needs of employees where the accommodations can be made without undue hardship on the conduct of the employer's business, were not binding on employers. An interpretive guideline of this kind is, under the Administrative Procedures Act, an agency statement of policy which does not have the force of law, and which binds the agency but not any other person. The guidelines were issued without either the authority or procedure necessary to have them given effect as a rule.

2. The statute, which by its terms prohibits religious discrimination, does not include a duty reasonably to accommodate the religious needs of employees. The Legislature did not enact legislation expanding the prohibition to include the duty, as did the Congress after the substantially identical federal statute was held not to include the duty. In the absence of any clear legislative interpretation that the term "discrimination" includes a duty to make reasonable accommodations, such a construction goes beyond the legislative mandate. Not only did the Legislature fail to enact positive legislation, but on three occasions when it amended the act for other purposes, it failed to deal with religious accommodation. Furthermore, the courts are reluctant to find affirmative duties in a general ban on discrimination. The doctrine of legislative acquiescence in administrative interpretation does not apply in this case because

none of the factors relied on by the courts in applying the doctrine are present.

Justice Levin agreed with Justice Kavanagh that the State Fair Employment Practices Act does not impose a separate obligation to accommodate the religious needs of employees. An employer may nevertheless be required to act affirmatively to avoid discriminating against an employee because of religion.

1. It is the duty of the Civil Rights Commission, under the Constitution of 1963, to investigate allegations of discrimination because of religion in the enjoyment of civil rights guaranteed by law and the constitution, and to secure the equal protection of those rights without religious discrimination. The right to an opportunity to be employed is a civil right guaranteed by law. Justice Levin agreed with Justices Williams and Moody that "discrimination" includes practices that are fair in form, but discriminatory in operation. An employer may be obliged to act affirmatively to avoid a discriminatory effect.

2. The stipulation of facts does not say whether General Motors, in particular cases or as a matter of policy or practice, made changes in the work schedule so that employees can refrain from work on their days of religious observance. Nor does it appear whether the refusal to accommodate Mary Parks' religious needs was inconsistent with past conduct, policy or practice of General Motors, or otherwise might have discriminated against her because of religion. The concession that General Motors refused to consider an alternative to discharge does not, standing alone, establish a policy or practice "discriminatory in operation" or that GM discriminated against her because of religion.

3. Whether a particular policy or rule of federal law should be incorporated into Michigan law should be decided as the issue arises. The guideline adopted by the United States Equal Employment Opportunity Commission which requires an employer to make reasonable accommodation to the religious needs of employees may reflect a perception that employers of large numbers of persons generally make an effort to do that where it can be done without undue hardship on the conduct of the employer's business, and may further reflect the view that it is therefore appropriate to presume discrimination because of religion from a failure so to accommodate with the burden of justifying the failure on the employer. However, it has not been shown that such a generalization has a factual basis in the experience of the administrative agencies to support it as the proper construction of the statute.

4. In this case, the Department of Civil Rights and General

Motors apparently desire an answer to the abstract question whether the State Fair Employment Practices Act should be read as imposing a duty of reasonable accommodation. Justice Levin agreed, for the reasons set forth by the Court of Appeals, there is no present reason for reading the State Fair Employment Practices Act, enacted in 1955, as imposing the duty of an employer under federal law to make reasonable accommodation to the religious needs of an employee.

5. The opinion of the Court does not preclude a finding of discrimination based on evidence that an employer failed to act affirmatively to avoid the discriminatory effect of a facially neutral practice, and leaves open the questions whether failure of an employer to accommodate the religious needs of employees or prospective employees may constitute discrimination, what would be a fair allocation of the burden of proof, and what should constitute valid defenses.

The cause should be remanded to the circuit court for further proceedings.

Justice Williams, joined by Justices Fitzgerald and Moody, would hold that the statutory duty to refrain from religious discrimination in employment imposes a duty on the employer to make reasonable accommodation of an employee's religious needs unless an undue hardship would be occasioned thereby. This duty does not violate either the state or federal constitutions. However, they agreed with Justice Levin that there is nothing in this matter to preclude a finding of discrimination based on evidence that the employer failed to avoid the discriminatory effect of a facially neutral practice. Therefore, they would remand to the circuit court on that issue.

1. The language of the State Fair Employment Practices Act does not show clearly whether the Legislature intended to impose upon an employer an obligation of reasonable accommodation of an employee's religious practices, as part of the duty to refrain from religious discrimination in employment. The administrative guideline or interpretation by the Civil Rights Commission which requires reasonable accommodation is not controlling, and under the Administrative Procedures Act does not have the force or effect of law, but is merely explanatory. The task, then, is to construe the legislative will as found in the statute.

2. Case law from other jurisdictions, while not controlling, can guide the Court where it is appropriate and sound. A common thread in such cases is that discriminatory consequences of otherwise neutral employment practices should be eliminated unless an undue hardship would be placed on the

employer's business. In addition, the guideline promulgated by the Civil Rights Commission is due some particular deference because of the constitutional establishment of the commission. A requirement of reasonable accommodation is a valid and reasonable construction of a general prohibition of religious discrimination and is in accord with the purpose of the State Fair Employment Practices Act to prevent and eliminate religious discrimination. The burden of proving that a reasonable accommodation cannot be made without undue hardship is on the employer.

3. The prohibition against religious discrimination in employment embraces the concept of religious practice as well as that of religious belief, and the Legislature necessarily included both concepts in the statute. It follows that a duty to make reasonable efforts to accommodate religious practices arose with the enactment of the law in order to achieve fully the prohibition of religious discrimination in employment. The failure of the Legislature to amend the State Fair Employment Practices Act to incorporate the substance of the administrative guideline of the Civil Rights Commission does not raise the inference that the Legislature intended to disapprove it.

4. The traditional view is that to be constitutional under the Establishment Clause of the First Amendment, a law concerning religion must reflect a clearly secular legislative purpose, must have a primary effect that neither advances nor inhibits religion, and must avoid excessive government entanglement with religion. That three-part test, however, only serves as a guideline to identify impairment of the objectives of the Establishment Clause and does not set the precise limits to the necessary constitutional inquiry. The Supreme Court of the United States has said that it will not tolerate either governmentally established religion or governmental interference with religion. Total separation between church and state is not called for, nor is it possible; some relationship between government and religious organizations is inevitable. Incidental, indirect or remote benefits to religion do not alone render a particular law constitutionally invalid. The problem, like many others in constitutional law, is one of degree.

5. The requirement of reasonable accommodation in this case is entirely consistent with the constitutionally necessary governmental neutrality in matters of religion. The primary and direct effect is to provide individual persons with a greater opportunity to secure or retain employment. Any aid filtering to a particular religious institution or to religion in general from the imposition of the requirement is too indirect and

remote to be constitutionally significant. The requirement is not tainted by the evils of sponsorship, financial support, and active involvement of the government against which the Establishment Clause was intended to afford protection.

6. Each case involving reasonable accommodation necessarily depends on its own facts and circumstances; the trier of fact is in the best position to weigh the considerations of the individual employment relation. An employer, in response to a communication of the religious needs of an employee, must at least make some good-faith effort at accommodation or show that it was unable reasonably to make the accommodation without undue hardship to its business. In this case, the claimant has made a prima facie showing of religious discrimination and the need for accommodation between her observance of the Sabbath and the defendant's work schedule. General Motors has taken the position that it has no duty of reasonable accommodation. The Court agrees with General Motors on that issue but there is nothing to preclude a finding of discrimination based on evidence that General Motors failed to act affirmatively to avoid a discriminatory effect of a facially neutral practice.

OPINION BY KAVANAGH, J.

1. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — DUTY OF EMPLOYER.

The State Fair Employment Practices Act does not impose a duty on an employer to make reasonable accommodation to the religious needs of employees (MCL 423.301 *et seq.;* MSA 17.458[1] *et seq.).*

2. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — ADMINISTRATIVE LAW.

*The Civil Rights Commission cannot legislate or impose substantive duties or penalties beyond the scope of its authority under the State Fair Employment Practices Act to proscribe religious discrimination in employment (MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

3. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — STATUTES — CONSTRUCTION.

*To construe the State Fair Employment Practices Act to require an employer to make reasonable accommodation to the religious practices of an employee goes beyond the legislative mandate (MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

OPINION BY LEVIN, J.

4. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT.

The State Fair Employment Practices Act does not impose a separate obligation upon an employer to meet the religious needs of employees (MCL 423.301 *et seq.;* MSA 17.458[1] *et seq.).*

5. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — CIVIL RIGHTS COMMISSION.

*It is the duty of the Civil Rights Commission, under the Constitution of 1963, to investigate allegations of discrimination because of religion in the enjoyment of the right to an opportunity to be employed, which is a civil right guaranteed by the State Fair Employment Practices Act, and to secure the equal protection of that right without religious discrimination (Const 1963, art 1, § 2; art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

6. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — WORDS AND PHRASES.

*The term religious discrimination, under the State Fair Employment Practices Act, includes practices that are fair in form, but discriminatory in operation; an employer may be obliged to act affirmatively to avoid a discriminatory effect (Const 1963, art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

7. CIVIL RIGHTS — SUNDAYS AND HOLIDAYS — FAIR EMPLOYMENT PRACTICES ACT.

*A stipulation by an employer that it refused to consider an alternative other than discharge from employment of an employee because her observance of the Sabbath as a Seventh-day Adventist conflicted with her assigned hours of work does not, standing alone, establish a policy or practice discriminatory in operation or that the employer discriminated against the employee because of religion (MCL 423.303; MSA 17.458[3]).*

8. CIVIL RIGHTS — FAIR EMPLOYMENT PRACTICES ACT — ADMINISTRATIVE LAW — CONSTITUTIONAL LAW.

*Neither the State Fair Employment Practices Act nor the Constitution of 1963 requires the assimilation into Michigan law of whatever Congress enacts, federal agencies promulgate or federal courts decide on the issue of discrimination in employment; whether a particular policy or rule of federal law should be incorporated into Michigan law should be decided as the issue arises (Const 1963, art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

9. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT.

*There is no present reason for reading the State Fair Employment Practices Act as imposing a duty upon an employer to make reasonable accommodation to the religious needs of an employee where that can be done without undue hardship to the conduct of the employer's business (Const 1963, art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

10. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — ADMINISTRATIVE LAW.

A decision that the State Fair Employment Practices Act does not impose a duty on an employer to make reasonable accommodation to the religious needs of an employee as a matter of law does not preclude a finding of religious discrimination, as a matter of fact, based on evidence that an employer failed to act affirmatively to avoid the discriminatory effect of a facially neutral practice (Const 1963, art 5, § 29; MCL 423.303; MSA 17.458[3]).

OPINION BY WILLIAMS, J.

See headnote 10.

11. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — DUTY OF EMPLOYER — REASONABLE ACCOMMODATION.

*The statutory duty under the State Fair Employment Practices Act to refrain from religious discrimination in employment imposes a duty on an employer to make reasonable accommodation to the religious needs of an employee where that can be done without undue hardship to the conduct of the employer's business (MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

12. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — ADMINISTRATIVE LAW.

*An administrative guideline or interpretation of the State Fair Employment Practices Act concerning religious discrimination may not exceed the power expressly given to the Civil Rights Commission by statute or the constitution, and any such guideline, under the Administrative Procedures Act, does not have the force or effect of law, but is merely explanatory (Const 1963, art 5, § 29; MCL 24.207[h], 423.301 et seq.; MSA 3.560[107][h], 17.458[1] et seq.).*

13. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — CONSTITUTIONAL LAW — ADMINISTRATIVE LAW.

*An administrative guideline concerning religious discrimination promulgated by the Civil Rights Commission under the State Fair Employment Practices Act is due some particular deference because of the constitutional establishment of the commission (Const 1963, art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

14. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — REASONABLE ACCOMMODATION — BURDEN OF PROOF.

*The burden of proving, under the State Fair Employment Practices Act, that a reasonable accommodation to an employee's religious practices cannot be made by an employer without undue hardship to the conduct of the employer's business is on the employer (MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

15. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — REASONABLE ACCOMMODATION.

*The prohibition against religious discrimination in employment embraces the concept of religious practice as well as that of religious belief, and the Legislature necessarily included both concepts in the State Fair Employment Practices Act; it follows that a duty to make reasonable efforts to accommodate religious practices arose with the enactment of the law in order to achieve fully the prohibition of religious discrimination in employment (US Const, Am I; Const 1963, art 1, § 4; MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

16. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — CONSTRUCTION.

*The failure of the Legislature to amend the State Fair Employment Practices Act specifically to incorporate the substance of an administrative guideline by the Civil Rights Commission interpreting the statutory prohibition against religious discrimination in employment does not raise the inference that the Legislature intended to disapprove that construction of the statute (MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

17. CONSTITUTIONAL LAW — ESTABLISHMENT OF RELIGION — STATUTES.

*The traditional view is that to be constitutional under the Establishment Clause a law concerning religion must reflect a clearly secular legislative purpose, have a primary effect that neither advances nor inhibits religion, and avoid excessive governmental entanglement with religion; that test, however, only serves*

*as a guideline to identify impairments of the objectives of the Establishment Clause and does not set the precise limits to the necessary constitutional inquiry (US Const, Am I; Const 1963, art 1, § 4).*

18. CONSTITUTIONAL LAW — ESTABLISHMENT OF RELIGION — STATUTES.

*Total separation between church and state is not called for by the constitution, and incidental, indirect, or remote benefits to religion do not alone render a particular law constitutionally invalid (US Const, Am I; Const 1963, art 1, § 4).*

19. CONSTITUTIONAL LAW — ESTABLISHMENT OF RELIGION — CIVIL RIGHTS — FAIR EMPLOYMENT PRACTICES ACT — RELIGIOUS DISCRIMINATION.

*The requirement of the State Fair Employment Practices Act that an employer make reasonable accommodation to the religious practices of an employee where that can be done without undue hardship to the conduct of the employer's business is entirely consistent with the necessary governmental neutrality in matters of religion because the primary and direct effect is simply to provide certain individuals with a greater opportunity to secure or retain employment without giving up the practices of their religion; the requirement is not tainted by the evils of sponsorship, financial support, and active involvement of the government against which the Establishment Clause of the constitution was intended to afford protection (US Const, Am I; Const 1963, art 1, § 4).*

20. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — REASONABLE ACCOMMODATION — QUESTION OF FACT.

*The good-faith effort which an employer must make to reasonably accommodate the religious needs of an employee, as part of the proscription of the Fair Employment Practices Act against religious discrimination, cannot be given a hard and fast meaning; each case necessarily depends on its own facts and circumstances, which the trier of fact is in the best position to weigh (MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

21. CIVIL RIGHTS — RELIGIOUS DISCRIMINATION — FAIR EMPLOYMENT PRACTICES ACT — REASONABLE ACCOMMODATION.

*An employee who was dismissed from employment because her observance of the Sabbath as a Seventh-day Adventist conflicted with her assigned hours of work has made a prima facie showing of religious discrimination against her religious needs and the need for reasonable accommodation of them under the*

*State Fair Employment Practices Act where the employer took the position that it had no duty of reasonable accommodation to the requirement of her religion to perform no work between sunset on Friday and sunset on Saturday (MCL 423.301 et seq.; MSA 17.458[1] et seq.).*

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Michael A. Lockman,* Assistant in Charge, Civil Rights & Civil Liberties Division, for Department of Civil Rights.

*Michael J. Connolly* for defendant.

KAVANAGH, J. *(for affirmance).* Judge ALLEN's opinion for the Court of Appeals, 93 Mich App 366; 287 NW2d 240 (1979), fully and accurately analyzes the Michigan statute and case law and recounts the pertinent history of federal cases applying the comparable federal law.

For the reasons set forth in that opinion we affirm.

COLEMAN, C.J., and RYAN, J., concurred with KAVANAGH, J.

LEVIN, J. The Civil Rights Commission found that General Motors had discriminated against Mary Parks because of religion. That finding was based on stipulated facts that Parks, an observant Seventh-day Adventist, when hired on September 18, 1972, at the Fisher Body plant in Pontiac, was placed on a shift that included hours of her Sabbath (Friday evening and Saturday), that she was discharged from employment when she failed to report for work on three successive Fridays (September 22, September 29, and October 6, 1972), and that General Motors, "upon being confronted with the conflict between the working hours of the second shift and claimant's observance of her Sab-

bath, considered no alternative other than claimant's discharge and took no action whatsoever other than discharge of claimant".

The circuit court reversed the decision of the CRC. The Court of Appeals affirmed; it concluded "that the FEPA did not impose an obligation on the employer to make affirmative accommodations to conform to the employee's religious needs", and directed that "[a]ll charges brought against the respondent herein [General Motors] are dismissed".

I agree that the Fair Employment Practices Act[1] does not impose a separate obligation to accommodate the religious needs of employees. An employer may nevertheless be required to act affirmatively to avoid discriminating against an employee because of religion.

## I

The FEPA[2] and constitution proscribe "discrimination against any person because of religion".[3] It is the duty of the CRC, under the constitution, to investigate allegations of such discrimination "in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination".[4]

The right to an opportunity to be employed—although not absolute and subject to numerous limitations—is a civil right so guaranteed by law.[5]

[1] MCL 423.303; MSA 17.458(3).

[2] *Id.*

[3] Const 1963, art 5, § 29. See also Const 1963, art 1, § 2.

[4] Const 1963, art 5, § 29.

[5] See fn 1. See also Const 1963, art 1, § 2, Convention Comment, 2 Official Record, Constitutional Convention 1961, p 3363.

The term "discrimination" includes, I agree with Justices WILLIAMS and MOODY, "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation". An employer may be obliged to act affirmatively to avoid a discriminatory effect.

The stipulation of facts does not advert to whether General Motors, in particular cases or as a matter of policy or practice, made changes in the work schedule, at this or other locations, so that employees can refrain from work during their days of religious observance. Nor does it appear whether GM's refusal to accommodate Mary Parks' religious needs was inconsistent with past conduct, policy or practice respecting the religious needs of General Motors employees or otherwise might have discriminated against Mary Parks on the basis of religion.

The CRC's authority concerns allegations of discrimination against a person because of religion. General Motors' concession that it refused to consider an alternative other than discharge does not, standing alone, establish a policy or practice "discriminatory in operation" or that General Motors discriminated against her because of religion.

II

In September 1972, after Parks had been hired but before she was discharged, the CRC adopted an EEOC religious discrimination guideline which stated that it concerns "the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain

special religious holidays during the year and, as a consequence, do not work on such days". The guideline states that the EEOC "believes" that the duty not to discriminate on religious grounds:

"[I]ncludes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."[6]

The CRC concluded that General Motors made no effort to accommodate Parks' religious needs, in violation of the guideline, on the basis of General Motors' concession that, when confronted with the conflict between the working hours of the second shift and Parks' observance of her Sabbath, it considered no alternative other than her discharge and took no action whatsoever other than to discharge her.[7]

Neither the FEPA nor the Michigan Constitution requires the assimilation into Michigan law of whatever the Congress enacts, federal agencies

[6] 29 CFR 1605.1.

[7] The CRC further found that General Motors was precluded from asserting undue hardship because of its failure to make any effort to accommodate Parks' religious needs, and that it could have reasonably accommodated her religious needs within the terms of the collective-bargaining agreement with the United Auto Workers without undue hardship on the conduct of its business, and failed to do so.

promulgate or the federal courts decide. The question whether a particular policy or rule of federal law should be incorporated into Michigan law should be decided as the particular issue arises.

If this Court were to adopt the EEOC guideline as a proper or the correct construction of the FEPA, the likelihood is that the argument would be made—and would prevail—that we had also adopted the federal case law construing and applying the guideline, and that the terms "reasonable accommodation" and "undue hardship" have the meaning which has been or will be ascribed to them by the EEOC or the federal courts. Some of the federal case law is conflicting. This Court has not examined that body of law, and it would be neither appropriate nor meaningful for it to attempt to do so in the instant case.[8]

The EEOC guideline may reflect a perception that large employers or employers operating large plants generally make an effort to reasonably accommodate the religious needs of employees where this can be done without undue hardship on the conduct of the employer's business and may further reflect the view that it is therefore appropriate to presume discrimination because of religion from a failure to so accommodate the religious needs of an employee and to cast the burden of justifying the failure to accommodate upon the employer. It has not, however, been shown that such a perception or view has a factual basis in

[8] I appreciate that, whether the EEOC guideline is adopted or not, the federal precedents are likely to be considered by the CRC in determining whether there has been discrimination as a result of a failure to act affirmatively. But then the persuasiveness of the federal precedents would depend on whether, in the case relied on, there was a factual showing of discrimination—the CRC inquiry could not be confined to whether there was "reasonable accommodation" or "undue hardship". The focus would be on whether there was discrimination, and not on the terminology of the guideline.

the experience of the EEOC or of the CRC in the administration of their responsibilities. We are asked to adopt the guideline as *the* proper construction of the statute,[9] applicable to all employers and all businesses, although there may be no basis in fact or experience for creation of such a presumption or allocation of the burden of proof.[10]

Courts ordinarily refrain from stating rules of general application until their experience in the decision of a large number of cases in varying factual situations justifies a generalization. This is the first case to reach the appellate courts of this state alleging discrimination because of religion based on asserted failure to engage in affirmative conduct to accommodate an employee's religious needs. This Court has no basis in its experience, nor has it been shown the CRC has any basis in its experience to justify the adoption of the generalizations set forth in the guideline.

Both the Michigan Department of Civil Rights and General Motors apparently desire an answer to the abstract question whether the FEPA should be read as imposing a duty of reasonable accommodation to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business.

I would, for reasons set forth in Judge ALLEN's opinion in the Court of Appeals, answer the ques-

[9] The guideline is, we all agree, merely an expression of agency policy. It was not adopted as a rule and does not have the force of law. See *Dep't of Civil Rights ex rel Parks v General Motors Corp,* 93 Mich App 366, 373 (1979), adopted in Justice KAVANAGH's opinion and Justice WILLIAMS' opinion in this Court.

[10] General Motors is a large employer, but the rule which the CRC asks this Court to enunciate in the construction of the FEPA would tend to impose the same burden of proof on all employers without regard to their size or the nature of their businesses and in situations distinct from those which engendered the concepts set forth in the guideline.

tion posed by this test case in the negative; the Court has no present basis for reading the FEPA, enacted in 1955, as imposing the duty first enunciated in 1967 by the EEOC, subsequently enacted in 1972 into Title VII of the Civil Rights Act,[11] and thereafter, in 1977, applied retroactively by the United States Supreme Court.[12]

## III

It is my understanding of the lead opinion that it does not preclude a finding of discrimination based on evidence that an employer failed to act affirmatively to avoid the discriminatory effect of a facially neutral practice,[13] and that it leaves open the questions whether the failure of an employer to accommodate the religious needs of its employees or prospective employees may constitute discrimination, what would be a fair allocation of the burden of proof and what should constitute valid defenses to evidence of discrimination.[14]

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[11] Section 701(j), 42 USC 2000e(j).

[12] *Trans World Airlines, Inc v Hardison,* 432 US 63; 97 S Ct 2264; 53 L Ed 2d 113 (1977).

[13] While Judge ALLEN states *(Dep't of Civil Rights v General Motors Corp, supra,* p 379) that the Court of Appeals and the United States Court of Appeals for the Sixth Circuit have had a "long-standing reluctance" "to find affirmative duties in a general ban on discrimination" and adverts to two decisions in which the Court of Appeals "declined to find affirmative duties mandated within a statute which forbids 'discrimination' ", his opinion does not state, let alone hold, that in no circumstances is there an obligation to act affirmatively to avoid discrimination.

[14] Accommodation of an employee's Sabbath observance may involve more than a request that an employer accommodate, without undue hardship to itself, the religious needs of an employee. Accommodation of one employee's religious practice may necessitate the transfer of another employee to a less desirable shift; solely because of their religions, one employee would be moved to a more desirable shift, and another employee would be moved to a less desirable shift. Such a reallocation of benefits because of religion may go beyond what is required by the FEPA and may indeed be inconsistent with its mandate barring discrimination because of religion. Alternatively,

I would remand the cause to the circuit court for further proceedings consistent with this opinion.

WILLIAMS, J. The central issue in this case is not difficult of statement: does the duty to refrain from religious discrimination in employment impose an obligation on the employer to reasonably accommodate an employee's religious needs? Put within the general factual context of this case, we are required to determine whether an employee who refuses to work a scheduled shift because it conflicts with her religion's Sabbath observance may be summarily discharged or whether the employer must first attempt some accommodation between the work schedule and its employee's religious practices.

This conflict between employees' religious practices and employers' neutral work schedules and policies, however simple of statement, presents this Court with what Justice Marshall, in the federal context, has termed "[o]ne of the most intractable problems" arising under civil rights legislation. *Trans World Airlines, Inc v Hardison,* 432 US 63, 85; 97 S Ct 2264; 53 L Ed 2d 113 (1977) (Marshall, J., *dissenting).* On the one hand, this state's Legislature has simply prohibited an employer "to discriminate" because of religion. MCL 423.303; MSA 17.458(3).[1] It has not attempted to outline what "discriminate" means in respect to religious practices. On the other hand, the Michi-

accommodation of an employee's religious practice may not burden another employee or may not cause undue hardship to the employer if such accommodation could be accomplished through voluntary shift swaps or voluntary substitutions of other personnel already on board.

[1] This statute, the Michigan State Fair Employment Practices Act (FEPA) was repealed by passage of the Elliott-Larsen Civil Rights Act, 1976 PA 453, effective March 31, 1977, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.* The claimant in this case, Mary Parks, was discharged while the FEPA was in effect and therefore it is that statute and not the Elliott-Larsen act which governs this case.

gan Civil Rights Commission, established by the Constitution of 1963 and given the task of securing the equal protection of civil rights guaranteed by law, has interpreted the legislative prohibition of religious discrimination as requiring an employer to make reasonable accommodations to an employee's religious practices.

The difficulty of this issue is compounded by the fact that imposition of a duty of reasonable accommodation raises constitutional questions respecting an establishment of religion.[2] Courts in both the federal and state forums have grappled with both of these issues under analogous circumstances with divergent results.

After a careful review of the conflicting considerations in this sensitive area, we find that the statutory duty to refrain from religious discrimination in employment imposes a duty on the employer to reasonably accommodate an employee's religious needs unless an undue hardship would be occasioned thereby. Such a duty, moreover, does not violate either the Establishment Clause of the First Amendment to the United States Constitution or art 1, § 4 of the Michigan Constitution.

[2] US Const, Am I provides:

"Congress shall make no law *respecting an establishment of religion,* or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis supplied.)

Const 1963, art 1, § 4 provides:

"Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. *The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief."* (Emphasis supplied.)

Therefore we would reverse the Court of Appeals and the circuit court and remand to the Michigan Civil Rights Commission [MCRC] for further proceedings consistent with the above analysis. However, in light of the split in this Court and since we agree with Part III of Justice LEVIN's opinion as far as it goes, we remand to the circuit court for evidentiary proceedings. See our conclusion *infra.*

## I. FACTS

The factual background to this case is quite simple and is drawn from the stipulation of facts entered into by the parties below, on which the case has been tried by the lower courts.

Claimant Mary Parks was hired by respondent General Motors Corporation, Fisher Body Division (GM), on September 18, 1972, as an hourly employee at its Pontiac, Michigan, Fisher Body plant and placed on the second shift as an assembler in the Trim and Final Department. This shift runs from 4:00 p.m. until 12:30 a.m.

At the time of her hire claimant was a practicing Seventh-day Adventist. This religion forbids performance of work by its members between sundown Friday and sundown Saturday, which is their Sabbath. Thus on the first three Thursdays after Ms. Parks was hired she informed her foreman that she would be unable to work her following day's shift due to her religious beliefs. Accordingly, claimant failed to report to work on the three consecutive Fridays falling on September 22, September 29, and October 6, 1972. As a result of these Friday absences, Ms. Parks' employment with GM was terminated on October 9, 1972, for the stated reason that she was "unable to meet

conditions of employment". GM has stipulated that upon being confronted with the conflict between the working hours of claimant's assigned second shift and her Sabbath observance, it considered and took no action other than discharge.

Shortly after her discharge claimant filed an administrative complaint on October 19, 1972, with the Michigan Civil Rights Commission charging GM with religious discrimination. On September 8, 1975, almost three years later, the MCRC issued a formal charge of religious discrimination against GM, stating that GM had a duty to accommodate claimant in the observance of her Sabbath and that it did not do so. In an opinion and order of September 23, 1975, the MCRC found, among other things, that § 3 of Michigan's State Fair Employment Practices Act (FEPA), MCL 423.303; MSA 17.458(3), which by its terms forbids "any employer, because of the * * * religion * * * of any individual, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, conditions or privileges of employment", may be construed to require an employer to make reasonable accommodations for an employee's religious needs.[3] The MCRC further found that GM

[3] On September 26, 1972, eight days after Ms. Parks was hired, the MCRC adopted interpretive guidelines on the subject of religious discrimination which construed the duty not to discriminate on the basis of religion, including an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees. These guidelines approved and adopted by reference, pursuant to MCL 24.232(4); MSA 3.560(132)(4), are similar to guidelines issued by the United States Equal Employment Opportunity Commission (EEOC) on July 13, 1967. 3 CCH Employment Practices Guide, ¶ 24,235, pp 8635-5—8635-7; BNA, Fair Employment Practice Manual 455:1091. The EEOC guidelines provide as follows:

"PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

"§ 1605.1 Observation of the Sabbath and other religious holidays.

"(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to dis-

could have reasonably accommodated Ms. Parks' religious needs in this case without undue hardship on the conduct of its business but that it made no effort to do so, thus discriminating against claimant on account of religion. The MCRC also concluded that its reasonable accommodation requirement did not violate the Establishment Clause of either the First Amendment to the United States Constitution or art 1, § 4 of the Michigan Constitution.[4] The MCRC ordered GM to cease and desist from unlawfully discriminating against Ms. Parks on account of religion and to reinstate her with back pay and other benefits.

GM appealed the MCRC's order to the Oakland County Circuit Court. The circuit court, trying the appeal *de novo* pursuant to Const 1963, art 5, § 29 and MCL 37.4; MSA 3.548(4), now MCL 37.2606; MSA 3.548(606), perceived an "obvious and significant difference between a prohibition of religious

charge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 CFR 1605.1, as amended July 13, 1967.

[4] See fn 2, *supra*.

discrimination [found in the FEPA] and a requirement of accommodation to religious beliefs [found in the interpretive guidelines]". On March 21, 1978, the circuit court reversed the order of the MCRC and held the action of the MCRC in adopting and enforcing religious accommodation guidelines to go well beyond its constitutionally and legislatively delegated authority.

On appeal to the Court of Appeals, the decision of the circuit court was affirmed. 93 Mich App 366; 287 NW2d 240 (1979). The Court of Appeals held that the FEPA did not impose an obligation on an employer to make affirmative accommodations to an employee's religious needs since the interpretive guidelines of the MCRC construing that act to require such reasonable accommodation had no legal effect in and of themselves, and since such a construction, in light of certain interpretive aids, went beyond the legislative mandate set forth in § 3(a) of the FEPA.

We granted leave to appeal and directed the parties to include among the issues to be briefed whether, under the FEPA, the duty to refrain from religious discrimination in employment imposed an obligation on the employer to reasonably accommodate an employee's religious needs. 408 Mich 929 (1980).

## II. DISCUSSION

The proscription against religious discrimination in § 3 of the FEPA states simply:

"It shall be an unfair employment practice:

"(a) For any employer, because of the race, color, religion, national origin or ancestry of any individual,

to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment, or any matter, directly or indirectly related to employment, except where based on a bona fide occupational qualification." MCL 423.303; MSA 17.458(3).

The act does not attempt anywhere to define the term "religion". Thus, it is unclear at the start from a simple reading of the language of the statute whether the Legislature intended to impose upon an employer an obligation to make reasonable accommodations to the religious needs of employees. While courts will view an administrative "guideline" or interpretation in any number of ways, such as giving it deference, great weight, most respectful consideration, or merely looking to it for guidance, they generally do not consider it controlling. See, generally, Davis, Administrative Law of the Seventies (Supplementing Administrative Law Treatise, June, 1976), § 5.05, p 161. From the other point of view it is axiomatic that an administrative agency may not exceed the power given to it by statute or constitution, and that the "ambit of the power of the commission is in a field, meted and bound by the express provisions of the law". *McKibbin v Corporation & Securities Comm,* 369 Mich 69, 83; 119 NW2d 557 (1963), quoting from *G F Redmond & Co v Michigan Securities Comm,* 222 Mich 1, 4; 192 NW 688 (1923). Moreover, such "guidelines", under the Administrative Procedures Act, do not have the force or effect of law, but are merely explanatory. MCL 24.207(h); MSA 3.560(107)(h). Our task, then, is to construe the legislative will as we find it. *McKibbin, supra,* 81.

This issue, although one of first impression in our state, has caused no little amount of difficulty

both in the federal courts and in the courts of several of our sister states. Thus before we wrestle with this difficult problem, it will be of some benefit to examine how these other courts have dealt with this same problem of legislative silence respecting religious accommodation in the face of similarly phrased general prohibitions of religious discrimination. Consideration of the case law of other jurisdictions is also warranted since both lower courts grounded their decisions, in part, on such case law.

*A. The Federal Courts*

The federal courts have had frequent opportunities to review questions dealing with religious discrimination in employment. Section 703(a)(1) of Title VII of the 1964 Civil Rights Act, 42 USC 2000e-2(a)(1), makes it unlawful for an employer

> "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin".

The Equal Employment Opportunity Commission (EEOC), in 1967, issued guidelines interpreting the above provision so as to oblige an employer "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business". See fn 3, *supra.* The substance of this guideline was later incorporated into a 1972 amendment of Title VII, § 701(j), 42 USC 2000e(j), in its definition of religion.

> "(j) The term 'religion' includes all aspects of reli-

gious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

What is relevant, for purposes of analogy, to this Court's present deliberations is the response of the federal courts to the EEOC guidelines interpreting Title VII's general ban of religious discrimination before those guidelines were incorporated by the 1972 Congressional amendment.

The first major case to face this issue was *Dewey v Reynolds Metals Co,* 429 F2d 324 (CA 6, 1970), *aff'd by an equally divided court* 402 US 689; 91 S Ct 2186; 29 L Ed 2d 267 (1971). While the original opinion of the Sixth Circuit panel is of doubtful precedential value due, in part, to its variety of rationales reversing the district court's ruling for the plaintiff employee who had absented himself from work due to his religious beliefs, see *Trans World Airlines, Inc v Hardison,* 432 US 63, 73, fn 8; 97 S Ct 2264; 53 L Ed 2d 113 (1977), on rehearing the majority of the panel pointedly expressed its viewpoint on the validity of the EEOC regulations.

"Nowhere in the legislative history of the Act do we find any congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the [Civil Rights] Act.

* * *

"The fundamental error of Dewey and the Amici Curiae is that they equate religious discrim[i]nation with failure to accommodate. We submit these two concepts are entirely different." *Dewey, supra,* 334-335.

*Dewey,* it must be observed, was decided before the 1972 amendment to Title VII defined "religion" to include religious observances and practices and imposed a reasonable accommodation duty on the employer. *Dewey* also preceded the United States Supreme Court decision in *Griggs v Duke Power Co,* 401 US 424, 431; 91 S Ct 849; 28 L Ed 2d 158 (1971), which spoke of Title VII as proscribing "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation". Further, the affirmance by an equally divided Supreme Court entitles *Dewey* to no precedential weight and its several alternative rationales, according to the Supreme Court, make its impact "inconclusive". *Trans World Airlines, supra,* 73, fn 8.

After the 1972 amendment to Title VII and the *Griggs* case later federal decisions dealing with pre-1972 employee discharges or refusals to hire started finding the 1967 EEOC guidelines on religious accommodation valid. The Courts of Appeals in the Fifth Circuit, *Riley v Bendix Corp,* 464 F2d 1113, 1116-1117 (CA 5, 1972), the Ninth Circuit, *Yott v North American Rockwell Corp,* 501 F2d 398, 402-403 (CA 9, 1974), *cert den* 445 US 928 (1980) (hereinafter cited as *Yott I)* (for subsequent case history see footnote 12, *infra),* and even in the Sixth Circuit in which *Dewey, supra,* had been decided, *Reid v Memphis Publishing Co,* 468 F2d 346, 350-351 (CA 6, 1972) (hereinafter cited as *Reid I)* (for subsequent case history see footnote 5, *infra),* all held the 1967 EEOC guideline requiring reasonable accommodation a valid interpretation of Title VII's then-applicable proscription against religious discrimination in cases involving religious objection to working on the Sabbath or to union membership and dues payment. The basis

for this result was primarily: (1) the unanimous Supreme Court decision in *Griggs, supra,* 432, which, although dealing with racial discrimination, interpreted the thrust of Title VII to be directed at the *consequences* of employment practices, not simply the motivation, *Reid I, supra,* 350; *Yott I, supra,* 402; and (2) the legislative history of the 1972 amendment (the amendment's sponsor, Senator Randolph of West Virginia, stated that the amendment was in response to the Supreme Court's equally divided affirmance of the *Dewey* case: " 'This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved.' "), *Riley, supra,* 1116; *Reid I, supra,* 350-351, as well as the passage of the amendment which was hailed by these courts as having laid to rest any doubts as to the effect of the EEOC guidelines, *Riley, supra,* 1116. Indeed, the 1972 amendment was characterized as having validated or affirmed the guideline's interpretation of Title VII's ban on religious discrimination. *Riley, supra,* 1117; *Reid I, supra,* 351; *Yott I, supra,* 402-403.[5]

[5] Not all panels of the federal Court of Appeals upheld the validity of the EEOC guidelines for pre-1972 discharges decided by the appellate court after the 1972 amendment became effective. There was an apparent intra-circuit conflict in the Sixth Circuit. In the *Reid I* case the district court had entered judgment for the employer relying on *Dewey, supra,* for the proposition that the employer had no duty to a potential employee's religious belief contrary to the employer's established work schedule. The Court of Appeals panel, however, vacated this judgment, since it held the EEOC guidelines requiring such accommodation valid. That panel then remanded the case to the district court for a determination whether the employer, under the circumstances, could make reasonable accommodations to the employee's religious practices without undue hardship. *Reid I, supra,* 351.

On remand the district court this time entered judgment for the employee. On appeal a partially different Sixth Circuit panel held the district court's finding that an accommodation to the employee's religious practices would not impose an undue hardship on the employer unsupported by substantial evidence and clearly erroneous.

The United States Supreme Court pronounced the final—if not unequivocal—word on the effect of the 1967 EEOC guidelines in *Trans World Airlines, supra.* That case involved a pre-1972 dismissal of an employee due to work-schedule problems arising from the employee's observance of his religion's (Worldwide Church of God) prohibition of work during its sundown Friday to sundown Saturday Sabbath. The Supreme Court, in light of Congress' ratification of the EEOC guidelines by positive legislation, accepted the guidelines as a "defensible construction of the pre-1972 statute". *Trans World Airlines, supra,* 76, fn 11.[6]

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*Reid v Memphis Publishing Co (After Remand),* 521 F2d 512, 517 (CA 6, 1975), *cert den* 429 US 964 (1976) (hereinafter cited as *Reid II).* The panel in *Reid II* then reverted to its *Dewey* reasoning.

"Title VII, in proscribing discriminatory practices in employment, served a legitimate and laudable legislative purpose; the 1967 EEOC Guideline 1605.1 does not. By this Guideline EEOC has injected something new and entirely different from discrimination. It has required employers not only to tolerate the religious beliefs but also all of the religious practices of their employees, no matter what they are, even though a hardship is inflicted on the employer, so long as it is not an undue hardship. The legislative history of the Act does not show anything that employers have done to warrant such treatment." *Reid II, supra,* 519.

As to the 1972 amendment to Title VII, the *Reid II* panel said simply:

"The subsequent enactment of § 2000e(j) in 1972 cannot be relied on to establish a congressional intent with respect to the 1964 statute, which was not expressed in that statute." *Reid II, supra,* 520.

The Sixth Circuit, over a dissent by Judge Edwards, who sat on the panel in both *Reid* opinions, voted against an *en banc* hearing. See *Reid v Memphis Publishing Co,* 525 F2d 986 (CA 6, 1975) *(Reid III).*

[6] The full text of this footnote reads as follows:

"Ordinarily, an EEOC guideline is not entitled to great weight where, as here, it varies from prior EEOC policy and no new legislative history has been introduced in support of the change. *General Electric Co v Gilbert,* 429 US 125, 140-145 [97 S Ct 401; 50 L Ed 2d 343] (1976). But where 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' *Red Lion Broadcasting Co v FCC,* 395 US 367, 381-382 [89 S Ct 1794; 23 L Ed 2d 371] (1969) (footnote omitted), the guideline is entitled to some deference, at least sufficient in this case to warrant our accepting the guideline as a defensible construction of the pre-1972 statute, *i.e.,* as imposing on TWA the duty of 'reasonable accommodation' in the absence of 'undue hardship.' We

*B. The State Courts*

The controversy surrounding the issue of whether a duty of reasonable accommodation is properly derivable from a general prohibition of discrimination has not been confined to the federal forum. Many states, like Michigan, have legislation analogous to Title VII—prior to its 1972 amendment defining "religion"—in its general prohibition of religious discrimination and have therefore been confronted with the same issue. *Maine Human Rights Comm v Local 1361, United Paperworkers International Union, AFL-CIO,* 383 A2d 369 (Me, 1978), involved a Seventh-day Adventist's refusal, for religious reasons, to pay required union dues. That state's Supreme Court, after noting that its employment discrimination statute was intended to be the state counterpart of the federal act, relied on the just-discussed federal case law in upholding that state's Human Rights Commission guideline, which mirrored the EEOC's, as a "reasonable construction of the Maine act". *Local 1361, supra,* 378.

A similar problem was before the Alaska Supreme Court in *Wondzell v Alaska Wood Products, Inc,* 583 P2d 860 (Alas, 1978) (hereinafter cited as *Wondzell I), modified on other grounds on rehearing* 601 P2d 584 (Alas, 1979) (hereinafter cited as *Wondzell II)* (see footnote 7, *infra).* There a Seventh-day Adventist refused to join the union or pay union dues required by an applicable union security agreement. The Alaska Supreme Court, likewise, was "persuaded that a duty of reasonable accommodation should be read into the Alaska statute" which forbids discrimination on the basis of religion. *Wondzell I, supra,* 864. As in the Maine case, the Alaska court took cognizance of the fact

thus need not consider whether § 701(j) must be applied retroactively to the facts of this litigation."

that the state anti-discrimination statute was modeled on the original 1964 federal act. However, even though the Alaska statute did not itself originally contain a reasonable accommodation requirement and even though it was never amended in line with the 1972 federal amendment, the court still found a duty of reasonable accommodation to exist. *Wondzell I, supra,* 863-864 and fn 4; accord, *Wondzell II, supra,* 585.[7]

*Rankins v Comm on Professional Competence of the Ducor Union School Dist,* 24 Cal 3d 167; 154 Cal Rptr 907; 593 P2d 852 (1979), *app dis* 444 US 986 (1979), dealt with a 1974 California constitutional provision proscribing a person from being disqualified from employment because of creed. In this case an elementary school teacher had been notified of the school district's intent to dismiss him for his unexcused absences taken to observe various holy days recognized by his religious sect, the Worldwide Church of God. The California Supreme Court, after looking to federal and foreign states' case law, found the duty of reasonable accommodation implied by California's constitutional prohibition of religious disqualification from employment.

Although there is case law contrary to the imposition of a reasonable accommodation requirement, for various reasons we believe such case law to be of minimal assistance to GM's position. The decision in *Corey v Avco-Lycoming Division, Avco Corp,* 163 Conn 309; 307 A2d 155 (1972), *cert den*

[7] On rehearing the Alaska Supreme Court held that 1) the union's offered accommodation of dues payment without membership was unreasonable where the worker had offered a plan of substitute payment to charity, and 2) the hardship to the union in being precluded from receiving dues could not be regarded as undue where the amount was only $6.75 per month and where there was not a widespread refusal to pay dues based on religious beliefs. *Wondzell II, supra,* 586.

409 US 1116 (1973), which upheld the discharge of a Seventh-day Adventist because of time conflicts between her Sabbath and her work shift, was based primarily on the res judicata effect the Connecticut Supreme Court gave to a prior board of arbitration's denial of the employee's grievance charging her employer with religious discrimination. While that court also went on to observe that religious discrimination was entirely different from a failure to accommodate, support for this observation, as well as for its ruling on res judicata, was provided exclusively by *Dewey, supra. Corey, supra,* 322-323. *Dewey* was affirmed by an equally divided Supreme Court, thus entitling it to no precedential weight, and its impact the Supreme Court termed "inconclusive".

*Olin Corp v Illinois Fair Employment Practices Comm,* 34 Ill App 3d 868, 883; 341 NE2d 459 (1976), also involved a Seventh-day Adventist who due to his Sabbath observance could not work his assigned shift. The Illinois Fair Employment Practices Commission, at that time, had in effect religious discrimination guidelines taken directly from those of the EEOC requiring reasonable accommodation unless an undue hardship to the employer's business would be caused thereby. The Illinois Court of Appeals, however, refused to read an Illinois statute's general prohibition of discrimination due to religion as requiring the employer to accommodate the employee's religious practice.

"We find the reasoning of the majority in *Reid II* persuasive and refuse to engraft the standards embodied in the commission's guidelines onto our statute. We note that our State act has not been amended to reflect the 1972 amendment to the Civil Rights Act of 1964 regarding the definition of 'religion'." See also fn 5 *supra,* discussing *Reid II.*

On appeal to the Illinois Supreme Court the issue of whether in the absence of an explicit statutory provision employers were obligated to reasonably accommodate the religious needs of employees was avoided by that court in affirming the Court of Appeals. *Olin Corp v Fair Employment Practices Comm,* 67 Ill 2d 466, 475; 367 NE2d 1267 (1977). The Illinois Supreme Court found that even if it was assumed that the Illinois anti-discrimination law required reasonable accommodation to the religious needs of employees where it could be done without undue hardship on the employer's business, the employer in *Olin* had proved that "undue hardship rendered the requested accommodations unreasonable".

In a case dealing with a statute prohibiting discrimination based on, *inter alia,* creed, the Wisconsin Supreme Court held that the discharge of an employee who had requested time off for an eight-day religious convocation occurring in the middle of a six-month management training program was not discriminatory. *American Motors Corp v Dep't of Industry, Labor & Human Relations,* 101 Wis 2d 337; 305 NW2d 62 (1981). The court similarly rejected arguments that the Wisconsin statute required accommodation. Perceiving the central issue to be one of legislative intent, the court noted: "We do not in any way intimate that accommodation should not appropriately, or could not constitutionally, be adopted by legislative enactment. All we conclude is that the legislature in the State of Wisconsin has not yet seen fit to establish such public policy * * *." *Id.,* 351. The court went on to note that a proposed amendment to the Wisconsin Fair Employment Act would specifically provide for accommodation. "The introduction of this bill and its language is significant

in the context of the present case, because it contemplates that the failure to accommodate is an *additional* type of employment discrimination not covered in the original statute. Thus, insofar as legislative intent is concerned, the framers of this bill are of the opinion that the question of the duty to accommodate is being submitted to the legislature for consideration for the first time." *Id.,* 352. Similarly, the court repeatedly noted that the Department of Industry, Labor and Human Relations had not passed any administrative rules regarding accommodation despite its power to do so. *Id.,* 354-355, 364, and 367. Thus the primary consideration in *American Motors* was the legislative and administrative void concerning accommodation and not interfering with the legislative process. In the case at bar, however, the MCRC has spoken, albeit through interpretive guidelines rather than rules.[8] The Michigan Legislature has had the opportunity to set aside these guidelines but has chosen not to.

GM cites in its brief another case which it feels favors its position. In *International Harvester Co Parts Depot v Lamb* (Ct of Appeals, Franklin County, Ohio), Civil Action No 76AP-598 (1977), the Ohio Civil Rights Commission had promulgated guidelines interpreting its generally phrased anti-discrimination law to require an employer to accommodate an employee's religion in a manner least burdensome to that employee unless such accommodation is excused due to business necessity. That court, relying on *Reid II,* fn 5 *supra,*

[8] The Court of Appeals correctly distinguishes between interpreting guidelines and administrative rules. See 93 Mich App 372-374; 287 NW2d 242-243. Although interpretive guidelines may not have the same force as administrative rules, MCL 24.207(h); MSA 3.560(107)(h), both give notice to the Legislature of the policy considerations of the MCRC. Thus failure to suspend or set aside such guidelines may be considered as legislative acquiescence.

found the guidelines invalid because they expanded or modified the underlying statute. This finding, however, was not necessary to the court's decision since it seems the employer did make efforts to accommodate the employee but could not do so successfully within the confines of the applicable collective-bargaining agreement without serious business hardships. Further, the court found that even if the guidelines were valid they were not applicable to the case since they had been passed more than nine months after the alleged act of discrimination. In addition, this is an unreported case and, therefore, may only be used as precedent in Ohio Tenth District Court of Appeals. See *State v George,* 50 Ohio App 2d 297; 4 Ohio Op 3d 259; 362 NE2d 1223 (1975). See also *Keener v Ridenour,* 594 F2d 581 (CA 6, 1979).

*C. A Duty of Reasonable Accommodation in Michigan?*

We think it obvious that none of the federal and state case law just reviewed provides an honest, on-all-fours answer to the question presently before us. While the federal precedents are helpful to a general understanding of the problems inherent in this general area of civil rights law, the 1972 amendment to Title VII incorporating the EEOC's guideline on reasonable accommodation has rendered the federal body of case law unsuited to Michigan's particular situation where no comparable legislative affirmation has taken place. We cannot just ignore the fact that most of the federal case law in this area was developed after the 1972 amendment and in upholding the pre-1972 validity of the reasonable accommodation guidelines those courts had the luxury of the safety net that that amendment provided. Also, the Supreme Court's equivocal language in footnote 11 of *Trans World*

*Airlines, supra,* counsels against an exclusive and unfettered reliance on the federal case law.[9]

The same general caution exists with respect to any reliance on other states' interpretation of their own statutes or constitutions. Each state's ban on religious discrimination, while in form much like that of Michigan's FEPA, was adopted under different circumstances and exists within a different system. For example, Maine's and Alas-

[9] Such a recognition serves to render futile much of the legal thrust and parry of the parties concerning the effect various federal and state legislative actions and inactions should have on the correct construction of the FEPA. For example, appellant Michigan Department of Civil Rights thrusts by asserting that the 1972 Congressional amendment of Title VII which defined "religion" in terms of a reasonable accommodation requirement essentially validated the existence of the duty to accommodate imposed by Title VII itself prior to its amendment. Appellant thus asserts that *Trans World Airlines, supra,* stands for the proposition that the duty to accommodate arose by virtue of the prohibition against discrimination, and not because of the amendatory legislation, and this Court should therefore render a similar construction of the FEPA.

Appellee GM parries by stating that the 1972 Congressional amendment to Title VII is compelling evidence that Congress did not intend an accommodation requirement in the original 1964 act. The amendment validated the EEOC guidelines and not, per the appellant, any *ab initio* Title VII duty to accommodate. Further, *Trans World Airlines* did not decide that a duty of accommodation existed under Title VII prior to the 1972 amendment. Rather, the Supreme Court merely gave the guidelines "some deference" due to Congress' affirmation of them via the 1972 amendment.

GM then counter-thrusts by arguing the inapplicability of *Trans World Airlines* in regard to giving effect to the MCRC's own guidelines requiring reasonable accommodation since the Michigan Legislature, unlike Congress, has not ratified the guidelines by positive legislation. Appellant in turn counters this by observing that the Michigan Legislature, unlike Congress, had no need to do so since it was not faced with a state court's interpretation of the FEPA which, like *Dewey,* implied that no duty to accommodate existed. GM, again taking the offensive, notes that Michigan's Legislature has apparently responded to restrictive federal decisions dealing with civil rights in the past by broadening them, as when it amended the Elliott-Larsen Civil Rights Act so as to broaden "sex" to include pregnancy and child-birth, MCL 37.2201(d); MSA 3.548(201)(d), apparently in response to *General Electric Co v Gilbert,* 429 US 125; 97 S Ct 401; 50 L Ed 2d 343 (1976). Thus its failure to amend the FEPA in light of *Dewey* supports the inference that an accommodation duty was not intended.

ka's statutes were adopted after Title VII's enactment and thus those states' supreme courts have expressly placed heavy reliance in matters of statutory construction on their statutes' federal counterparts. California's applicable prohibition is not statutory, but rather is part of its constitution and was also adopted after Title VII. On the other hand Wisconsin's statute prohibiting religious discrimination is like Michigan's in its predating of Title VII. Further, some states such as Maine and Wisconsin have administrative agencies akin to the MCRC, but whereas Maine's, like Michigan's, has promulgated guidelines reflecting those of the EEOC, Wisconsin's has not.

However, while we are certainly not controlled by such case law from other jurisdictions, we can be guided by it when it is determined to be appropriate and sound. In this regard we cannot ignore the fact that despite the dissimilar circumstances under which the cases just reviewed were decided, a common thread can be found running through those cases which have upheld the requirement of reasonable accommodation to the religious needs of employees. That thread is the concern of the courts that discriminatory *consequences* of employment practices facially neutral or fair in form be eliminated unless an undue hardship would thereby be placed on the employer's business. This interpretation of "discrimination" to include not only overt discrimination but also practices that are fair in form, but discriminatory in operation, was first advanced by the United States Supreme Court in *Griggs, supra,* 431, a case dealing with racial discrimination. The applicability of such an interpretation to religious discrimination has been grounded—at least in the federal forum—on the fact that the Equal Employment statute treats

racial and religious discrimination similarly. As the *Reid* court noted:

"The prohibitions against both forms of discrimination (and the exceptions thereto) are usually contained in the same sentences in the statute." 468 F2d 350. See also *Yott I, supra,* 402-403.

State courts have likewise looked to *Griggs* in interpreting their general prohibitions of religious discrimination to include a duty of reasonable accommodation. In *Local 1361, supra,* 373, the Maine Supreme Court looked explicitly to *Griggs* in rejecting the union's argument that it had requested the dismissal of an employee because she did not pay her union dues, and not because of her religion. The court observed, after noting the broad terms in which "discrimination" was used in its act, that

"we find nothing in the Maine act which suggests that the Legislature intended it to apply to the limited situation, typically devoid of proof, that an employer or labor organization intends to discriminate. As in *Griggs v Duke Power Co, supra,* the touchstone of our statutory prohibition is whether in fact the disputed practice results in unlawful employment discrimination." *Local 1361, supra,* 375.

Likewise, the Supreme Court of California, in reliance on *Griggs,* interpreted the constitutional provision at issue in *Rankins, supra,* 172, to forbid "not only overt religious discrimination but also qualifications for employment that are discriminatory in effect". Further, although *Griggs* spoke in terms of "business necessity" as validating a practice fair in form but discriminatory in effect, *Griggs, supra,* 431, the Alaska Supreme Court, in reading a duty of reasonable accommodation into

its statute prohibiting religious discrimination, opined that the touchstones of such a duty—"reasonable accommodation" and "undue hardship"—are in fact derivable from the *Griggs* "business necessity" test and are "really exemplary of the statute's general purpose of preventing unreasonable discrimination in employment". *Wondzell I, supra,* 864, fn 4.

We find persuasive the reasoning of the above courts in their refusal to ignore the discriminatory effects of employer practices or policies that are overtly neutral. Such a decision, however, is best tempered by the recognition, by the reasoning in *Griggs, supra,* that certain circumstances should excuse the imposition of truly facially neutral rules. We find sound the reasoning of those federal and state courts which have upheld the EEOC guidelines or the guidelines or interpretations of appropriate state commissions modeled after those of the EEOC that require a duty of reasonable accommodation and allow undue hardship as a defense to such a duty as a valid and reasonable construction of a general prohibition of religious discrimination in employment. See *Reid I, supra,* 350-351; *Wondzell I, supra,* 864, fn 4; *Local 1361, supra,* 378.

While we have reached our conclusion by endeavoring to deduce the legislative intent, we are not unmindful that our conclusion is given additional strength by a different analysis. It can be not unreasonably argued, while we did not do so in our own analysis heretofore, that because the Civil Rights Commission has a particular constitutional genesis, its actions have more than the usual statutory authority and that the regulation in question is due some particular deference.

Article 5, § 29 of the 1963 Michigan Constitution states:

"There is hereby established a civil rights commission * * *. It shall be *the duty* of the commission in a manner which may be prescribed by law *to investigate* alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, *and to secure the equal protection* of such civil rights without such discrimination." (Emphasis added.)

In *Beech Grove Investment Co v Civil Rights Comm,* 380 Mich 405; 157 NW2d 213 (1968), a majority of this Court agreed that

"*the duty* of the commission to investigate alleged discrimination and to secure the equal protection of civil rights without such discrimination *was created by the constitutional provision itself.* The manner may be prescribed by law but *the authority to act lies with* the *commission whether the manner is or is not so prescribed.*" (Emphasis added.) 380 Mich 419 (plurality opinion by ADAMS, J.). See 380 Mich 442 (SOURIS, J., *concurring).*

Therefore, the Michigan Civil Rights Commission, deriving its power in part from the state constitution as well as from the Legislature and empowered to investigate discrimination and secure the equal protection of civil rights, should be given deference in the performance of its duties. We therefore hold that the FEPA's proscription of religious discrimination entails the obligation, on the part of the employer, to make reasonable accommodation to the religious needs of employees or prospective employees where such can be done without undue hardship on the conduct of the employer's business. The burden of proving that a reasonable accommodation cannot be made without such undue hardship is on the employer.

Such a construction of FEPA's prohibition against religious discrimination also accords more fully, we think, with the purpose of the FEPA to

"promote and protect the welfare of the people of this state by prevention and elimination of discriminatory employment practices and policies based upon * * * religion". 1955 PA 251. To require an employer to attempt reasonable accommodation to an employee's religious needs absent undue hardship both encourages and fosters to the full extent practicable the employment of all properly qualified persons regardless of their religion and to that extent certainly promotes the common weal. This reading of FEPA is also consonant with our policy of liberally construing remedial legislation. See *In re School Dist No 6,* 284 Mich 132, 144; 278 NW 792 (1938). See also *White v Motor Wheel Corp,* 64 Mich App 225, 230-231; 236 NW2d 709 (1975).

It is fundamental to recognize that the prohibition against religious discrimination in employment embraces not only the concept of religious *belief* but that of religious *practice* as well. Religion not only encompasses a belief but also a practice of the faith in which one believes. To afford protection only to the right of religious belief ignores the basic right of religious conduct. In *Cantwell v Connecticut,* 310 US 296, 303; 60 S Ct 900; 84 L Ed 1213 (1940), it was recognized that the First Amendment "embraces two concepts,—freedom to believe and freedom to act".[10]

[10] While one has an absolute and inalienable right to freedom of belief, freedom to act, by the necessity of social living, must be tempered. As the United States Supreme Court noted: "Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell, supra,* 304. This principle has been expressed in the area of freedom of religious activity in such cases as *State ex rel Swann v Pack,* 527 SW2d 99 (Tenn, 1975), *cert den* 424 US 954 (1976) (perpetually enjoining and restraining the handling of venomous snakes or drinking poison even as part of a religious ceremony); *State v Massey,* 229 NC 734; 51 SE2d 179 (1949), *appeal*

Neither concept can be ignored. Freedom to act is an integral part of the right of religious freedom. Accordingly, when the Michigan Legislature enacted the FEPA proscribing discrimination against religion, it necessarily included both concepts. Without this realization, the thrust of the statute loses half of its meaning. It follows, therefore, that in order to fully achieve the prohibition against religious discrimination in employment, as mandated by the FEPA, a duty to make reasonable efforts to accommodate religious practices arose with the enactment of the law. Finally, the failure of the Legislature to specifically amend the statute, as the Congress did, to incorporate the substance of the guideline does not raise the contrary inference that the Legislature intended to disapprove that construction. See *Wondzell I, supra,* 863-864.

## III. ESTABLISHMENT CLAUSE CONSIDERATIONS

Appellee GM contends that a construction of the FEPA that finds an affirmative duty on the part of the employer to reasonably accommodate an employee's religious needs unless undue hardship can be shown would violate the Establishment Clause of the First Amendment to the United States Constitution[11] and art 1, § 4 of the Michigan Con-

*dismissed for want of substantial federal question sub nom Bunn v North Carolina,* 336 US 942 (1949) (city ordinance prohibiting the handling of poisonous reptiles does not violate freedom of religious worship). *Cf. People v Woody,* 61 Cal 2d 716; 394 P2d 813 (1964) (statute proscribing use of peyote could not constitutionally be applied to prevent Indian tribe from using peyote in religious ceremony); *Wisconsin v Yoder,* 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972) (mandatory education laws held inapplicable past eighth grade to members of the Amish faith).

[11] The First Amendment of the federal constitution is made applicable to the states through the Fourteenth Amendment. *Cantwell v Connecticut,* 310 US 296, 303; 60 S Ct 900; 84 L Ed 1213 (1940).

stitution by obliging it to treat its employees disparately based solely on religious considerations.

This constitutional issue is both complex and difficult, and like the previous issue, has caused the courts of both the state and federal forums which have considered it no small amount of difficulty, attested to, in part, by the differing results reached by those courts. Indeed, appellate courts have not been loath to avoid reaching the issue whenever possible.[12] Despite the difficulty of the issue, however, we feel we cannot properly avoid it. In its answer to the MCRC's charge, GM asserted as its fourth affirmative defense the unconstitutionality of any reasonable accommodation requirement. The opinion of the MCRC held such an assertion to be without merit; the trial court, on the other hand, found the MCRC's reasonable accommodation guideline to contain substantial constitutional implications.

Further, the factual posture of the case makes the issue unavoidable. For GM this is admittedly a test case. It has not attempted in any way whatsoever to accommodate Ms. Parks' religious needs, nor has it attempted to prove with record support

[12] See, *e.g., Gavin v Peoples Natural Gas Co,* 613 F2d 482, 484-485 (CA 3, 1980) (the court remanded for a determination of whether reasonable accommodation had, in fact, been made by the employer); *Yott v North American Rockwell Corp,* 602 F2d 904, 906 (CA 9, 1979), *cert den* 445 US 928 (1980) (hereinafter cited as *Yott II)* (the court found not clearly erroneous the trial court's alternate holding, offered in a supplementary opinion, that reasonable accommodation was not possible); *Anderson v General Dynamics Convair Aerospace Division,* 589 F2d 397, 402, fn 5 (CA 9, 1978), *cert den sub nom International Ass'n of Machinists & Aerospace Workers, AFL-CIO, Silvergate Dist Lodge 50 v Anderson,* 442 US 921 (1979) (hereinafter cited as *Anderson I)* (the district court had not reached the constitutional issue); *Redmond v GAF Corp,* 574 F2d 897, 904, fn 17 (CA 7, 1978) (the constitutional issue was not raised below).

that it can do nothing to help claimant because of a resulting undue hardship to its business. Thus these alternate, factual avenues of resolution are at this point foreclosed to us.

Finally, and most importantly, the parties have had a chance to fully express their viewpoints on this issue—GM in its brief to this Court and the MCRC in its oral argument before us. Thus, although the Court of Appeals did not need to reach the constitutional issue due to its interpretation of the FEPA, we feel that issue is properly before us.

A look at the results of the other courts which have preceded us in deciding this difficult and sensitive issue serves to perplex as much as to inform. Each court to consider the issue has approached it more or less through the now well-known three-part test that the United States Supreme Court has established over the years in dealing with Establishment Clause issues. See *Committee for Public Education & Religious Liberty v Nyquist,* 413 US 756, 772; 93 S Ct 2955; 37 L Ed 2d 948 (1973). To pass constitutional muster under the Establishment Clause the law in question first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion. *Id.,* 773. In a word, neutrality is what is required of the state. *Roemer v Board of Public Works of Maryland,* 426 US 736, 747; 96 S Ct 2337; 49 L Ed 2d 179 (1976). Yet despite the same approach to the issue, the results of the courts have been anything but uniform. In the federal forum where the discussion centers on the constitutionality of the 1972 amendment to Title

VII, the district courts have split on the issue,[13] while all three federal courts of appeals to confront it on the merits have come out in favor of its constitutionality, although accompanied by dissents.[14] Of the state courts mentioned as requiring reasonable accommodation, only the California Supreme Court in *Rankins, supra,* has passed on the issue, finding the requirement not violative of the Establishment Clause. The United States Supreme Court, as will be discussed *infra,* has yet to make an explicit pronouncement on the matter.

Although we do not have the comfort of a clear and convincing majority rule on this issue which by its persuasiveness as well as its force of numbers would ease the decisional process, we are confident, after considerable research and contemplation, that a reading of the FEPA's general prohibition of religious discrimination to require reasonable accommodation by the employer to the employee's religious needs does not violate either the federal or this state's constitution.

In reaching this decision we have looked for

[13] The 1972 amendment (§ 701[j] of Title VII) has been held constitutional in North Carolina, *Jordan v North Carolina National Bank,* 399 F Supp 172, 179 (WD NC, 1975), *rev'd on other grounds* 565 F2d 72 (CA 4, 1977), and Missouri, *Brown v General Motors Corp,* 20 FEP Cases (BNA) 88 (WD Mo, 1978), *rev'd on other grounds* 601 F2d 956 (CA 8, 1979). Findings of unconstitutionality have come from the Pennsylvania district court. *Gavin v Peoples Natural Gas Co,* 464 F Supp 622, 632 (WD Pa, 1979), *vacated and remanded on other grounds* 613 F2d 482 (CA 3, 1980).

[14] *Tooley v Martin-Marietta Corp,* 648 F2d 1239 (CA 9, 1981), *cert den sub nom United Steel Workers of America v Tooley,* 454 US 1098 (1981); *Anderson v General Dynamics Convair Aerospace Division,* 648 F2d 1247 (CA 9, 1981) (hereinafter cited as *Anderson II). Cummins v Parker Seal Co,* 516 F2d 544 (CA 6, 1975), *vacated on other grounds* 561 F2d 658 (CA 6, 1977), *Nottelson v Smith Steel Workers DALU 19806,* 643 F2d 445 (CA 7, 1981), *cert den* 454 US 1046 (1981).

guidance, like the courts which have preceded us in similar cases, to the substantial body of United States Supreme Court case law on the Establishment Clause. We think such a course appropriate since this Court has previously acknowledged the similarities between the federal constitution's Free Exercise and Establishment Clauses and art 1, § 4 of this state's constitution, with the consequence that they are subject to similar interpretation.

"Taken together, these sentences [art 1, § 4] are an expanded and more explicit statement of the establishment and free exercise clauses of the First Amendment to the United States Constitution, the first and fourth sentences constituting the free exercise clause, and the second and third sentences constituting the establishment clause. They are, accordingly, subject to similar interpretation." *Advisory Opinion re Constitutionality of PA 1970, No 100,* 384 Mich 82, 105; 180 NW2d 265 (1970).[15]

We are also aware that the United States Supreme Court itself has noted that the tripartite test which it has developed for Establishment Clause issues is only intended to serve as a guideline with which to identify instances in which the objectives of the Establishment Clause have been impaired, and "must not be viewed as setting the precise limits to the necessary constitutional inquiry". *Meek v Pittenger,* 421 US 349, 359; 95 S Ct 1753; 44 L Ed 2d 217 (1975). See also *Tilton v Richardson,* 403 US 672, 678; 91 S Ct 2091; 29 L

[15] We think the fourth sentence of this section might be more properly construed as containing both a free exercise (one's rights cannot be *diminished* on account of religious belief) and an establishment (one's rights cannot be *enlarged* on account of religious belief) component.

Ed 2d 790 (1971).[16] In using this test then as our Baedeker to this area, we must not forget the general lay of the land in which we are traveling. As was noted in *Walz v Tax Comm of New York City,* 397 US 664, 668-669; 90 S Ct 1409; 25 L Ed 2d 697 (1970),

"The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. * * * The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. * * * The course of constitutional neutrality in this area cannot be an absolutely straight line."

That this constitutionally required "neutrality" does not demand an unyielding and absolute rigidity, the slightest deviation from which is proscribed, was made clear in *Walz, supra:*

"The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Id.,* 669 (emphasis supplied).

See also *Sherbert v Verner,* 374 US 398, 415-416, 422-423; 83 S Ct 1790; 10 L Ed 2d 965 (1963) (Stewart, J., *concurring in result,* Harlan, J., *dis-*

[16] Apparently, this three-part test now only receives the express endorsement of a plurality of the United States Supreme Court. See *Wolman v Walter,* 433 US 229; 97 S Ct 2593; 53 L Ed 2d 714 (1977). Nonetheless, we believe it remains a useful guideline in this complex area.

*senting).* In short, total separation between church and state is not called for, nor is it possible in an absolute sense; some relationship between government and religious organizations is inevitable. *Lemon v Kurtzman,* 403 US 602, 614; 91 S Ct 2105; 29 L Ed 2d 745 (1971). Incidental, indirect, or remote benefits to religion do not alone render a particular law constitutionally invalid. *Nyquist, supra,* 771.

"[T]he line between state neutrality to religion and state support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree.'" *Board of Education of Central School Dist No 1 v Allen,* 392 US 236, 242; 88 S Ct 1923; 20 L Ed 2d 1060 (1968), quoting from *Zorach v Clauson,* 343 US 306, 314; 72 S Ct 679; 96 L Ed 954 (1952).

With these thoughts in mind, we turn to a consideration of the Supreme Court's three-part test relating to the Establishment Clause.

*A. Secular Purpose*

The purpose of the FEPA's prohibition of religious discrimination and the reasonable accommodation requirement we have inferred in such a prohibition is to prevent discrimination in employment based on the legally irrelevant factor of religion. In other words, the purpose is to promote equal employment opportunities for members of all religious faiths, *Rankins, supra,* 178, and not to advance one religion over another or religion in general over non-religion. By requiring an employer to attempt reasonable accommodation of an employee's religious needs unless undue hardship would result to the employer's business, those who might have been unable to find or retain suitable

employment due to an otherwise facially neutral work policy which conflicted with their religious tenets may now be able to join or stay in the work force without doing violence to their religious convictions. As the Court of Appeals for the Seventh Circuit noted under the federal act, a secular purpose inheres in the law's intent to "relieve individuals of the burden of choosing between their jobs and their religious convictions where such relief will not unduly burden others". *Nottelson v Smith Steel Workers DALU 19806,* 643 F2d 445, 454 (CA 7, 1981), *cert den* 454 US 1046 (1981). As we noted earlier, the reasonable accommodation requirement fosters the employment of all properly qualified persons. We conclude therefore that the purpose of such a requirement is truly a secular one.

*B. Primary Effect*

This prong of the three-part test requires us to determine whether in the present situation the primary effect of the reasonable accommodation requirement is to advance religion. This question is not easy to resolve since there is a good deal of logic to the position that since reasonable accommodation is based solely on religion, the requirement favors religion over non-religion, and favors some religions over others since only those religions which manifest their beliefs in acts requiring modification of an employer's work rules are benefited. See *Cummins v Parker Seal Co,* 516 F2d 544, 558 (CA 6, 1975) (Celebrezze, J., *dissenting); Gavin v Peoples Natural Gas Co,* 464 F Supp 622, 629 (WD Pa, 1979).

Were we to interpret the requirement of reasonable accommodation as obliging the employer to treat employees unequally solely on the basis of their religions so as to require an employer to

discriminate against some employees in order to accommodate or prefer the religious needs of others or to bear additional costs for an employee's religious needs when no such costs are incurred for other employees' religious needs, we might well run afoul of the Establishment Clause. However, we feel that *Trans World Airlines, supra,* obviates these anticipated problems. See Wheeler, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement,* 4 Hastings Constitutional L Q 901, 903 (1977).

We believe that an interpretation of the reasonable accommodation requirement that disallows treating employees unequally on the basis of religion can hardly be said to have the primary effect of advancing religion to any significant extent. The effect, rather, would be to restrain employers from enforcing uniform, facially neutral work rules that have a discriminatory effect on certain employees due to their religious beliefs and practices, thus guaranteeing job security except when accommodation of an employee's religious needs would impose an undue hardship (as that term has been interpreted in *Trans World Airlines)* upon the employer's business. "It [the reasonable accommodation requirement of Title VII] does not confer a benefit on those accommodated, but rather relieves those individuals of a special burden that others do not suffer by permitting them to fulfill their societal obligations in a different manner * * *." *Nottelson, supra,* 454. While it may be argued that the reasonable accommodation requirement may benefit some religions as, for example, through a larger attendance at scheduled religious services which might otherwise be missed due to work schedules and therefore the receipt by those churches of "a correspondingly fuller collection

plate", *Cummins, supra,* 516 F2d 553, we believe such benefit to be incidental to the requirement's primary effect of preventing religious discrimination and guaranteeing equal employment opportunities to members of minority religions.

*C. Excessive Entanglement*

The third prong of the test requires the avoidance of excessive governmental entanglement with religion. The danger here is that an employee's expressed desire to have his or her employer accommodate his or her religious needs will eventually involve the government, via the MCRC and the courts, in determining the validity of the religious nature of the employee's claims, as well as the sincerity of the religious beliefs claimed to be held by the employee. It was just such a concern that formed the explicit basis for one federal district court's determination that § 701(j) of Title VII was unconstitutional. *Gavin, supra,* 464 F Supp 632. In that case there existed a controversy as to whether an employee could be required to raise and lower the American flag as part of his job. The employee, a Jehovah's Witness, claimed such a task was in violation of his religious belief against worshipping false idols. The trial court believed that a determination of whether the employee's belief could in fact be characterized as a "religious" one, and whether such a belief, which may be outside the standardized creed of his faith, was still protected under Title VII, would necessarily lead the court into an excessive entanglement with religion.

Although this concern is certainly legitimate, to find the law unconstitutional on this basis would be imprudent. First of all, the religious validity of claimant's beliefs, as well as the sincerity in which they are held, are not questioned in this case.

Secondly, a quick review of the decided case law relevant to this issue will disclose that the *Gavin* situation is quite unusual. Most of the cases involving a conflict between an employee's religious beliefs or practices and a work requirement usually concern the necessity to be absent from work in order to observe a Saturday Sabbath, a holy day, or to attend a compulsory religious meeting, or an inability to join a union or pay union dues pursuant to a union security clause.[17] See, *e.g., Cummins* (Saturday Sabbath); the *Reid* cases (Saturday Sabbath); *Rankins* (absences for holy days); the *Yott* cases (union security clause); the *Anderson* cases (union security clause); *Local 1361* (union security clause); the *Wondzell* cases (union security clause). Most often in these types of cases, as in the present one, neither the sincerity of the employee's beliefs nor the religious validity of the belief or practice will be contested. We agree with the observation made in this regard in the context of Title VII in *Cummins, supra,* 516 F2d 554:

"Appellee suggests, however, that EEOC investigators will be forced to study and to evaluate the dogma of the many religious sects in order to ascertain whether employees' practices and observances are genuinely religious and therefore protected under Title VII. In most cases, this issue probably will not be disputed seriously. To the extent that the question does arise, however, we think that it will require no more government involvement in religion than the concededly non-excessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption. See *Walz v Tax Comm,* 397 US

[17] A 1980 National Labor Relations Act amendment, PL 96-593, exempts employees belonging to a "bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations" from paying union dues, while allowing bargaining agreements to require that such employees contribute a sum equal to union dues to a nonreligious charity.

664, 674-676 * * *; *id.*, 698-699 (opinion of Harlan, J.)." *Cf. Nottelson, supra,* 455 (conscientious objector exemption of selective service statutes involves a similar type of determination).

Further, in cases such as *Wisconsin v Yoder,* 406 US 205, 216, 235; 92 S Ct 1526; 32 L Ed 2d 15 (1972), the Supreme Court has recognized the necessity of examining religious beliefs and the sincerity with which they are held in order to accord certain individuals free exercise rights over otherwise contrary state law. Without some recognition of the religious nature of the asserted conflict with public school education past the eighth grade in *Yoder,* the Supreme Court there could not have excused the Amish in that case from the state-imposed requirement of compulsory school attendance until the age of 16. See Note, *Is Title VII's Reasonable Accommodations Requirement a Law "Respecting an Establishment of Religion"?,* 51 Notre Dame Lawyer 481, 483-484 (1976). We therefore conclude that the reasonable accommodation requirement that we have read into the FEPA does not produce an excessive entanglement between government and religion.

*D. Overall Neutrality*

In sum, we think a reading of the FEPA's prohibition of religious discrimination that requires an employer to make reasonable accommodation to the religious needs of his employees unless undue hardship would result is entirely consistent with the necessity of government neutrality respecting matters of religion. Such a requirement is the type of "play in the joints productive of a benevolent neutrality" that the Supreme Court spoke of in *Walz, supra,* 669. As Justice Douglas wrote in

*Zorach v Clauson,* 343 US 306, 313-314; 72 S Ct 679; 96 L Ed 954 (1952):

> "We are a religious people * * *. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. * * * [A state acts properly when it] respects the religious nature of our people and accommodates the public service to their spiritual needs."

The indirect benefit which certain religions may receive under our reading of the FEPA is qualitatively and quantitatively different from that most often found objectionable in Establishment Clause cases. First, we think it constitutionally significant that the reasonable accommodation requirement here at issue primarily benefits individuals, not institutions. See *Nyquist, supra,* 801 (Burger, C.J., *concurring in part, dissenting in part).* See also *Jordan v North Carolina National Bank,* 399 F Supp 172, 180 (WD NC, 1975), *rev'd on other grounds* 565 F2d 72 (CA 4, 1977). The minimal assistance given to individuals in securing or retaining employment, through the enhancement of their right of free exercise by the reasonable accommodation requirement, is far from the type of individual aid which the Supreme Court has proscribed as having the primary effect of advancing religion. We are not dealing with aid that in its effect is analogous to a state's attempt to directly alleviate a parent's burden in sending his or her child to parochial school through the use of tuition grants or tax benefits. In such a case the religious mission of the parochial school is so intertwined with the secular education it provides, that aid to the parent which better enables him or her to

send the child there has the unmistakable effect of providing financial support to the sectarian institution which the child attends. *Nyquist, supra,* 783, 791. The primary and direct effect in this case, in contradistinction, is simply to provide individuals with a greater opportunity to secure or to remain employed in jobs where their religion is not a bona fide occupational qualification for the job, but rather presents a hindrance to the securing or maintaining of it because of a conflict between required practices of the religion and the neutral work schedule or policies of the employer. The thrust of the requirement is directed at the employment of individuals and not at the survival of institutions charged with a religious mission. Any aid filtering to a particular religion or to religion in general from the imposition of the reasonable accommodation requirement is too indirect and remote to be constitutionally significant.

Second, the type of aid given to the employee is also significant. Here there is no direct financial support given to an individual on account of his religious beliefs or to a religious institution. Nothing as tangible as instructional materials and equipment, *Meek, supra,* 366, textbooks, *Wolman v Walter,* 433 US 229, 258-259; 97 S Ct 2593; 53 L Ed 2d 714 (1977) (Marshall, J., *dissenting),* or standardized tests, *Wolman, supra,* 240-241 (plurality opinion) is provided. Rather the employer must merely seek to reasonably accommodate an employee's religious needs unless an undue hardship would be occasioned thereby on his business.

Although this case does not present us with the issue of whether the Free Exercise Clause compels the reasonable accommodation requirement, we believe that the Establishment Clause certainly does not prohibit such a requirement. As the

United States Supreme Court stated in the context of passing on the conscientious objector provision of the Military Selective Service Act of 1967: "Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette v United States,* 401 US 437, 453; 91 S Ct 828; 28 L Ed 2d 168 (1971) (footnote omitted). See also *Trans World Airlines, supra,* 90-91 (Marshall, J., *dissenting); Nottelson, supra,* 454. This is consonant with the Supreme Court's earlier statement in *Zorach, supra,* 314, to the effect that

> "we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

Indeed, we feel this case somewhat analogous to that of *Zorach, supra.* In *Zorach* the United States Supreme Court upheld the "released time" program of New York City as a constitutional effort of the public schools to "accommodate their schedules to a program of outside religious instruction", *Zorach, supra,* 315. Under this program a public-school student, on written request of his or her parents, could be released from school for one hour a week to attend religious instruction or devotional exercises off the school grounds. We feel, similarly, that requiring employers to attempt a reasonable accommodation of their business to the religious needs of their employees does not breach the required wall of separation between church and state. To hold such a required attempt to accommodation unconstitutional "would be to find

in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe". *Zorach, supra,* 314. In short, we do not find the reasonable accommodation requirement impermissibly tainted by the evils of " 'sponsorship, financial support, and active involvement of the sovereign in religious activity' " against which the Establishment Clause was intended to afford protection. *Lemon, supra,* 612.

We close by making clear that this Court does not intend to impart any definitive opinion on the degree of accommodation that may be required of an employer in a particular case. As one federal court of appeals has noted:

> "The term 'reasonable accommodation' is a relative term and cannot be given a hard and fast meaning. Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of 'reasonableness' under the unique circumstances of the individual employer-employee relationship. The trier of fact is in the best position to weigh these considerations." *Redmond v GAF Corp,* 574 F2d 897, 902-903 (CA 7, 1978).

For our present purposes, however, it seems clear that an employer, in response to the communicated religious needs of its employee, must at least make some good-faith effort at accommodation and, if those efforts are unsuccessful, demonstrate that it was unable reasonably to accommodate the employee's religious needs without undue hardship, or, failing the employer's taking of active steps toward accommodation, the employer must prove that any proposed or possible accommodation would have created an undue hardship

on its business. See *Edwards v School Board of the City of Norton,* 483 F Supp 620, 625 (WD Va, 1980). In this case claimant has made a prima facie showing of religious discrimination by her employer against her religious needs and the need for accommodation. See *Brown v General Motors Corp,* 601 F2d 956, 959 (CA 8, 1979). In response, however, GM has stipulated to its failure to consider any alternative to Ms. Parks' religious needs other than dismissal, thus taking a position from the beginning that it had no duty to reasonably accommodate. GM has therefore clearly failed to prove that it has made good-faith efforts to accommodate claimant's religious beliefs. Likewise, GM has also failed to press on this Court any claim that it would have suffered an undue hardship on the conduct of its business were it to accommodate claimant's religious needs. See *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, we would reverse the judgments of both the circuit court and the Court of Appeals.

## CONCLUSION

Our decision recognizes that an employer has both a duty to refrain from religious discrimination in employment and a duty to reasonably accommodate an employee's religious needs unless an undue hardship would be occasioned thereby. The opinions of our brothers KAVANAGH and LEVIN find that there is no duty to reasonably accommodate. On that we are in disagreement. The opinion of our brother LEVIN, however, finds that there is nothing in this matter to "preclude a finding of discrimination based on evidence that an employer failed to act affirmatively to avoid the discriminatory effect of a facially neutral practice". With that we are in agreement.

Were we to base an order on our opinion as to the duty to accommodate alone, we would reverse the Court of Appeals and the circuit court and remand to the Michigan Civil Rights Commission for further proceedings not inconsistent therewith. However, inasmuch as the majority of this Court holds otherwise with respect to that part of our opinion, we base our order on that part of our opinion in which we are in agreement with our brother LEVIN where our opinion is a part of the majority, namely that the commission may, if the facts warrant, make "a finding of discrimination based on evidence that an employer failed to act affirmatively to avoid the discriminatory effect of a facially neutral practice". Therefore, we reverse the Court of Appeals and remand to the circuit court to take such further proceedings that are not inconsistent with the opinion that there may be a factual basis for "a finding of discrimination based on evidence that an employer failed to act affirmatively to avoid the discriminatory effect of a facially neutral practice". No costs, a public question.

FITZGERALD and BLAIR MOODY, JR., JJ., concurred with WILLIAMS, J.

PEOPLE v ROGERS

Docket No. 67548. Decided March 1, 1982. On application by the people for leave to appeal the Supreme Court, in lieu of granting leave to appeal, affirmed the judgment of the Court of Appeals.

Jimmy Rogers, III, was convicted on his plea of guilty in Recorder's Court of Detroit, Harvey F. Tennen, J., of second-degree murder and possession of a firearm during the commission of a felony. The Court of Appeals, Bashara, P.J., and N. J. Kaufman and Banks, JJ., reversed the defendant's convictions in an unpublished per curiam opinion on the ground that the trial court did not advise the defendant that he could not be placed on probation on a conviction of murder (Docket No. 51698). The people apply for leave to appeal.

In a unanimous opinion per curiam, the Supreme Court *held:*

Whether a particular departure from the requirements of the General Court Rules on guilty-plea proceedings justifies or requires reversal for additional proceedings depends on the nature of the noncompliance. It is important that the defendant be advised of the possible sentence consequences before pleading guilty of an offense, and to emphasize that importance the Court imposed the sanction of reversal of the defendant's convictions for failure of the trial court, prior to accepting the defendant's plea, to give the advice required by the court rules, that for the offenses of murder, armed robbery, and treason, he cannot be placed on probation.

Affirmed.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people.

*Rene A. Cooper* for defendant.

PER CURIAM. The guilty-plea procedure requires that:

"Speaking directly to the defendant, the court shall tell him:

* * *

"(f) if the plea is to murder, armed robbery or treason, he cannot be placed on probation". GCR 1963, 785.7(1).

The question in this case is whether it is reversible error for the plea-taking judge to have failed to advise the defendant that probation was unavailable, as Rule 785.7(1)(f) requires.

I

The defendant was charged with first-degree murder[1] and possession of a firearm during the commission of a felony.[2] He pled guilty to the felony-firearm count and of second-degree murder.[3] The judge advised the defendant that second-degree murder was punishable by a maximum of life imprisonment, but he did not tell the defendant that he could not be placed on probation.

In an unpublished per curiam opinion issued June 9, 1981, the Court of Appeals set aside both of the defendant's guilty pleas because of the judge's failure to give the advice required by Rule 785.7(1)(f). The prosecutor has pursued an appeal to this Court from that decision.

II

*Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132

[1] MCL 750.316; MSA 28.548.

[2] MCL 750.227b; MSA 28.424(2).

[3] MCL 750.317; MSA 28.549.

(1975), does not answer the question posed here. The rule then being interpreted did not include a provision comparable to Rule 785.7(1)(f). As to sentence consequences, we said:

"The rule does not require the judge to inform the defendant of all sentence consequences—only the maximum sentence, any mandatory minimum and, as appears below, if he is on probation or parole, the possible effect on his status as a probationer or parolee.

"The rule reflects the extent to which this Court is willing to impose on the judge the obligation of informing the defendant of such consequences. A failure to impart the information so required by this subsection (b) will continue to require reversal." 395 Mich 118.

In the appeal of *Hord* (p 118), the failure to advise a defendant who had pled guilty to a charge of armed robbery that he could not be placed on probation was specifically raised, and we affirmed Hord's conviction. In *Guilty Plea Cases,* however, we adopted a new Rule 785.7 which for the first time required in subsection (1)(f) advice on the unavailability of probation in certain cases: "The attention of the bench and bar is directed to the addition of new subsection (1)(c) and (1)(f) and new subdivisions (4) and (5)." 395 Mich 137. We also said:

"Noncompliance with a requirement of Rule 785.7 may but does not necessarily require reversal.

"Whether a particular departure from Rule 785.7 justifies or requires reversal or remand for additional proceedings will depend on the nature of the noncompliance."

Since then, the Court of Appeals has reached conflicting positions on whether noncompliance

with Rule 785.7(1)(f) requires reversal.[4] We have insisted on strict compliance with two other subsections on sentence consequences, Rule 785.7(1), subds (b) and (d). *People v Jones,* 410 Mich 407; 301 NW2d 822 (1981). The requirements of Rule 785.7 as to advice on sentence consequences represents our judgment that it is important that the defendant be advised of these sentence consequences before pleading guilty of an offense. We underscored this importance in *Jones* by imposing the sanction of reversal for noncompliance with (1)(b) and (1)(d); we believe (1)(f) is of the same stature and adopt the same sanction for noncompliance.

In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we affirm the Court of Appeals judgment.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

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[4] Compare *People v Lendzian,* 80 Mich App 323; 263 NW2d 360 (1977); *People v Earl Jones,* 94 Mich App 232; 288 NW2d 385 (1979); and *People v Sylvester,* 103 Mich App 499; 303 NW2d 230 (1981), with *People v Thalacker,* 99 Mich App 372; 297 NW2d 670 (1980).

BREWER v PAYLESS STATIONS, INC

Docket No. 63767. Argued March 3, 1981 (Calendar No. 1).—Decided March 1, 1982.

John Brewer brought an action for damages against Payless Stations, Inc., alleging that its negligence in designing and maintaining a gasoline service station caused an automobile collision and fire in which the plaintiff was injured, and against General Motors Corporation, alleging that its negligence in designing and manufacturing the gasoline tank of the Chevelle automobile in which the plaintiff was riding also caused his injuries. The plaintiff settled his claim against General Motors Corporation for $150,000, and released GM from liability. The Wayne Circuit Court, John M. Wise, J., denied the plaintiff's motion *in limine* for an order prohibiting any reference to the settlement in the presence of the jury. The Court of Appeals, T. M. Burns, P.J., and M. F. Cavanagh and MacKenzie, JJ., on an interlocutory appeal, reversed in a per curiam opinion, holding that evidence of the settlement is irrelevant (Docket No. 78-1845). Defendant Payless Stations, Inc., appeals.

In a unanimous opinion per curiam, the Supreme Court *held:*

As a matter of policy, rather than of law, the procedure shall be that when there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, the jury shall not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise. Following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced.

1. The plaintiff argues for the "court rule", by which the jury determines the total damages without reference to the settlement and the court makes the appropriate deduction. The defendant argues for the "jury rule", by which the jury is informed of the amount of the settlement and makes the appropriate deduction in arriving at the verdict; the defendant also argues for stability in the law.

2. The Court is looking for greater stability in the law, but is persuaded that the "jury rule" will not lead in that direction.

The "jury rule" can work to the disadvantage of either the plaintiff or the defendant. If the fact and amount of settlement have no bearing upon either liability or ultimate damages, there is little cause to burden the jury with the added duty of calculating a liquidated settlement into its deliberations. The uncertainty of juror reaction to the fact of an indemnity release is a foreseeable deterrent to settlements. The "court rule" is more consistent with the policy of the Court to encourage settlements.

Affirmed.

94 Mich App 281; 288 NW2d 352 (1979) affirmed.

*Richard M. Goodman, P.C.* (by *Susan M. Lister; Robb, Dettmer & Phillips, P.C.,* by *George R. Thompson,* of counsel), for plaintiff.

*Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (Gromek, Bendure & Thomas,* of counsel), for defendant.

PER CURIAM. Plaintiff was injured in an automobile accident on February 8, 1970. He filed suit January 24, 1973, alleging that an automobile with unknown occupants recklessly drove out of a Payless gas station and caused plaintiff's vehicle to swerve into oncoming traffic. It was struck by a car moving in the opposite direction. The fuel tank erupted and plaintiff was severely burned.

The complaint alleged that Payless had negligently designed its station and maintained a nuisance. It joined General Motors Corporation as a defendant, claiming a negligent design of the automobile's fuel tank.

In 1976, plaintiff and General Motors executed an indemnity release. In consideration of $150,000, plaintiff released General Motors from any liability for his injuries.

On May 8, 1978, plaintiff filed a motion *in limine* seeking an order prohibiting any reference

to the settlement with General Motors in the presence of the jury. The trial judge denied the motion. Plaintiff brought an interlocutory appeal and the Court of Appeals reversed.

We affirm the conclusion of the Court of Appeals that the judge shall make the deduction of $150,000 from any damages which the jury finds plaintiff to have suffered. However, we reach this conclusion as a matter of policy rather than of law.

## I

The parties agree that the defendant is entitled to a deduction of $150,000 from the damages determined by the jury. The parties disagree as to whether this deduction should be made by the judge or jury. The practice differs across the state and nation. The question requires resolution so far as the orderly administration of justice in Michigan is concerned.

Foremost, the approach of the parties to a trial is significantly affected by the determination of whether the settlement—and the amount received by the plaintiff—is known to the jury. The presentation of evidence, arguments of counsel and instructions to the jury hang upon this issue. The procedural posture of this pretrial interlocutory appeal permits us to focus upon the one issue: Does the judge or the jury deduct the amount of the settlement from the total jury award of damages under the facts of this case in which evidence of the amount has no bearing on a material issue of fact?[1]

[1] "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." MRE 402.

Because the issue is decided as a matter of policy, it serves no purpose to distinguish or possibly overrule prior appellate decisions in Michigan which hold that the jury should make the calculations.[2] It is equally fruitless to analyze the split of opinion among panels of the Court of Appeals.[3]

It should be noted, however, that there has been considerable movement in other states towards what is sometimes called the "court rule" in similar cases *(i.e.,* the jury determines the total damages and the court makes the appropriate deduction).[4]

Because of divergent opinions largely based upon other divergent opinions, we find the "written word" blending into opaque law. We are persuaded, therefore, to take in hand an eraser. How-

[2] See *Stitt v Mahaney,* 403 Mich 711; 272 NW2d 526 (1978), *Manuel v Weitzman,* 386 Mich 157; 191 NW2d 474 (1971), *Larabell v Schuknecht,* 308 Mich 419; 14 NW2d 50 (1944), *Awedian v Theodore Efron Manufacturing Co,* 66 Mich App 353; 239 NW2d 611 (1976), *Reno v Heineman,* 56 Mich App 509; 224 NW2d 687 (1974), *Steele v Wilson,* 29 Mich App 388; 185 NW2d 417 (1971), *Cooper v Christensen,* 29 Mich App 181; 185 NW2d 97 (1970), *Chunko v LeMaitre,* 10 Mich App 490; 159 NW2d 876 (1968), *King v Greyhound Corp,* 4 Mich App 364; 144 NW2d 841 (1966).

[3] Compare *Croda v Sarnacki,* 106 Mich App 51; 307 NW2d 728 (1981), and *Wilson v W A Foote Memorial Hospital,* 91 Mich App 90; 284 NW2d 126 (1979), with *Kueppers v Chrysler Corp,* 108 Mich App 192; 310 NW2d 327 (1981), *Silisky v Midland-Ross Corp,* 97 Mich App 470; 296 NW2d 576 (1980), and *Brewer v Payless Stations, Inc,* 94 Mich App 281; 288 NW2d 352 (1979).

[4] See, *e.g., Luth v Rogers & Babler Construction Co,* 507 P2d 761 (Alas, 1973); *Egurrola v Szychowski,* 95 Ariz 194; 388 P2d 242 (1964), *Brooks v Daley,* 242 Md 185; 218 A2d 184 (1966), *McCombs v Stephens,* 252 SC 442; 166 SE2d 814 (1969). Some courts, in adopting the "court rule", expressly overruled or limited earlier cases which had endorsed the "jury rule". See, *e.g., Pease v Beech Aircraft Corp,* 38 Cal App 3d 450; 113 Cal Rptr 416 (1974), *Orr v Coleman,* 455 SW2d 59 (Ky, 1970), *Silisky v Midland-Ross Corp,* 97 Mich App 470; 296 NW2d 576 (1980), and *Slayton v Ford Motor Co,* 140 Vt 27; 435 A2d 946 (1981). See generally Anno: *Manner of crediting one tortfeasor with amount paid by another for release or covenant not to sue,* 94 ALR2d 352, 360-373 (1964).

ever, as we clean the board, we assuredly should retain some of the philosophy and experienced observations which are our gifts from other minds.

II

Aside from persuasive legal and procedural arguments presented by both plaintiff and defendant, plaintiff argues that introduction to the jury of the settlement with General Motors could appear to the jury as an admission of liability, but with the real defendant out of the lawsuit. He also argues that the jury could use the settlement amount as a measure of damages. If the settlement was for a relatively low amount compared to plaintiff's claim, plaintiff fears the jury would use it as a measure of actual damages.[5] On the other hand, if the amount of settlement was large, the jury might conclude that the settling party was primarily responsible.[6] He also contends that the probative value of this evidence is minimal because of his agreement as to the amount of the settlement which would be deducted from the total damages. By contrast, the prejudicial effect would be great and it would be unfair.

Defendant argues that the jury should not be "kept in the dark" if it is to deliver a considered judgment. It is inappropriate to conclude that the jury will not follow instructions or fail to perform its duties in other respects, so defendant urges the Court to believe that taking the calculation of settlement from the jury would be a "sad commentary upon the constitutional guarantee of trial by

[5] *State v Ingram,* — Ind App —; 399 NE2d 808 (1980), *Degen v Bayman,* 86 SD 598; 200 NW2d 134 (1972), *Slayton, supra.*

[6] *Burger v Van Severen,* 39 Ill App 2d 205; 188 NW2d 373 (1963), *Ingram, supra.*

jury (Const 1963, art 1, § 14; US Const, Am VII)". Defendant believes that the "court rule" would involve a greater risk of impermissible conduct by jurors than the "jury rule" precisely because of their ignorance. Defendant argues for stability in the law.

III

We, also, look for an avenue to greater stability, but are persuaded that the "jury rule" will not lead in that direction.

Essentially, such a rule is a two-edged sword. It cuts both ways. Some of the plaintiff's arguments above could be used by a defendant. For example, the mere fact of settlement by a codefendant could suggest liability on the part of a blameless non-settling defendant. The amount of the settlement, if large, might tend to suggest a higher value of a claim. If small, the jury might tend to "make it up" by a higher verdict as to the non-settling tortfeasor. See *Orr v Coleman,* 455 SW2d 59 (Ky, 1970), in which the court found jury consideration of the fact and amount of settlement prejudicial to defendant non-settling tortfeasor.

On the other hand, a small settlement could disadvantage a plaintiff if the jury perceived that amount as bearing on the total value of the claim. The jury also might consider its duty to be diminished by settlement or consider the amount involved to be adequate regardless of the non-settling defendant's liability.

It is true that juries are expected to consider complicated facts and instructions and that our adversary system relies upon their ability to do so before reaching their conclusions. It is also true

that jurors are human and so are subject to suggestion and sometimes to confusion concerning the relative importance of a mass of factual material and its relationship to instructions from the bench.

If facts such as here before us have or should have no bearing upon either liability or ultimate damages, there appears to be little cause to burden the jury with the added duty of calculating a liquidated settlement into its deliberations. See *Slayton v Ford Motor Co,* 140 Vt 27; 435 A2d 946 (1981).

Finally, the uncertainty of juror reaction to the fact of an indemnity release is considered as a foreseeable deterrent to settlements between plaintiffs and codefendants. We find the "court rule" to be more consistent with the existing policy of this Court to encourage settlements when feasible.

Therefore, in all cases which commence trial after the date of this decision, the policy in Michigan shall be: When there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, the jury shall not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise. Following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced.

The result of the Court of Appeals is affirmed.

No costs, this being a question of policy.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

PEOPLE v CAZAL

Docket No. 66646. Argued October 13, 1981 (Calendar No. 6).—Decided March 2, 1982.

Anibal Cazal was charged with four counts of felonious assault. The Oakland Circuit Court, Francis X. O'Brien, J., sitting as the trier of fact, convicted the defendant of the lesser included offense of intentionally discharging a firearm aimed at another without malice. The Court of Appeals, R. M. Maher and Hoffius, JJ. (Beasley, P.J., dissenting), reversed the decision of the trial court and vacated the defendant's conviction in an unpublished per curiam opinion (Docket No. 49683). The Court of Appeals held that the rule adopted in *People v Chamblis,* 395 Mich 408 (1975), that in any criminal case where the charged offense is punishable by incarceration for more than two years the trial court, regardless of a request by the defendant, may not instruct the jury on lesser included offenses for which the maximum allowable incarceration period is one year or less applied to nonjury trials, and that the trial court's consideration of the lesser included offense constituted error requiring reversal. The people appeal by leave granted.

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

1. The rule limiting a jury's consideration of certain lesser included offenses applies only to jury trials. It was adopted pursuant to the supervisory power of the Supreme Court over the courts of Michigan as a prophylactic measure designed to reduce the possibility of prejudice to a defendant, and not pursuant to constitutional or statutory requirements.

2. The underlying policies of the rule which are aimed at

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 551.
75 Am Jur 2d, Trial § 876.
Lesser offenses "necessarily included" in offense charged, under Rule 31[c] of Federal Rules of Criminal Procedure. 11 ALR Fed 173.

[2] 75 Am Jur 2d, Trial § 880.

[3-7] 75 Am Jur 2d, Trial §§ 876-882.

[6, 7] 20 Am Jur 2d, Courts § 115.

improving the factfinder's performance apply in a jury trial where confusion of the trier of fact through the presentation of an unmanageable number of resolutions is possible and where limitation of the potential for inappropriate compromise verdicts is desired. However, where a trial judge sits as the trier of fact, these policies are less compelling because of the difference in his role. Unlike the jury, a trial judge should be aware of lesser included offenses without the need for instruction, and the possibility that consideration of misdemeanor offenses will confuse or prejudice the judge's deliberations is significantly less. When a trial judge sits as a trier of fact, his role is more circumscribed than that of the jury by the requirement that he articulate the facts found and the conclusions of law upon which the judgment is based and by the stricter standard of review applied on appeal, and thus the possibility of an inappropriate compromise judgment is significantly reduced or eliminated. Therefore, the rule, while specifically applicable to jury trials, does not apply in cases where the trial judge sits as the trier of fact.

3. The rule is not extended to bench trials by the provision of the Code of Criminal Procedure relating to bench and jury trials. Those provisions do not prohibit the Supreme Court from exercising its supervisory power over the courts of Michigan to accord defendants fair trials. The rule was designed to protect the integrity of jury deliberations, and its application to bench trials would be needless.

4. The application of the rule only to jury trials is based on the rational distinction between the functions of the jury and the functions of the judge when sitting as the trier of fact and does not deny a criminal defendant the equal protection of the law.

5. The decision of the Court in this case will become effective in all other cases in which trial is commenced after the date of the decision.

Reversed, and conviction and sentence reinstated.

1. CRIMINAL LAW — LESSER INCLUDED OFFENSES — MISDEMEANORS — JURY INSTRUCTIONS — POLICY.

The rule that in any criminal case where the charged offense is punishable by incarceration for more than two years the trial court, regardless of a request by the defendant, may not instruct the jury on lesser included offenses for which the maximum allowable incarceration period is one year or less, was adopted pursuant to the supervisory power of the Supreme Court over the courts of Michigan as a prophylactic measure,

designed to reduce the possibility of prejudice to the defendant, and not pursuant to constitutional or statutory requirements (Const 1963, art 6, § 5).

2. CRIMINAL LAW — LESSER INCLUDED OFFENSES — JURY INSTRUCTIONS — POLICY.

The rule limiting a jury's consideration of certain lesser included offenses in felony trials incorporated policies designed to assure a defendant a fair trial, including limiting the number of charges the defendant would be forced to defend, providing the defendant with fair notice of the charges, avoiding undue confusion of the jury by presenting it with a limitless array of possible verdicts, and limiting the number of compromise resolutions where they are inappropriate.

3. CRIMINAL LAW — LESSER INCLUDED OFFENSES — POLICY — BENCH TRIALS.

The applicability of the policies underlying the adoption of the rule limiting a jury's consideration of certain lesser included offenses in felony trials is affected by a change in the role of the trier of fact, and reasons for imposing policies appropriate where a jury sits as the trier of fact are less compelling in the context of a bench trial.

4. CRIMINAL LAW — BENCH TRIALS — COMPROMISE JUDGMENTS.

The role of a trial judge sitting as the trier of fact in a criminal case is more circumscribed than the role of a jury, significantly reducing or eliminating the possibility of an inappropriate compromise judgment because the judge's duty to find facts based on the evidence presented and to apply the law to those facts is reinforced by the requirement that the judge must articulate the facts found and the conclusions of law upon which his judgment is based, and on appeal a stricter standard of review is applied to findings of a trial judge.

5. CRIMINAL LAW — LESSER INCLUDED OFFENSES — JURY INSTRUCTIONS — JURY TRIALS — BENCH TRIALS.

The rule limiting a jury's consideration of certain lesser included offenses in felony trials is specifically applicable to jury trials and does not apply in cases in which a trial judge sits as the trier of fact because of the differences in the functions performed by a jury and a trial judge sitting as the factfinder.

6. CRIMINAL LAW — LESSER INCLUDED OFFENSES — POLICY.

The provisions of the Code of Criminal Procedure relating to bench trials and jury trials does not prohibit the Supreme

Court from exercising its supervisory power over the courts of Michigan to accord criminal defendants fair trials and does not require that the rule limiting a jury's consideration of certain lesser included offenses in felony trials, which incorporated policies specifically directed at jury trials, be extended to bench trials (Const 1963, art 6, § 5; MCL 763.4; MSA 28.857).

7. CRIMINAL LAW — LESSER INCLUDED OFFENSES — JURY INSTRUCTIONS — EQUAL PROTECTION.

The application of the rule limiting consideration of certain lesser included offenses in felony trials only to jury trials is based on the rational distinction between the functions of the jury and the functions of the judge when sitting as the trier of fact and does not deny a criminal defendant the equal protection of the law (US Const, Am XIV).

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Richard H. Browne,* Assistant Prosecuting Attorney, for the people.

*Richard P. King* and *Donald W. Grant* for defendant.

COLEMAN, C.J. The issue is whether the rule announced in *People v Chamblis,* 395 Mich 408; 236 NW2d 473 (1975), applies when a trial judge sits as a trier of fact. We hold that the *Chamblis* rule is applicable only to jury trials.

I

Defendant was charged with four counts of felonious assault[1] arising from a shooting incident. Following a bench trial, the trial judge found defendant not guilty of felonious assault, but guilty of intentionally discharging a firearm aimed

[1] MCL 750.82; MSA 28.277. Felonious assault is a felony punishable by imprisonment for not more than four years or by a fine of not more than $2,000, or both. MCL 750.503; MSA 28.771.

at another without malice.[2] The Court of Appeals vacated the conviction because it violated the *Chamblis* rule.[3]

## II

In *Chamblis, supra,* 429, this Court stated:

"We are establishing a rule today, as a matter of policy, limiting the extent of compromise allowable to a jury in deciding whether to convict of a lesser included offense. In any case wherein the charged offense is punishable by incarceration for more than two years, the court, whether or not requested, may not instruct on lesser included offenses for which the maximum allowable incarceration period is one year or less."

The *Chamblis* rule is more easily understood when viewed in the context in which it was announced. On December 18, 1975, this Court simultaneously released nine opinions addressing issues concerning jury instructions in criminal cases.[4] The opinions not only resolved their respective cases, but also were designed to provide some uniformity and direction, see *People v Ora Jones,* 395 Mich 379, 395; 236 NW2d 461 (1975); *People v*

[2] MCL 750.234; MSA 28.431. Intentionally discharging a firearm aimed at another person without malice is a misdemeanor punishable by imprisonment for not more than one year or by a fine of not more than $500.

[3] The Court of Appeals opinion in this case is unpublished. However, in *People v Minier,* 100 Mich App 114; 299 NW2d 383 (1980), *lv den* 411 Mich 902 (1981), and *People v Brown,* 87 Mich App 612; 274 NW2d 854 (1978), the Court held that the *Chamblis* rule did not apply to bench trials.

[4] See *People v Henry,* 395 Mich 367; 236 NW2d 489 (1975), *People v Ora Jones,* 395 Mich 379; 236 NW2d 461 (1975), *People v Chamblis,* 395 Mich 408; 236 NW2d 473 (1975), *People v Carter,* 395 Mich 434; 236 NW2d 500 (1975), *People v Jenkins,* 395 Mich 440; 236 NW2d 503 (1975), *People v Paul,* 395 Mich 444; 236 NW2d 486 (1975), *People v Burden,* 395 Mich 462; 236 NW2d 505 (1975), and *People v Mann,* 395 Mich 472; 236 NW2d 509 (1975).

*Henry,* 395 Mich 367, 374; 236 NW2d 489 (1975). Among the issues addressed were (1) when a judge must grant a defendant's request for a lesser offense instruction and (2) when a judge, *sua sponte,* must, may, and may not give an instruction on a lesser offense.

The Court recognized that the common-law definition of lesser offenses had expanded from "necessarily included offenses" to encompass "cognate offenses", *Ora Jones, supra,* 387. This decision significantly expanded the number of instructions which may be appropriate in a case. The decision also created the possibility that so many instructions might be given as to create confusion among the jurors and deny defendant a fair trial.

Therefore, in *Chamblis, supra,* the Court announced a rule to limit the number of offenses the jury could consider. The *Chamblis* rule was not based on any finding that jury consideration of certain offenses or a certain number of offenses was prejudicial per se. The rule is a prophylactic measure designed to reduce the possibility of prejudice. In short, the *Chamblis* rule was not adopted as a matter of constitutional or statutory law, but as a matter of policy pursuant to this Court's supervisory power over the courts of Michigan, Const 1963, art 6, § 5.

Designed towards assuring a fair trial, the *Chamblis* rule incorporated several policies which included:

(1) limiting the number of charges which a defendant would be forced to defend,

(2) providing the defendant with fair notice of the charges he or she must defend,

(3) avoiding undue confusion of the jury by presenting it with a limitless array of possible verdicts, and

(4) limiting the number of compromise resolutions, when such resolutions may be inappropriate.

III

The first two policies focus on the defendant's ability to present a defense. The latter ones concern improving the factfinder's performance. Accordingly, a change in the role of the factfinder may affect the applicability of some of these policies. In the instant case, the Court must determine whether the change of the factfinding functions from the jury to the trial judge affects the validity of the policies underlying the *Chamblis* rule.

The third policy, enumerated above, concerns the possibility of confusing the factfinder by presenting it with an unmanageable number of possible resolutions.

In *Henry, supra,* 373, the Court proceeded from the premise that a jury is not aware of possible verdicts until it receives instructions from the trial judge. Presenting the jury with an undue number of offenses, elements and possible verdicts creates a danger of possible confusion of the jury. The *Chamblis* rule was designed to reduce the danger of this possibility by restricting the number of alternatives presented, while at the same time providing for consideration of those offenses which more closely approximate the conduct charged.

In contrast to a jury, a trial judge should be aware of lesser included offenses without the need for instruction. In *People v Murray,* 72 Mich 10, 16; 40 NW 29 (1888), the Court stated:

"Without any requests from counsel it is the duty of

the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he should state to them fully the law applicable to the facts. Especially is this his duty in a criminal case. * * * Too much reliance is often placed upon counsel by the court in this respect for requests; but this should not be done. The court must do its duty in a criminal case, whether counsel do so or not. It is to the court that the accused has a right to look to see that he has a fair trial."

This duty and the trial judge's knowledge of the law, plus his opportunity for study and reflection before rendering a decision, significantly reduce any possibility that the consideration of misdemeanor offenses will confuse or prejudice the judge's deliberations.

Therefore, the third policy underlying the *Chamblis* rule is less compelling when considered in the context of a bench trial.

The fourth enumerated policy of the *Chamblis* rule is to limit the potential for compromise verdicts in situations in which they are not appropriate. The Court recognized the possibility of compromise verdicts and that instructions on lesser offenses increased this possibility, *Chamblis, supra,* 426. Although some compromise verdicts may be assailable in logic, they are supportable because of the jury's role in our criminal justice system, see *People v Vaughn,* 409 Mich 463; 295 NW2d 354 (1980). In *Chamblis, supra,* 426-427, the Court summarized the jury's role, stating:

"Juries in criminal cases often find defendants not guilty or find persons who have committed the charged greater offense guilty of only a lesser offense in the face of the evidence for reasons satisfactory to them. 'The very essence of the jury's function is its role as spokes-

man for the community conscience in determining whether or not blame can be imposed.' *United States v Dougherty,* 154 US App DC 76, 105; 473 F2d 1113, 1142 (1972) (Bazelon, C.J., *dissenting).* The observation was made by the United States Supreme Court in *Duncan v Louisiana,* 391 US 145, 157; 88 S Ct 1444; 20 L Ed 2d 491 (1968) that:

" 'the most recent and exhaustive study of the jury [Kalven and Zeisel, *The American Jury* (1966)] in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.' "

The Court also referred to the unimpeachable nature of the jury's verdict, stating:

"We do not deny that the possibility of compromise exists. However, as Justice Holmes noted in *Dunn v United States,* 284 US 390, 394; 52 S Ct 189; 76 L Ed 356 (1932): 'That the verdict may have been the result of compromise, or of a mistake on the part of the jury is possible. But verdicts cannot be upset by speculation or inquiry into such matters.'

"While we will not 'speculate', as an appellate court it is our responsibility to review jury verdicts to determine whether they are supported by evidence." *Chamblis, supra,* 426.

While recognizing the historical role of the jury, the Court noted that the appropriateness of compromise verdicts was not without limits, stating:

"We are convinced that the cause of justice is not well served by convicting of assault and battery a defendant charged with murder. *As a matter of policy*

*people who commit serious crimes should be punished for those offenses, and those who did not commit such serious crimes should not be tried for those crimes only to be found guilty of a much lower offense.* In the example cited, if the most serious offense for which a jury feels conviction is justified is assault and battery, the original charge of murder appears to bear no realistic relationship to the offense committed, and no good purpose would be served by allowing such an instruction.

"At some point, both the defendant and the prosecution should be able to prevent any further potential for 'compromise'." *Chamblis, supra,* 428. (Emphasis added.)

When a trial judge sits as a trier of fact, the judge's role is more circumscribed and the possibility of an inappropriate compromise judgment is significantly reduced or eliminated. The judge's duty is to find facts based on the evidence presented and to apply the law to those facts. This duty is reinforced by the requirement that the judge articulate the facts found and the conclusions of law upon which the judgment is based, GCR 1963, 517.1, *People v Jackson,* 390 Mich 621; 212 NW2d 918 (1973). Also, the stricter standard of review applied on appeals from a trial judge's findings of fact, see *People v Hubbard,* 387 Mich 294; 196 NW2d 768 (1972), is a reflection of the differences between the roles performed by a judge and a jury.

By the terms of the *Chamblis* rule and the context of the cases in which it was formulated, the rule is specifically applicable to jury trials. For these reasons and because of the differences in the functions performed by the jury and the judge sitting as factfinder, we hold that the *Chamblis* rule does not apply in cases in which the trial judge sits as a trier of fact.

IV

Defendant responds that even if the policies underlying the *Chamblis* rule do not apply in bench trials, the Code of Criminal Procedure requires that the same rules apply in bench trials and jury trials. MCL 763.4; MSA 28.857, which predates *Chamblis,* provides:

"In any case where a defendant waives his right to a trial by jury and elects to be tried by the judge of such court as provided in section 3 of this chapter any judge of the court in which said cause is pending shall have jurisdiction to proceed with the trial of said cause, and shall proceed to hear, try and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury."

Defendant concludes that this provision requires that the *Chamblis* rule be applied in bench trials. We disagree.

The Code of Criminal Procedure was amended subsequent to *Chamblis* to provide that:

"Except as provided in subsection (2), [concerning controlled substance offenses] upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." MCL 768.32; MSA 28.1055.

Neither of these statutory provisions prohibit this Court from exercising its supervisory powers over the courts of Michigan, Const 1963, art 6, § 5, to accord defendants fair trials as required by the constitution.

The *Chamblis* rule was designed to provide further assurance that a defendant would receive a

fair trial by jury. The policies reflected in the rule are specifically directed to jury trials. In other contexts, the Court has adopted or upheld rules designed to protect the integrity of jury deliberations without needlessly applying the same rules to bench trials.[5] The *Chamblis* rule is an example of this type of rule. Accordingly, MCL 763.4; MSA 28.857 does not require that the *Chamblis* rule be extended to bench trials.

V

Defendant also claims that the failure to apply the *Chamblis* rule to bench trials lacks a rational basis and denies him equal protection of the law, US Const, Am XIV, Const 1963, art 1, § 2. For the reasons stated above, there clearly is a rational basis for distinguishing between bench trials and jury trials. Accordingly, the decision not to apply *Chamblis* to bench trials after a defendant has waived trial by jury does not deny the defendant equal protection of the law.

This decision will become effective in all other cases in which trial is commenced after the date hereof.

The decision of the Court of Appeals is reversed and defendant's conviction and sentence are reinstated.

KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with COLEMAN, C.J.

[5] For example, a trial judge was once required, and now may order, that a jury be sequestered during its deliberations, see 1893 PA 176, MCL 768.16; MSA 28.1039. However, a trial judge, sitting as a trier of fact, is not required to sequester himself until a final decision is announced. Neither is voir dire required in the absence of a jury. A trial judge, sitting as a factfinder, is not subject to any peremptory challenges. Instructions on the law to be applied are not required to be given in open court.

SUCHODOLSKI v MICHIGAN CONSOLIDATED GAS COMPANY

Docket No. 64822. Argued April 7, 1981 (Calendar No. 4).—Decided March 2, 1982.

Arthur L. Suchodolski brought an action against his former employer, the Michigan Consolidated Gas Company, for wrongful discharge from employment. The complaint was in six counts, one of which alleged age discrimination, and another of which alleged that his discharge was contrary to public policy because it was in retaliation for his attempts to bring improper accounting and other practices of his employer corporation to the attention of his superiors. The Wayne Circuit Court, John D. O'Hair, J., granted summary judgment for the defendant on all six counts. The Court of Appeals, D. C. Riley, P.J., and R. B. Burns and D. E. Holbrook, Jr., JJ., reversed as to the count alleging age discrimination and affirmed as to the rest in an unpublished per curiam opinion (Docket Nos. 78-4417, 44157). The plaintiff appeals as to the count alleging that his discharge was against public policy.

In a unanimous opinion per curiam, the Supreme Court *held:*

This case involves only a corporate management dispute and lacks the kind of violation of a clearly mandated public policy that would support an action for retaliatory discharge.

1. Courts have recognized that some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often the proscription is found in explicit legislative statements protecting employees who act in accordance with a statutory right or duty. Occasionally a sufficient legislative policy has been found to imply a cause of action for wrongful discharge even in the absence of an explicit prohibition, as when the discharge is for failure or refusal to violate a law, or for the exercise of a right conferred by legislative enactment.

2. In this case the plaintiff relies on two sources to establish "public policy": the Code of Ethics of the Institute of Internal Auditors, and the extensive regulation of the accounting systems of public utilities by the Public Service Commission, maintaining that the internal accounting practices about which he complained could have interfered with the commission's performance of its functions. The code of ethics of a private

association does not establish public policy. Nor is the regulation of public utilities sufficient to sustain a cause of action; the regulation of their accounting systems is not, as is the workers' compensation statute, directed toward conferring rights on employees. The plaintiff does not claim that his discharge arose from refusal to falsify reports or documents required by the Public Service Commission.

The judgment of the Court of Appeals is affirmed.

*Donnelly & Associates, P.C.* (by *Timothy G. Hagan),* for plaintiff.

*Dykema, Gossett, Spencer, Goodnow & Trigg* (by *Seth M. Lloyd* and *Richard L. Hurford)* for defendant.

PER CURIAM. At issue in this appeal is whether the circuit court properly granted summary judgment as to the plaintiff's claim that his discharge from his employment with Michigan Consolidated Gas Company was improper as contrary to public policy. The Court of Appeals affirmed the judgment for the defendant. We agree that summary judgment was appropriate and affirm.

I

The plaintiff began working for Michigan Consolidated Gas Company in September, 1972, as a senior auditor. He was discharged in January, 1976, and brought this action in 1978, stating various theories of recovery in a six-count complaint. Only one count is relevant to the present appeal.[1] Count V of the complaint said, in part:

[1] The circuit court entered judgment for the defendant on all six counts. The Court of Appeals reversed the decision as to the count claiming age discrimination on the authority of our decision in *Strachan v Mutual Aid & Neighborhood Club, Inc,* 407 Mich 928 (1979), *rev'g* 81 Mich App 165; 265 NW2d 66 (1978), but affirmed as to the other five counts.

The plaintiff has not appealed the judgment as to four of the counts.

"34. That plaintiff, in the course of his employment for defendant corporation, had discovered and reported poor internal management of defendant corporation.

"35. That plaintiff was terminated for attempting to report and correct such questionable procedures as the shifting of losses from appliance sales to the rate payers, uncollectable accounts receivable and the selling of automobiles and office equipment to employees of defendant corporation for very low prices.

"36. That defendant's discharge of plaintiff for attempting to report and correct the aforementioned practices was retaliatory and against the public policy of this state."

In affirming the summary judgment, the Court of Appeals noted that a "public policy" exception has developed to the general rule that either party to an employment contract for an indefinite term may terminate it at any time for any reason. The Court discussed at length the decision in *Sventko v Kroger Co,* 69 Mich App 644; 245 NW2d 151 (1976). In that case, the plaintiff claimed that she was discharged because she had filed a claim for workers' compensation benefits. The Court held that this stated a claim for which relief could be granted.

However, in an unpublished per curiam opinion, the Court of Appeals found *Sventko* inapplicable:

"We think that the *Sventko* case is factually distinguishable from the present case which involves a corporate management dispute and no clear mandate of public policy."

We granted leave to appeal.

## II

In general, in the absence of a contractual basis

for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason. See generally *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579; 292 NW2d 880 (1980). However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty.[2]

The courts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges. Such a cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment. Thus, in *Trombetta v Detroit, T & I R Co,* 81 Mich App 489; 265 NW2d 385 (1978), the Court said that it would have been impermissible to discharge an employee for refusing to falsify pollution control reports that were required to be filed with the state.[3]

In addition, the courts have found implied a

[2] *E.g.,* MCL 37.2701; MSA 3.548(701) (Elliott-Larsen Civil Rights Act); MCL 37.1602; MSA 3.550(602) (Handicappers' Civil Rights Act); MCL 408.1065; MSA 17.50(65) (Occupational Safety and Health Act); MCL 15.362; MSA 17.428(2) (The Whistleblowers' Protection Act).

[3] See also *Petermann v International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396,* 174 Cal App 2d 184; 344 P2d 25 (1959) (discharge because employee refused to give false testimony before legislative committee); *McNulty v Borden, Inc,* 474 F Supp 1111 (ED Pa, 1979) (discharge for refusal to participate in illegal price-fixing scheme).

prohibition on retaliatory discharges when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment. See, *e.g., Sventko v Kroger Co, supra; Hrab v Hayes-Albion Corp,* 103 Mich App 90; 302 NW2d 606 (1981). Both cases involved allegations of discharges in retaliation for having filed workers' compensation claims.[4]

The plaintiff relies on two sources to establish that a "public policy" would be violated by allowing his discharge to stand. First, he argues that the Code of Ethics of the Institute of Internal Auditors is such an expression of public policy. Second, he points to the extensive regulation of the accounting systems of public utilities by the Public Service Commission. *E.g.,* MCL 483.113; MSA 22.1323. He maintains that his complaints about the internal accounting practices of the defendant, which he alleges led to his discharge, related to matters that could have interfered with the Public Service Commission's ability to perform its regulatory functions.

We agree with the Court of Appeals that this case involves only a corporate management dispute and lacks the kind of violation of a clearly mandated public policy that would support an action for retaliatory discharge. The code of ethics of a private association does not establish public policy. Nor is the regulation of public utilities sufficient to sustain the plaintiff's action. The regulation of the accounting systems of utilities is not, as is the workers' compensation statute, directed

[4] Most of the cases in other jurisdictions also involve allegations of discharge in retaliation for filing workers' compensation claims. *E.g., Frampton v Central Indiana Gas Co,* 260 Ind 249; 297 NE2d 425 (1973); *Kelsay v Motorola, Inc,* 74 Ill 2d 172; 384 NE2d 353 (1979).

at conferring rights on the employees. Finally, we note that the plaintiff does not claim that his discharge arose from his refusal to falsify reports or documents required by the Public Service Commission.

The judgment of the Court of Appeals is affirmed.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

DAY v W A FOOTE MEMORIAL HOSPITAL

Docket No. 61821. Argued January 9, 1980 (Calendar No. 8).—Decided March 2, 1982.

Eva M. Day was killed in an automobile accident in the course of her employment by W. A. Foote Memorial Hospital, Inc. Fred E. Day, the decedent's husband, sought workers' compensation death benefits from her employer and its insurer, St. Paul Mercury Insurance Company. An administrative law judge denied benefits on the ground that the plaintiff was not a dependent within the meaning of the act, and the Workers' Compensation Appeal Board affirmed. The Court of Appeals, R. B. Burns, P.J., and D. F. Walsh and Clements, JJ., held that the plaintiff lacked standing to challenge the constitutionality of the provision of the act which conclusively presumes the dependency of a wife but not of a husband (Docket No. 77-4647). The plaintiff appeals.

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

1. The plaintiff's claim for death benefits was properly denied. Under the provision of the act, the plaintiff was required to show his dependency upon his wife; he was not conclusively presumed to be dependent. The plaintiff stipulated that he was not dependent in fact upon his deceased wife.

2. After oral argument in this case, the Supreme Court of the United States held that a provision of the Missouri workers' compensation act establishing the conclusive presumption that widows, but not widowers, were wholly dependent upon their deceased spouses for financial support, constituted a gender-based classification violative of the provisions of the Equal Protection Clause. That decision is binding on the Supreme Court of Michigan pursuant to the Supremacy Clause of the United States Constitution. There is no significant difference between the pertinent language of the Missouri statute and the

REFERENCES FOR POINTS IN HEADNOTES

[1-4] 81 Am Jur 2d, Workmen's Compensation § 17.
82 Am Jur 2d, Workmen's Compensation § 520.
[4] 7 Am Jur 2d, Automobile Insurance § 34.

conclusive presumption of dependency of widows in the Michigan Worker's Disability Compensation Act. Thus, on the authority of the United States Supreme Court decision in the Missouri case, Michigan's conclusive presumption provision is violative of the Equal Protection Clause.

3. The Supreme Court of the United States expressly declined to fashion a remedy in the Missouri case, leaving the state courts to seek a remedy consonant with the state Legislature's overall purpose. The legislative history of Michigan's act shows a deliberate decision to deny a conclusive presumption of dependency to widowers, and to limit it to widows. Invalidation of the presumption of dependency would be more consonant with the legislative purpose than would extension of the presumption to widowers. Invalidation of the presumption will not unduly burden most dependent widows, who may prove dependency in fact, while the financial burden on the system of providing workers' compensation by extending the presumption to widowers well might exceed the costs of adjudicating the dependency of both widows and widowers. Accordingly, all surviving spouses will be required to prove dependency in fact to recover death benefits.

4. The no-fault automobile insurance act, while it speaks in terms of conclusive dependency, operates to compensate only for the actual loss of the dependents of a deceased person without distinction between widows and widowers. It does not indicate a current legislative preference, nor does it provide a basis for extending the conclusive presumption of dependency of widows under the workers' compensation act to widowers. The focus of the no-fault act is on compensation for actual survivor's loss, while the focus of the workers' compensation act is on dependency.

5. The Court declines to preserve the status quo of the conclusive presumption provision of the workers' compensation act until the Legislature addresses the question. The remedy fashioned by the Court cures the constitutional defect of the provision with no damage to the statutory scheme. Since the decision of the Supreme Court of the United States in the Missouri case, the Legislature has twice extensively revised the Worker's Disability Compensation Act without addressing the question.

The decision of the WCAB is affirmed.

1. CONSTITUTIONAL LAW — WORKERS' COMPENSATION — DEPENDENCY — PRESUMPTIONS — EQUAL PROTECTION.

The decision of the Supreme Court of the United States that the

conclusive presumption of the Missouri workers' compensation act that widows, but not widowers, were wholly dependent upon their deceased spouses for financial support constitutes gender-based discrimination against female wage earners and surviving male spouses, violative of the provisions of the Equal Protection Clause, is binding on the Supreme Court of Michigan pursuant to the Supremacy Clause of the United States Constitution (US Const, art VI, § 2, Am XIV).

2. WORKERS' COMPENSATION — DEPENDENCY — PRESUMPTIONS — EQUAL PROTECTION.

The conclusive presumption of the Worker's Disability Compensation Act that a widow was dependent upon her husband for financial support, but the determination of all other questions of dependency in accordance with the fact of dependency at the time of a compensable injury, constitutes a gender-based classification, violative of the Equal Protection Clause (US Const, Am XIV; MCL 418.331; MSA 17.237[331]).

3. WORKERS' COMPENSATION — DEPENDENCY — PRESUMPTIONS — EQUAL PROTECTION.

The legislative history of the Worker's Disability Compensation Act indicates an intent by the Legislature to deny a conclusive presumption of dependency to widowers and to limit the presumption to widows; therefore, because the presumption is violative of the Equal Protection Clause as a gender-based classification, and because an invalidation of the presumption would be more consonant with the legislative scheme for providing compensation than extension of the presumption to widowers, all surviving spouses must prove their degree of dependency in fact to receive workers' compensation benefits (US Const, Am XIV; MCL 418.331; MSA 17.237[331]).

4. WORKERS' COMPENSATION — DEPENDENCY — PRESUMPTIONS — NO-FAULT ACT.

That the no-fault automobile insurance act permits recovery of benefits for survivor's loss by the dependents in fact of a deceased person without distinction between widows and widowers does not provide a basis for extending the conclusive presumption of dependency of the Worker's Disability Compensation Act to both spouses because the no-fault act requires proof of actual loss, and workers' compensation benefits are paid to widows without proof of previous dependency (MCL 418.331, 500.3108; MSA 17.237[331], 24.13108).

*Rosenburg, Stanton, Bullen & Nelson, P.C.* (by *Terry J. Klaasen),* for plaintiff.

*Smith, Haughey, Rice & Roegge* (by *John W. Raven)* for defendants.

LEVIN, J. We granted leave to appeal to consider whether the conclusive presumption of a widow's dependency on her husband for financial support set forth in the Worker's Disability Compensation Act is an unconstitutional gender-based discrimination because there is no similar presumption for widowers.

After oral argument in this Court, the United States Supreme Court decided *Wengler v Druggists Mutual Ins Co,* 446 US 142; 100 S Ct 1540; 64 L Ed 2d 107 (1980), which held that language of Missouri's workers' compensation law providing for a similar conclusive presumption of dependency of widows was an unconstitutional gender-based discrimination. The Court, however, expressly declined to decide whether the remedy should be to extend the conclusive presumption of dependency to widowers or to eliminate it altogether. The Court left that question to the state courts, saying that they should seek a remedy consonant with the overall legislative purpose.

We are persuaded that invalidation of the conclusive presumption of a widow's dependency would be more consonant with the legislative scheme for providing compensation than would extension of the presumption to widowers as well as widows. Accordingly, all surviving spouses are required to prove their dependency in fact.

## I

The act provides that a wife is "conclusively

presumed to be wholly dependent for support upon a deceased" husband. In all other cases, questions of dependency "shall be determined in accordance with the fact".[1]

In *Wengler,* the United States Supreme Court considered language of the Missouri workers' compensation act providing that a wife "shall be conclusively presumed to be totally dependent for support upon a deceased" husband.[2] There is thus no significant difference between the pertinent language of the Michigan and Missouri statutes.

In holding that Missouri's conclusive presumption unconstitutionally discriminated against "women wage earners and surviving male spouses", the United States Supreme Court said:

"Providing for needy spouses is surely an important governmental objective * * *. But the question remains whether the discriminatory means employed—discrimination against women wage earners and surviving male spouses—itself substantially serves the statutory end. Surely the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need." *Wengler, supra,* 446 US 151.

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[1] "(1) The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

"(a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death a hearing referee shall find the wife was living apart for justifiable cause or because he had deserted her.

"(b) * * * In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury." MCL 418.331; MSA 17.237(331).

[2] Mo Rev Stat § 287.240 (Supp 1979); see *Wengler v Druggists Mutual Ins Co,* 446 US 142, 144, fn 1; 100 S Ct 1540; 64 L Ed 2d 107 (1980).

Missouri sought to justify the presumption as an administrative convenience, arguing that more wives than husbands are dependent on their spouses. The Court found the asserted justification inadequate to satisfy "heightened scrutiny under the Equal Protection Clause".[3]

The United States Supreme Court's assessment of this gender-based discrimination is binding on this Court under the Supremacy Clause. On the authority of *Wengler,* we hold violative of the Fourteenth Amendment the conclusive presumption of dependency for widows set forth in the Worker's Disability Compensation Act.

II

The question, then, is the appropriate remedy for this unconstitutional gender-based presumption: invalidation, extension to widowers, or preservation of the statute for a short period of time to enable the Legislature to forge its own solution. In *Wengler,* the Court did not order a particular solution, but left the appropriate remedy to the state courts, who, the Court said, would seek the outcome most amenable to the state Legislature's overall purpose.[4]

We are persuaded that invalidation of the presumption of dependency would be more consonant

[3] *Id.,* 152.

[4] "We are left with the question whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows. Because state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation. Accordingly, we reverse the decision of the Supreme Court of Missouri and remand the case to that court for further proceedings not inconsistent with this opinion." *Wengler, supra,* 446 US 152-153.

with the legislative purpose than extending the presumption to widowers. The legislative history of the conclusive presumption for widows reveals a deliberate legislative decision not to extend the presumption to widowers. Invalidation of the presumption will not unduly burden most dependent widows. Nor does the 1972 enactment of the no-fault automobile liability insurance act indicate a legislative preference for extension of such a conclusive presumption to widowers, as Day contends.

A

Insurance rates and compensation benefits have been computed based upon the validity of the conclusive presumption permitting all widows to recover without proof of dependency and allowing widowers to recover only if dependent in fact. Since 1927, no workers' compensation has been payable to surviving husbands of working women whose earnings were used only for their own support.[5] Working women providing some support left their husbands with a right to some compensation. Extension of the conclusive presumption of dependency to widowers would result in a large class of beneficiaries not heretofore entitled to compensation.

The legislative history of the Worker's Disability Compensation Act indicates that the absence of a conclusive presumption of dependency for widowers is the result of an affirmative legislative decision to deny such a presumption to widowers and to limit the presumption to widows.

[5] See 1927 PA 376.

If there are children under 16 (who are conclusively presumed to be dependent), the husband would receive the award for the use and benefit of the children. MCL 418.331(1)(b); MSA 17.237(331)(1)(b).

Widowers were at one time accorded a conclusive presumption of dependency. The first workers' compensation act, enacted in 1912, provided that both a wife and a husband were conclusively presumed to be wholly dependent for support upon the spouse.[6] The 1919 act continued this conclusive presumption of dependency of each spouse upon the other.[7]

In 1927, the Legislature carried forward the language of the 1919 act providing a conclusive presumption of dependency for widows, but did not carry forward the presumption for widowers.[8] The Legislature thus determined that the conclusive presumption of dependency should not be accorded to surviving husbands.

The California Supreme Court reviewed a simi-

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[6] "Sec. 6. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

"(a) A wife upon a husband with whom she lives at the time of his death;

"(b) A husband upon a wife with whom he lives at the time of her death". 1912 (1st Ex Sess) PA 10.

[7] "The following persons shall be conclusively presumed to be wholly dependent for support upon the deceased employee:

"(a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the Industrial Accident Board shall find the wife was living apart for justifiable cause or because he had deserted her;

"(b) A husband upon a wife with whom he lives at the time of her death". 1919 PA 64.

[8] "Sec. 6. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

"(a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the department of labor and industry shall find the wife was living apart for justifiable cause or because he had deserted her;

"(b) * * * In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury." 1927 PA 376.

lar legislative history and found it controlling.[9] We view this history as significant but not conclusive. To the extent it reflects a greater solicitude for widows than widowers, the history is ambivalent. If the Legislature were given only two options—a presumption for all spouses or a presumption for none—it might have chosen to extend the presumption to all.

But the presumption of dependency may have also been a matter of administrative convenience. When first enacted, the conclusive presumption that each spouse was dependent upon the other may have reflected the Legislature's perception of existing fact. Most widows of working men probably were dependent on their husbands, and few widowers of working women were wealthy men. The decision not to carry forward the presumption

[9] *Arp v Workers' Compensation Appeal Board,* 19 Cal 3d 395; 138 Cal Rptr 293; 563 P2d 849 (1977).

Two other state courts, finding before *Wengler* that their states' gender-based presumptions were unconstitutional, extended the presumption of dependency to widowers. *Tomarchio v Greenwich Twp,* 75 NJ 62; 379 A2d 848 (1977); *Passante v Walden Printing Co,* 53 AD2d 8; 385 NYS2d 178 (1976). After *Wengler,* the Missouri Legislature extended the presumption of dependency to widowers before the Missouri Supreme Court could consider the question. *Wengler v Druggists Mutual Ins Co,* 601 SW2d 8 (Mo, 1980).

The Georgia Supreme Court refused to extend the presumption to widowers after *Wengler,* but did facilitate proof of dependency. Under the Georgia statute, a widow was conclusively presumed dependent, but a widower had to prove (1) dependency in fact, (2) that he lived with the deceased wife, and (3) that he was incapable of self-support. The Georgia court held that the Legislature would not have accorded widowers a conclusive presumption of dependency. The court then went on to hold that, because the Legislature would not have imposed on widows the burden of proving that they lived with their husbands, and that they were incapable of self-support, neither sex would have to prove these additional facts. *Ins Co of North America v Russell,* 246 Ga 269; 271 SE2d 178 (1980).

The Tennessee Legislature extended the presumption of dependency to widowers before *Wengler,* and the Tennessee Supreme Court applied this expression of legislative intent to accidents occurring before the statute was amended. *Davis v Aetna Life & Casualty Co,* 603 SW2d 718 (Tenn, 1980).

for surviving husbands may have reflected an expanding female work force and the judgment that many women who worked did not contribute to their husbands' support.[10]

To the extent that the presumption of dependency is an administrative convenience, the Legislature probably would choose to abandon the presumption rather than to extend it to all spouses. The financial burden on the system of extending the presumption of dependency to all widowers of working women might well exceed the costs of adjudicating dependency and the degree of dependency in each case.

It could be argued, however, that workers' compensation death benefits are designed to compensate all widows for the loss of their husbands, regardless of actual pecuniary loss. Thus the Legislature, forced to choose, would prefer to compensate all spouses through a conclusive presumption of dependency, rather than compensate only dependent widows. Workers' compensation death benefits might be seen as specific benefits because they are payable to all widows, regardless of wealth, and are paid in a lump sum, albeit weekly, over a period of time.[11]

We reject such an argument. The death benefits are paid to widows regardless of wealth only because of the conclusive presumption of dependence. Since no benefits are payable in respect to

[10] The Worker's Disability Compensation Act avoids the intricacies subsequently enacted into the no-fault automobile liability insurance act, which requires a determination of the amount actually contributed by the deceased spouse. See. MCL 500.3108; MSA 24.13108, *Miller v State Farm Ins Co,* 410 Mich 538; 302 NW2d 537 (1981).

[11] The statute provides for a weekly payment of two-thirds of the deceased worker's average weekly wages for 500 weeks from the date of his death. MCL 418.321; MSA 17.237(321).

the death of an unmarried person who leaves no dependents, the death benefit does not seem in this analysis to be a specific lump sum payment.

B

We also find unpersuasive the argument that invalidation of the presumption would impose a substantial hardship on dependent widows, contrary to the act's remedial purpose.

All widows may still prove dependency in fact. If a widow is unemployed and dependent, ordinarily there will be little difficulty in proving dependency in fact. A wage-earning widow who is only partially dependent on her husband will be entitled to compensation to the extent of her actual dependency.[12]

C

Day argues that the conclusive presumption of dependency of widows and widowers alike set forth in the no-fault automobile liability insurance act, enacted in 1972, indicates a current legislative preference for extending the presumption to both sexes for purposes of workers' compensation.

Although the no-fault act speaks in terms of conclusive dependency, it operates to compensate both spouses only for actual loss in death situations; the insurer is obligated to pay such

[12] A partially dependent widow with minor children may be burdened somewhat because the entire award will be for the use and benefit of the children, although it is still paid to the widow. See fn 5, *supra*. We do not think this burden on partially dependent widows who have children is so significant as to justify this Court in extending the conclusive presumption of dependency to all widowers.

amounts, within statutory limits, as the deceased would actually have contributed to the survivor's support.[13] The Worker's Disability Compensation Act, in contrast, provides for payment of compensation to the surviving wife and children of a covered worker without proof that the deceased worker actually contributed to their support. In short, the no-fault act's focus is on actual loss, while the workers' compensation act's focus is on dependency. The provision of the no-fault act permitting recovery by a husband who was actually provided for by a deceased wife does not therefore provide a basis for extending the workers' compensation act's conclusive presumption of dependency to both spouses.

## III

We decline to preserve the status quo until the Legislature addresses the question, as this Court did in *Shavers v Attorney General,* 402 Mich 554; 267 NW2d 72 (1978). In *Shavers,* the Court held the entire statutory scheme regulating no-fault insurance rates and the availability of no-fault insurance to be inadequate to the demands of due process, and suggested the need for a new regulatory system. In this case, however, the Court can remedy the constitutional defect with no damage to the overall statutory scheme. If the Legislature should wish to extend the presumption to all spouses, it can readily amend the statute. Since *Wengler* was decided in April 1980, the Legislature has twice extensively revised the Worker's Disability Compensation Act[14] and has had ample opportunity to address the question.

[13] MCL 500.3108; MSA 24.13108.

[14] 1980 PA 357; 1981 PA 192-203.

## IV

In the instant case the plaintiff widower stipulated at the hearing that he was not in fact dependent on his deceased wife. No purpose would therefore be served by remanding to the Workers' Compensation Appeal Board for a determination of dependency.[15] Because we have concluded that this Court should not extend the conclusive presumption of dependency to widowers, we affirm the decision of the WCAB.

Affirmed.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with LEVIN, J.

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[15] See *Thomas Canning Co v Johnson,* 212 Mich 243, 249; 180 NW 391 (1920); *Congresshills Apartments v Ypsilanti Twp,* 102 Mich App 668, 675; 302 NW2d 274 (1981).

PEOPLE v WILLIAMS

Docket No. 67830. Decided March 2, 1982. On application by the people for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and remanded for consideration of other questions.

J. D. Williams was tried in the Recorder's Court of Detroit, Dalton A. Roberson, J., for first-degree murder and possession of a firearm in the commission of a felony. After the trial court directed a verdict of acquittal for a codefendant, Williams requested an instruction to the jury that he could be convicted of being an accessory after the fact. The trial court so instructed the jury, and Williams was convicted of being an accessory after the fact and of felony-firearm. The Court of Appeals, Maher, P.J., and M. J. Kelly and R. B. Burns, JJ., reversed and remanded in an unpublished per curiam opinion on the ground that Williams was not charged in the information as an accessory after the fact (Docket No. 52726). The people appeal.

In a unanimous opinion per curiam, the Supreme Court *held:*

The defendant's action in prevailing upon the trial court to instruct the jury on the charge of accessory after the fact was the equivalent of a motion to amend the information. The defendant will not be heard to complain that the jury convicted him of a crime that his attorney argued should be an option for conviction and urged upon the jury as the only crime of which the defendant might be guilty. Since the defendant urged the extension of this option to the jury, he cannot argue that amendment was unfair because of lack of notice.

Reversed and remanded to the Court of Appeals for consideration of other issues not addressed by it.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people.

*Robert E. Slameka* for defendant.

PER CURIAM. The question presented in this case is whether a defendant who requests that the jury be instructed that it might convict him of a certain crime is entitled, after conviction of that crime, to a reversal on the basis that the crime was not charged in the information. We conclude in this case that the defendant's request for an instruction was the functional equivalent of a motion to amend the information which was granted by virtue of the court's instruction to the jury.

I

The defendant and a codefendant were charged with first-degree murder contrary to MCL 750.316; MSA 28.548 and with possession of a firearm in the commission of a felony contrary to MCL 750.227b; MSA 28.424(2). The trial court granted the codefendant's motion for a directed verdict of acquittal. At this point counsel for the defendant requested that the court instruct the jury that it could convict the defendant of being an accessory after the fact. Counsel stated:

> "I can still ask for an accessory after the fact because in the indictment it charges two of them with the commission of this crime. The complaint and warrant charges two people.
>
> "I have a right to go along and base my case, base my premise that my client was nothing more than an accessory after the fact."

The prosecutor did not object to the giving of an accessory-after-the-fact instruction and the trial court did so instruct. The jury convicted the defendant of being an accessory after the fact and of

possession of a firearm in the commission of a felony.

The defendant appealed to the Court of Appeals. In an unpublished per curiam opinion the Court of Appeals reversed, stating:

"The distinction between principals and accessories has been abrogated by statute, MCL 767.39; MSA 28.979. However, the distinction between a principal and an accessory after the fact remains. Accessory after the fact is a separate and distinct offense not included in the original charge. Thus, the offense must be charged in a separate count. *People v Bargy,* 71 Mich App 609; 248 NW2d 636 (1976).

"The prosecution did not charge the defendant as an accessory after the fact, and the trial judge should not have instructed the jury on that charge."

The prosecutor has applied for leave to appeal.

II

As noted earlier in this opinion it was the defendant, through his attorney, who successfully argued to the trial court that the question of his possible guilt of being an accessory after the fact should be submitted to the jury. Indeed, in his closing argument to the jury, defense counsel stressed that if the defendant was guilty of any crime, it was of being an accessory after the fact.

MCL 767.76; MSA 28.1016 provides:

"No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to

the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted."

We regard the defendant's action in prevailing upon the trial court to instruct the jury on the charge of accessory after the fact to have been the equivalent of a motion to amend the information pursuant to the above-quoted statute. The prosecutor voiced no objection and the trial court agreed to so instruct the jury, thus effectively amending the information. The defendant will not be heard to complain of the fact that the jury ultimately convicted him of a crime which his attorney argued should be an option for conviction by the jury and which defense counsel urged upon

the jury as the only possible crime of which the defendant might be guilty. Since it was the defendant himself who was urging the extension of this option to the jury, he certainly cannot argue that an amendment of the information in this respect was unfair because of a lack of notice.

The defendant raised other issues in the Court of Appeals which were not addressed by that Court in light of its disposition of the issue we have addressed here. Accordingly, upon remand to the Court of Appeals, the Court shall address those issues.

Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand the case to the Court of Appeals for resolution of the other issues raised by the defendant. We do not retain jurisdiction.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

PIWOWARSKI v DETROIT SULPHITE PULP & PAPER COMPANY

Docket No. 64010. Argued December 10, 1980 (Calendar No. 5).—Decided March 9, 1982.

Ignatius Piwowarski, who is now deceased and succeeded by his widow, plaintiff Albina Piwowarski, in 1970 claimed workers' compensation benefits against his former employer, Detroit Sulphite Pulp & Paper Company, its insurer, Liberty Mutual Insurance Company, and the Second Injury Fund for the loss of the industrial use of both hands as the result of an industrial accident in 1948 in which he lost his right hand and three fingers of his left hand. He had received specific-loss benefits for the injury. A hearing referee of the Bureau of Workers' Compensation denied the claim, deciding that the decedent had not suffered the loss of the industrial use of his left hand. The Workers' Compensation Appeal Board, *sua sponte,* applied the one-year-back rule to deny payment of benefits. The Court of Appeals, Bashara, P.J., and Bronson and Simon, JJ., in an unpublished per curiam opinion, reversed and remanded for review of the factual issue (Docket No. 31143). On remand, the Workers' Compensation Appeal Board awarded benefits for total and permanent disability. The Court of Appeals, D. E. Holbrook, Jr., P.J., and Allen and MacKenzie, JJ., denied leave to appeal and to cross-appeal (Docket Nos. 45118, 45520). The Second Injury Fund appeals, asserting that the one-year-back rule applies.

In an opinion per curiam by Justices Kavanagh, Williams, Levin, and Moody, the Supreme Court *held:*

An application for payment for the same category of disability is an application for "further compensation" within the meaning of the one-year-back rule; however, compensation for a second disability is not so limited. The petition in which the plaintiff's decedent requested benefits for total and permanent disability did not constitute an application for "further compensation" within the meaning of the one-year-back limitation

REFERENCES FOR POINTS IN HEADNOTES

[1-4] 82 Am Jur 2d, Workmen's Compensation §§ 333, 344, 382, 605.

provision, because specific-loss benefits and total and permanent disability benefits are not for the same category of disability, but rather are for distinct categories of disability. It follows that the one-year-back rule does not limit the obligation of the Second Injury Fund to pay benefits for the total and permanent disability of the decedent. Accordingly, the award of benefits is affirmed in part and the matter is remanded to the Court of Appeals for resolution of another issue. Because of the holding on the one-year-back rule, it is unnecessary to consider the question of waiver of the defense.

Reversed.

Chief Justice Coleman, joined by Justices Fitzgerald and Ryan, dissented from that part of the opinion of the Court which held that the one-year-back rule does not apply. The basic categories of workers' compensation benefits are comprised of wage-loss and specific-loss benefits. Benefits for total and permanent disability are conditioned on a loss of, or a loss of the industrial use of, specified parts of the body and carry with them a conclusive presumption of disability. Therefore, such benefits are more analogous to specific-loss benefits than to wage-loss benefits. In this case the plaintiff does not claim that there was any further disability or development of the decedent's disability, and the hearing referee found that the decedent lost the use of his hands on the date of the original injury. Therefore, the one-year-back rule should be applied. The defendant Second Injury Fund did not waive the defense of the one-year-back rule by failing to assert it before the Workers' Compensation Appeal Board because the hearing referee never reached the issue but found that the decedent was not totally and permanently disabled. Until a determination is made that an employee is entitled to additional benefits there is no reason to raise the defense of the one-year-back rule.

OPINION OF THE COURT

1. WORKERS' COMPENSATION — FURTHER COMPENSATION — ONE-YEAR-BACK RULE.

An application for workers' compensation benefits for the same category of disability is an application for "further compensation" subject to the one-year-back rule of the statute which limits the retroactive award of workers' compensation to the year immediately preceding the application for further compensation, but an application for compensation for a second disability is not so limited (MCL 418.833[1]; MSA 17.237[833][1]).

2. WORKERS' COMPENSATION — FURTHER COMPENSATION — ONE-YEAR-BACK RULE.

The one-year-back rule of the statute which limits the retroactive award of workers' compensation to the year immediately preceding an application for "further compensation" does not limit the obligation of the Second Injury Fund to pay benefits for total and permanent disability where the benefits previously paid were specific-loss benefits (MCL 418.833[1]; MSA 17.237[833][1]).

DISSENTING OPINION BY COLEMAN, C.J.

3. WORKERS' COMPENSATION — FURTHER COMPENSATION — ONE-YEAR-BACK RULE — TOTAL DISABILITY.

*The one-year-back rule of the statute which limits the retroactive award of workers' compensation to the year immediately preceding an application for further compensation limits the obligation of the Second Injury Fund to pay benefits for total and permanent disability where specific-loss benefits were previously paid for the same injury, loss of the use of hands, and the applicant did not suffer any further development of his disability (MCL 418.833[1]; MSA 17.237[833][1]).*

4. WORKERS' COMPENSATION — FURTHER COMPENSATION — ONE-YEAR-BACK RULE — WAIVER OF DEFENSES.

*Until a determination is made that an employee is entitled to additional benefits there is no reason to raise the defense of the one-year-back rule which limits the retroactive award of workers' compensation; therefore, the Second Injury Fund did not waive the defense of the one-year-back rule by failing to assert it before the Workers' Compensation Appeal Board where the hearing referee never reached the issue but found that the employee was not totally and permanently disabled (MCL 418.833[1]; MSA 17.237[833][1]).*

*Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* (by *Monica Farris Linkner)* for plaintiff.

*John R. Brown, P.C.,* for defendants Detroit Sulphite Pulp & Paper Company and Liberty Mutual Insurance Company.

*Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Morrison Zack,*

Assistant Attorney General, for defendant Second Injury Fund.

PER CURIAM. The issue in this case is whether the "one-year-back rule"[1] limits the obligation of the Second Injury Fund[2] to pay this plaintiff benefits for the total and permanent disability of her decedent.[3] To decide this question, we must first determine whether a request that benefits be paid for total and permanent disability is a request for "further compensation", where the benefits previously paid were specific-loss benefits.[4]

## I

In late 1948, plaintiff's decedent lost his right hand and three fingers of his left hand in an industrial accident. He received specific-loss benefits for his injuries. In 1970, he filed a petition

[1] In 1948, when plaintiff's decedent was injured, the one-year-back rule was found in 1948 CL 413.14; MSA 17.188. It read:

"If payment of compensation is made (other than medical expenses) and an application for further compensation is later filed with the commission, no compensation shall be awarded by the commission for any period which is more than 1 year prior to the date of the filing of such application."

The present formulation of the one-year-back rule is found in MCL 418.833(1); MSA 17.237(833)(1):

"If payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application."

[2] See MCL 418.501(1) *et seq.*; MSA 17.237(501)(1) *et seq.*

[3] In our order granting leave to appeal, we directed the parties "to include among the issues to be briefed the question of whether the refusal to apply the provisions of MCL 418.833(1); MSA 17.237(833)(1), the 'one-year-back rule', to the Second Injury Fund's liability for the payment of accrued total and permanent disability benefits constitutes reversible error". *Piwowarski v Detroit Sulphite Pulp & Paper Co,* 408 Mich 958 (1980).

[4] For the provisions in effect at the time of the injury, see 1948 CL 412.10; MSA 17.160. The present provisions are found in MCL 418.361; MSA 17.237(361).

claiming total and permanent disability as a result of the loss, in the 1948 accident, of the industrial use of both hands.

After the hearing referee decided that plaintiff's decedent had not suffered the loss of the industrial use of his left hand, the case was taken to the Workers' Compensation Appeal Board. The WCAB chose not to decide the factual issue of industrial use; instead, it *sua sponte* applied the one-year-back rule to deny payment of benefits for total and permanent disability. The Court of Appeals reversed and remanded, however, citing *Kleinschrodt v General Motors Corp,* 402 Mich 381, 384; 263 NW2d 246 (1978), in which we had said,

"We are of the opinion that the one-year-back provision is a defense, akin to the statute of limitations, which can be waived. It is not jurisdictional."

On remand, the WCAB reversed the referee and found that plaintiff's decedent had lost the industrial use of both hands. Benefits for total and permanent disability were awarded. The Court of Appeals denied the Second Injury Fund's application for leave to appeal and the plaintiff's delayed application for leave to cross-appeal. We subsequently granted leave to appeal.

In its brief to this Court, appellant fund now concedes that plaintiff's decedent suffered the loss of the industrial use of both hands in the 1948 accident. We are asked, though, to deny total and permanent disability benefits for plaintiff's decedent on the authority of the one-year-back rule.

## II

In *Martin v Somberg-Berlin Metals Co,* 407 Mich 737, 740-742; 288 NW2d 574 (1980), we explained,

"The argument of the Second Injury Fund in essence

is that the one-year-back rule admits of no exceptions and consequently *every* claim for compensation after compensation has once been paid is an application for 'further compensation' subject to the rule.

"While it may be literally true that once a worker has received compensation any compensation paid to that worker thereafter may be termed 'further compensation' that phrase in the one-year-back rule has not been so read over the years.

"In *Morgan v Lloyds Builders, Inc,* 344 Mich 524; 73 NW2d 880 (1955), the Court said:

" 'We find that the petition entitled, "application for hearing and adjustment of claim," filed by the plaintiff dated July 28, 1953, is not a petition for further compensation for loss of time or employment, but is a petition for loss of vision in the right eye. Without any deduction for the compensation heretofore paid for loss of time or employment, plaintiff is entitled to receive compensation for specific loss of eye, according to [MCL 412.10; MSA 17.160] of $26 per week, for a total of 150 weeks from May 9, 1951.' *Id.,* 528-529,

"and refused to apply the one-year-back rule.

"The WCAB has correctly regarded *Morgan* as authority for distinguishing among 'categories' of disability in determining whether an application is for 'further compensation' within the rule.

"Resumption of payment for the same category of disability results in 'further compensation' subject to the one-year-back rule. *Lynch v Briggs Manufacturing Co,* 329 Mich 168; 45 NW2d 20 (1950).

"If compensation is paid for a particular disability (general on account of back injury) and subsequently another disability is determined (total and permanent on account of loss of industrial use of legs) compensation for the second disability is not 'further compensation' subject to the one-year-back rule but is a separate 'category' not so limited. *Morgan, supra.*

"In this case no compensation has been paid for the 'total and permanent' disability resulting from the loss of industrial use of claimant's legs and hence the award of differential benefits is not 'further compensation' subject to the one-year-back rule." (Emphasis in original.)

The petition in which plaintiff's decedent requested total and permanent disability benefits did not constitute an application for "further compensation" within the meaning of the one-year-back provision. Specific-loss benefits and total and permanent disability benefits are not for the "same category of disability" but rather are for distinct categories of disability. It follows from *Martin* that the one-year-back rule does not limit the obligation of the Second Injury Fund to pay this plaintiff benefits for the total and permanent disability of her decedent.

In light of this holding, it is unnecessary for us to determine whether the fund's failure to assert the one-year-back rule defense at its first opportunity constitutes a permanent waiver of that defense.

Accordingly, we affirm, in part, the award of the WCAB and, for resolution of another issue framed by the fund,[5] we remand the matter to the Court of Appeals for consideration as on leave to appeal granted.

KAVANAGH, WILLIAMS, LEVIN, and BLAIR MOODY, JR., JJ., concurred.

COLEMAN, C.J. *(dissenting).* In 1948, plaintiff's decedent lost his right hand and three fingers of his left hand in an industrial accident. He received specific-loss benefits for his injuries. In 1970, he filed a petition for total and permanent disability benefits based on the loss of the use of both hands

[5] "Under the provisions of MCL 412.10; MSA 17.160, as amended by 1956 PA 195, effective August 1, 1956, and MCL 412.9; MSA 17.159, does the Court of Appeals failure to correct the appeal board's order imposing on the Second Injury Fund 350 weeks of the employer's liability for basic compensation and failure to limit the fund's liability for differential benefits to August 1, 1956 constitute error and require modification?"

resulting from the 1948 injury, but alleging no further development of the injury.

The hearing referee found that plaintiff's husband had not established the loss of the use of both hands. On appeal, the Workers' Compensation Appeal Board (WCAB) affirmed the denial of benefits, holding *sua sponte* that MCL 418.833(1); MSA 17.237(833)(1)[1] limited its authority to award benefits in this case. The Court of Appeals reversed and remanded, holding that the WCAB erred in raising the one-year-back rule *sua sponte,* see *Kleinschrodt v General Motors Corp,* 402 Mich 381; 263 NW2d 246 (1978).

On remand, the WCAB found that plaintiff's husband lost the industrial use of his hands in 1948 and awarded total and permanent disability benefits. The Court of Appeals denied leave to appeal. On June 20, 1980, this Court granted the Second Injury Fund's application for leave to appeal.

The per curiam would affirm the WCAB's decision that the limitations contained in MCL 418.833(1); MSA 17.237(833)(1) did not preclude the award of total and permanent disability benefits in this case. The Court also remands the case to the Court of Appeals to consider another issue raised by appellant.

I am writing separately to express my disagreement with that part of the opinion which holds

[1] MCL 418.833; MSA 17.237(833) provides:

"(1) If payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application.

"(2) When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than 1 year prior to the date of taking such action."

that the one-year-back rule does not apply in this case.

I

In *Martin v Somberg-Berlin Metals Co,* 407 Mich 737; 288 NW2d 574 (1980), this Court considered the scope of the one-year-back rule. In *Martin,* plaintiff received wage-loss benefits for a back injury and later filed a claim for total and permanent disability benefits based on subsequent loss of industrial use of his legs. Apparently finding a *further development* of plaintiff's injury,[2] the hearing referee declined to apply the one-year-back rule. This Court affirmed that determination saying:

"If compensation is paid for a particular disability (general on account of back injury) and subsequently another disability is determined (total and permanent on account of loss of industrial use of legs) compensation for the second disability *is not 'further compensation' subject to the one-year-back rule but is a separate 'category' not so limited."* (Emphasis added.)

This language in the *Martin* opinion suggests that the primary focus is upon whether an injured worker's latter claim for benefits is based on a disability in the same or a different category vis-à-vis the earlier claim. No definition of categories is expressly given in the opinion. Although wage-loss benefits are described as being in a category different from total and permanent disability benefits,

[2] In *Martin v Somberg-Berlin Metals Co,* 407 Mich 737; 288 NW2d 574 (1980), the plaintiff was injured in 1963. He asserted the condition had worsened and the hearing referee determined that plaintiff became totally and permanently disabled in August of 1965. Thus, even though the opinion does not expressly state that plaintiff suffered a further development of his original injury, a review of the underlying facts indicates he did suffer a further development.

*Martin* does not address the issue of whether specific-loss and total and permanent disability benefits are in the same or a different category for the purpose of the one-year-back rule; nor do any of the cases cited in *Martin.* Furthermore, none of the cases cited by the parties or uncovered by this author's research answers the question of whether these benefits are in the same or a different category for the purpose of the one-year-back rule.

However, in *Hutsko v Chrysler Corp,* 381 Mich 99, 102; 158 NW2d 874 (1968), this Court explained the differences between wage-loss disability benefits and specific-loss benefits saying,

> "Michigan has 2 types of workmen's compensation benefits, wage loss disability payments and specific or schedule loss payments. The first type is dependent upon proof of a wage loss resulting from an industrial injury. It is a differential payment computed on what wage the injured workman is able to earn after his injury and the wage he was earning at the time he was injured. If there is no difference he receives no benefits. The second type is a specific loss benefit paid under a schedule of losses applicable to certain designated organs or anatomical members. To this benefit the injured workman is entitled during the period provided in the schedule, irrespective of any wages he receives whether greater or less than those he received at the time of his injury."

I conclude that these two basic types of benefits, wage-loss and specific-loss, comprise the basic categories of benefits referred to in *Martin.* Furthermore, in light of *Hutsko, supra,* total and permanent disability payments are more analogous to specific-loss benefits than wage-loss benefits. We recognize that total and permanent disability benefits include features found in both wage-loss and specific-loss benefits. However, given (1) that such

benefits are conditioned upon a loss of or loss of use of specified body members, see MCL 418.361(2); MSA 17.237(361)(2), and (2) that such benefits carry with them a conclusive presumption of disability, see MCL 418.351(1); MSA 17.237(351)(1), I would conclude that such benefits are in the same category as specific-loss benefits for the purposes of the one-year-back rule.

Importantly in this case, plaintiff's decedent did not claim that any further disability or development of his disability occurred which may have excepted him from the one-year-back rule. The hearing referee determined that he lost the use of his hands on the day of his original injury.

Because plaintiff's husband's second application for benefits was based on a disability in the same category as his earlier application,[3] and he did not suffer any further development of his disability, the one-year-back rule should be applicable to this situation.

## II

Plaintiff responds by arguing that even if that is the case, defendants waived the one-year-back rule defense by not raising it before the WCAB. In *Kleinschrodt, supra,* upon which plaintiff relies, plaintiff was awarded benefits by the hearing referee. Defendant appealed to the WCAB, raising the single issue of whether plaintiff had lost the industrial use of his hand. Under these circum-

[3] Although no one expressly raises the issue, the one-year-back rule would apply to preclude the WCAB from awarding further specific-loss benefits for the loss of plaintiff's husband's left hand. He had already received specific-loss benefits for the loss of three fingers on that hand. His later petition for specific-loss benefits for the loss of his hand was for benefits in the same category as those claimed in his earlier petition. No further development of the disability occurred. Following *Martin, supra,* these benefits should have been denied.

stances, the Court held that defendant waived the "one-year-back" rule by not asserting it before the WCAB in its appeal.

In the instant case, the hearing referee found that plaintiff's husband was not totally and permanently disabled and denied benefits. Plaintiff appealed to the WCAB raising the single issue of whether he had lost the industrial use of his hands. Under these circumstances, *the defendant could not have appealed the hearing referee's ruling on the one-year-back rule because the hearing referee never passed on that issue but found that plaintiff's husband was not totally and permanently disabled.*

Until a determination is made that an employee is entitled to additional benefits, there is no reason for the defendant to raise this issue. No authority is cited requiring that this defense be raised in a void in the first responsive pleading or be waived, compare GCR 1963, 116.2.[4] Accordingly, under the circumstances of the instant case, I would hold that defendant did not waive the one-year-back rule defense by failing to assert it before the WCAB during plaintiff's appeal. It is a costly mistake to extend the holding in *Kleinschrodt* beyond the facts presented in that case.[5]

In conclusion, I would hold that plaintiff's second application for benefits based on total and

[4] GCR 1963, 116.2 provides:

"The defense of lack of jurisdiction over the person or property is waived unless made in the responsive pleading or motion first filed. * * *"

[5] Note that I dissented in *Kleinschrodt* (RYAN, J., *concurring),* and would have adhered to the rule of law applied in *Loucks v Bauman,* 356 Mich 514; 97 NW2d 321 (1959). However, this case is distinguishable from *Kleinschrodt.*

permanent disability was in the same category and for the same injuries as the specific injuries suffered in 1948 and duly compensated and I would affirm the WCAB holding that the one-year-back rule applies.

FITZGERALD and RYAN, JJ., concurred with COLEMAN, C.J.

BEACH v CITY OF SALINE

Docket No. 66265. Decided March 9, 1982. On application by the plaintiff for leave to appeal the Supreme Court, in lieu of granting leave to appeal, affirmed the judgment of the Court of Appeals in part. Rehearing denied 413 Mich 1108.

Hubert Beach brought an action against the City of Saline and its mayor, council, and clerk seeking to enjoin a purchase by the city of certain real property and to compel a referendum on the purchase. The Washtenaw Circuit Court, Henry T. Conlin, J., entered a judgment for the defendants. The Court of Appeals, D. C. Riley, P.J., and N. J. Kaufman and MacKenzie, JJ., affirmed (Docket No. 48847). The plaintiff applies for leave to appeal.

In an opinion per curiam signed by Chief Justice Coleman and Justices Kavanagh, Levin, Fitzgerald, Ryan, and Moody, the Supreme Court *held:*

The words "initiative" and "referendum" have a legislative connotation. The right of referendum authorized by the home-rule act extends only to legislative acts of local government. There is nothing inherently legislative about a decision to acquire real estate. That part of the judgment of the Court of Appeals holding that the purchase by the city of real property constitutes an administrative act not subject to a referendum is affirmed.

Justice Williams concurred in the result.

101 Mich App 795; 300 NW2d 698 (1980) affirmed.

*Harris, Lax, Gregg & Guenzel* for plaintiff.

*Allan W. Grossman,* City Attorney, for defendants.

PER CURIAM. We examine the question of whether the acquisition of 160 acres of real property by the City of Saline is subject to referendum. We conclude that it is not and we affirm the

judgments of the Court of Appeals and of the trial court.

I

On October 11, 1976, the Saline City Council adopted a resolution authorizing the city attorney to file a request with the State Boundary Commission for annexation to the city of 160 acres of property. On November 23, 1977, the city obtained an option to purchase the property, and on January 23, 1978, the city council adopted a resolution exercising the option. On February 22, 1978, the plaintiff filed three petitions for referendum with the city clerk. One of the petitions which plaintiff sought to be submitted to the electorate concerned whether the city should purchase the property authorized by the city council resolution. When the city refused to submit the propositions to the electorate, plaintiff filed suit in Washtenaw Circuit Court seeking to enjoin the city from closing the purchase of the property and to compel the referendums. The circuit court entered a judgment in favor of the city and the Court of Appeals affirmed.

II

In *West v Portage,* 392 Mich 458, 465-466; 221 NW2d 303 (1974), the lead[1] opinion by Justice LEVIN concludes that a right of referendum authorized by the home-rule act[2] extends only to legisla-

[1] "Since neither opinion obtained four signatures, neither is binding under the doctrine of stare decisis." *People v Jackson,* 390 Mich 621, 627; 212 NW2d 918 (1973). The reference was to a case in which all seven Justices participated. See *Negri v Slotkin,* 397 Mich 105; 244 NW2d 98 (1976).

[2] See MCL 117.4i(6); MSA 5.2082(6).

tive acts:

> "We hold that the words 'initiative' and 'referendum' are themselves an implicit limitation on the matters that may properly be the subject of an initiative or referendum, and that the Legislature did not in 1909 intend to confer on the electors of home-rule cities the power to vote on questions not truly legislative in character."

The opinion was signed by three Justices, one Justice concurring in the result. In *Rollingwood Homeowners Corp, Inc v City of Flint,* 386 Mich 258, 268; 191 NW2d 325 (1971), the Court stated that "[t]here is nothing inherently legislative about a decision to acquire real estate". We are of the view that the opinion of Justice LEVIN in *West, supra,* correctly and adequately treats the governing legal principle and adopt the reasoning and conclusion of Justice LEVIN in part I of *West.*

Accordingly, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we affirm that part of the Court of Appeals judgment holding that the action of the City of Saline in purchasing real property constitutes an administrative act not subject to a referendum. In all other respects the application for leave to appeal is denied because the Court is not persuaded that the question presented should be reviewed by this Court.

No costs, a public question being involved.

COLEMAN, C.J., and KAVANAGH, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

WILLIAMS, J., concurred in the result on the basis of *Rollingwood Homeowners Corp, Inc v City of Flint, supra.*

# ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

PEOPLE v PEQUES. (Docket No. 65655.) This matter being presently before us pursuant to an order of the United States Supreme Court which vacated our judgment (410 Mich 894) and remanded the matter to this Court to consider whether our judgment was based upon federal or state constitutional grounds, or both, this matter is so considered on November 4, 1981, and we affirm the judgment of the Court of Appeals. *People v Peques,* 104 Mich App 45 (1980). Our affirmance is predicated upon Const 1963, art 1, § 17 and this Court's general superintendence of the state judiciary under Const 1963, art 6, § 4. The stay of resentencing previously ordered by this Court is dissolved.

WILLIAMS and BLAIR MOODY, JR., JJ., dissent, in part, and state as follows:

We would set aside that part of the judgment of the Court of Appeals which found that the defendant was entitled to resentencing by a different judge.

In making a sentence determination, it is within the discretion of the trial judge to consider as an aspect of remorse whether a defendant has or has not cooperated with law enforcement authorities. However, the recommendation of the trial judge to the Department of Corrections proposing future punishment if the defendant remains uncooperative is coercive and improper.

PEOPLE v MARTINEZ. (Docket No. 66788.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Annette M. Olejarz,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Lynn Chard,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49664, per curiam opinion of February 11, 1981.

MALE v GRAND RAPIDS EDUCATION ASSOCIATION. (Docket No. 65898.) Leave to appeal denied November 4, 1981. *Miller, Johnson, Snell & Cummiskey* for plaintiff-appellee. *Foster, Swift, Collins & Coey, P.C.,* for defendants-appellants. Reported below: 98 Mich App 742.

*In re* ZAHARION ESTATE, ZAHARION v SECURITY NATIONAL BANK. (Docket No. 64855.) Leave to appeal having been granted, oral arguments heard, an amplification of findings of fact received from the trial court pursuant to this Court's remand order, and supplemental briefs submitted by the parties; because it appears from the amplified record that the trial court found no constructive delivery occurred in this case and that the Court of Appeals decision, insofar as it reversed the circuit court, is premised on the assumption that constructive delivery occurred, we vacate the Court of Appeals judgment and reinstate the final judgment of the probate and circuit courts on November 4, 1981. In all other respects, we deny further review or relief. *Early, Starbuck & Lennon* for plaintiff-appellee. *Vandervoort, Cooke, McFee, Christ, Carpenter & Fisher* for defendants-appellants. Reported below: 95 Mich App 70.

PEOPLE v BERCEL. (Docket No. 67323.) Leave to appeal and cross-appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John D. Foresman,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant-cross-appellee. *Michael D. Lewis, P.C.,* for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 47914, per curiam opinion of May 8, 1981.

COLEMAN, C.J., and WILLIAMS and BLAIR MOODY, JR., JJ., would grant leave to appeal.

PEOPLE v LOTTER. (Docket No. 66688.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Earl H. Morgan, Jr.,* Prosecuting Attorney, for the people. *George Geddis, III,* for defendant-appellant. Reported below: 103 Mich App 386.

PEOPLE v HOWARD. (Docket No. 66794.) Leave to appeal considered November 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals and of the Recorder's Court for the City of Detroit, and set aside defendant's plea-based convictions. GCR 1963, 785.7(1)(b); *People v Jones,* 410 Mich 407 (1981). We remand the case to the Recorder's Court for the City of Detroit for further proceedings. Anthony Howard, *in propria persona,* appellant. Case below, Court of Appeals No. 51083, order of December 12, 1980.

FINK v PHYSIO-CONTROL CORPORATION. (Docket No. 67473.) Leave to appeal denied November 4, 1981. *Lakin, Worsham & Victor, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 57610, order of June 8, 1981.

PEOPLE v MITCHELL. (Docket No. 66600.) Leave to appeal considered November 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Recorder's Court for the City of Detroit for a new trial at which defendant is to be tried for second-degree murder and felony-firearm. *People v McMiller,* 389 Mich 425 (1973), and *Guilty Plea Cases,* 395 Mich 96, 118, 135-136 (1975), prevent defendant's retrial on the original charge where defendant's guilty plea is set aside for noncompliance with mandatory provisions of the guilty plea rule, GCR 1963, 785.7. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-appellant. Reported below: 102 Mich App 554.

PEOPLE v MILLARD LOFTIS. (Docket No. 67681.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Artis M. Noel,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. *Hubbard, Fox, Thomas, White & Bengtson, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 48410, per curiam opinion of July 10, 1981.

ATTORNEY GENERAL *ex rel* DIRECTOR, DEPARTMENT OF COMMERCE v BETA-X CORPORATION. (Docket No. 66595.) Leave to appeal granted November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Edwin M. Bladen* and *Marc A. Goldman,* Assistants Attorney General, for plaintiff-appellant. *Warner, Norcross & Judd* for Michigan Association of Independent Businesses as amicus curiae. Reported below: 103 Mich App 51.

PEOPLE v SANCHEZ. (Docket No. 66726.) Leave to appeal denied November 4, 1981, because the application was filed more than six months after the decision of the Court of Appeals. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *James A. Christopherson,* Assistant Prosecuting Attorney, for the people. *John V. Dughie* for defendant-appellant. Reported below: 98 Mich App 562.

PEOPLE v COLEMAN. (Docket No. 66709.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *John H. MacFarlane,* Chief Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45103, per curiam opinion of February 6, 1981.

PEOPLE v ASKEW. (Docket No. 67729.) Leave to appeal considered November 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals which denied defendant's motion to remand. Since the defendant's motion to remand identifies issues sought to be reviewed on appeal which should be initially decided by the trial judge, the Court of Appeals should have granted defendant's motion to remand to the trial court. GCR 1963, 817.6. The matter is remanded to the Court of Appeals which shall, while retaining jurisdiction, remand the matter to the Washtenaw Circuit Court for a hearing on defendant's allegations. We do not retain jurisdiction. *Paul Michael Thoen* for defendant-appellant. Case below, Court of Appeals No. 53903, order of July 23, 1981.

WOODY v HAVIR MANUFACTURING COMPANY. (Docket No. 66577.) Leave to appeal denied November 4, 1981. *Seymour Berger* for plaintiff-appellant. *MacArthur & Cheatham, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 78-3850, per curiam opinion of November 24, 1980.

PEOPLE v OLIVER. (Docket No. 66516.) Leave to appeal granted November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. Gregory

Kent Oliver, *in propria persona,* appellant. Case below, Court of Appeals No. 78-4182, per curiam opinion of October 27, 1980.

HARRIS v CITY OF DETROIT. (Docket No. 66602.) Leave to appeal denied November 4, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Caleb B. Martin, Jr.,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Reported below: 103 Mich App 136.

J & I SERVICE STATION, INC v CONSUMERS PETROLEUM COMPANY. (Docket No. 66564.) Leave to appeal denied November 4, 1981. *Stephen M. Landau, P.C.,* for plaintiff-appellee. *Cole & Tamsen* for defendant-appellant. Case below, Court of Appeals No. 52389, order of December 29, 1980.

*In re* DARDZINSKI ESTATE, KULONGOSKI v WECHSLER. (Docket No. 66590.) Leave to appeal denied November 4, 1981. *Raymond W. Krolikowski* for appellants. *John F. Gilhool* for appellees. Case below, Court of Appeals No. 51047, order of November 5, 1980.

HUXTABLE v MERIDIAN CHARTER TOWNSHIP BOARD OF TRUSTEES. (Docket Nos. 66507, 66508.) Leave to appeal denied November 4, 1981. *MacLean, Seaman, Laing & Guilford* for plaintiffs-appellees. *Foster, Swift, Collins & Coey, P.C.,* for defendant-appellant. *Lester N. Turner, P.C.,* for intervening defendants-appellants George and Lewis Eyde. Reported below: 102 Mich App 690.

PEOPLE v HOLDMAN. (Docket No. 66774.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter E. Deegan,* Prosecuting Attorney, and *Peter R. George,* Chief Appellate Attorney, for the people. State Appellate Defender, *F. Martin Tieber,* Deputy Defender, for defendant-appellant. Case below, Court of Appeals No. 78-4598, memorandum opinion of September 10, 1980.

KAVANAGH, J., would grant leave to appeal.

MOUNT CLEMENS THEATRICAL UNION, LOCAL 735 v R & R THEATRE COMPANY, INC. (Docket No. 67191.) Leave to appeal denied November 4, 1981. *Greenspon, Scheff & Washington* for plaintiff-appellee. *Bres-*

*kin & Gunsberg, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 54310, order of March 9, 1981.

PONTIAC SCHOOL DISTRICT v BLOOMFIELD TOWNSHIP. (Docket No. 66388.) Leave to appeal granted November 4, 1981. *Clark, Hardy, Lewis, Fine & Pollard, P.C.,* for plaintiff-appellant. *Dillon & Ryan* for defendant-appellee. Case below, Court of Appeals No. 47154, per curiam opinion of October 2, 1980.

MEACHUM v DONOVAN. (Docket No. 66204.) Leave to appeal denied November 4, 1981. *Olds, Sievers, MacKinder, Dunton & Ward* for plaintiff-appellee. *Globensky, Gleiss, Henderson & Bittner* for defendants-appellants. Case below, Court of Appeals No. 43856, per curiam opinion of October 1, 1980.

PEOPLE v PRICE. (Docket No. 64619.) Leave to appeal considered November 4, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we set aside the defendant's sentence and we remand the matter to the trial court for resentencing after preparation and consideration of an updated presentence report. *People v Triplett,* 407 Mich 510 (1980). Robert Keith Price, *in propria persona,* appellant. Case below, Court of Appeals No. 48024, order of January 24, 1980.

PEOPLE v PURIFOY. (Docket No. 64018.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 79-3678, order of October 16, 1979.

MIKLIK v MICHIGAN SPECIAL MACHINE COMPANY. (Docket No. 66306.) Leave to appeal granted November 4, 1981. *William Ross* for plaintiff-appellee. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 51003, order of December 3, 1980.

PEOPLE v FREEMAN. (Docket No. 67665.) Leave to appeal considered November 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals

for consideration as on leave granted. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 57611, order of June 29, 1981.

PEOPLE v DELONGCHAMPS and PEOPLE v MICK. (Docket Nos. 66608, 66609.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Rasdale,* Assistant Prosecuting Attorney, for the people. *Richard G. Chosid* for defendants-appellants. Reported below: 103 Mich App 151.

BOUYER v AUTO-OWNERS INSURANCE COMPANY. (Docket No. 66713.) Leave to appeal considered November 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Lipton, Papista & Garfinkle, P.C.,* for plaintiff-appellant. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendant-appellee. Case below, Court of Appeals No. 51412, order of February 5, 1981.

DEPARTMENT OF NATURAL RESOURCES v HERMES. (Docket No. 66738.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman, Donald K. Goulais,* and *Susan Peck Iannotti,* Assistants Attorney General, for plaintiff-appellee. *Green, Renner, Weisse, Rettig, Rademacher & Clark* for defendant-appellant. Reported below: 101 Mich App 517.

PEOPLE v BLANKENSHIP. (Docket No. 67954.) Leave to appeal denied November 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Judy H. Hughes,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. *David H. Tripp* for defendant-appellee. Reported below: 108 Mich App 794.

MICHIGAN NATIONAL LEASING CORPORATION v CARDILLO. (Docket No. 66680.) Leave to appeal granted November 4, 1981. *Donovan, Hammond, Carson, Ziegelman, Roach & Sotiroff* for plaintiff-appellee.

*Austin D. Perrotta* for defendant-appellant. Reported below: 103 Mich App 427.

Reconsideration granted May 28, 1982. It appearing that this case is not jurisprudentially significant in view of the enactment of 1982 PA 216, the November 4, 1981 order is vacated and leave to appeal is denied.

FITZGERALD, J., not participating.

PEOPLE v ROY LOFTIS. (Docket No. 65447.) Leave to appeal considered November 4, 1981 and in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the defendant's conviction and remand the case to Wayne Circuit Court for new trial. Over defense objection, the hearsay statement of an absent witness that the defendant "always gives me a sample" of heroin was admitted into evidence. This statement was against the penal interest of both the absent witness and the defendant. The statement should have been excluded under MRE 403 because its "probative value is substantially outweighed by the danger of unfair prejudice". *People v Wilkins,* 408 Mich 69 (1980); 4 Weinstein's Evidence, ¶ 804(b)(3)[03], p 804-113. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* for the people. *Clifford R. Williams* for defendant-appellant. Case below, Court of Appeals No. 78-5162, per curiam opinion of June 18, 1980.

COLEMAN, C.J., dissents and states: I would affirm for the reasons set forth in the Court of Appeals opinion.

PEOPLE v CHAPPLE. (Docket No. 66533.) Leave to appeal considered November 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, the matter is remanded to the Court of Appeals for decision on the merits of defendant's August 4, 1980 motion to discharge his appointed counsel, because the Court of Appeals erred in deciding defendant's appeal before defendant's motion was decided on the merits. If the motion is granted, the Court of Appeals shall resubmit defendant's appeal. David Lamont Chapple, *in propria persona,* appellant. Case below, Court of Appeals No. 46896, per curiam opinion of November 7, 1980.

PEOPLE v NELSON. (Docket No. 60590.) Defendant-appellant's application for rehearing is treated as a motion for reconsideration of this Court's order of July 26, 1979 (406 Mich 1020), because GCR 1963, 864.4 provides for the filing of such applications only in opinion cases. The motion is denied November 4, 1981, because it does not appear to the Court that the order of July 26, 1979 was entered erroneously. John Thomas Nelson, *in propria persona,* appellant.

PEOPLE v HINKLE. (Docket No. 68129.) Leave to appeal considered November 12, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the Court of Appeals order of September 24, 1981 and reinstate the trial court's order. Our independent determination of the issues of waiver and voluntariness does not leave us with a definite and firm conviction that the trial judge committed a mistake. *People v McGillen #1,* 392 Mich 251, 257 (1974). The case is remanded to Recorder's Court for trial. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. *Bernard Zack* and *John C. Mouradian* for defendant-appellant. Case below, Court of Appeals No. 59591, order of September 24, 1981.

COLEMAN, C.J., and BLAIR MOODY, JR., J., would deny leave to appeal.

PEOPLE v BAKER #2. (Docket No. 66792.) Leave to appeal considered November 4, 1981, and it appearing to this Court that the case of *People v Rochowiak* (Docket No. 62880) is presently pending on appeal before this Court and that the decision in that case may be decisive of an issue raised in the present application, it is ordered that the application be held in abeyance pending decision in that case. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellant. Reported below: 103 Mich App 704.

BLOOMFIELD HILLS CHRISTIAN CHURCH v CITY OF BLOOMFIELD HILLS. (Docket No. 66998.) Leave to appeal denied November 13, 1981. *Booth, Patterson, Lee, Karlstrom & Steckling* for plaintiff-appellant. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendant-appellee. Case below, Court of Appeals No. 54264, order of March 27, 1981.

SOCHA v PASSINO. (Docket No. 66826.) Leave to appeal denied November 13, 1981. *Sumpter & Loznak, P.C.,* for plaintiff-appellant.

*Stroup & Brown, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 50072, per curiam opinion of February 23, 1981.

DIEDRICH v HARTEN. (Docket No. 66914.) Leave to appeal denied November 13, 1981. *Bayer, Gornbein, Gropman & Kaplan, P.C.,* for plaintiff-appellant. *Dee Edwards* for defendants-appellees. Reported below: 103 Mich App 126.

DEPARTMENT OF TREASURY, REVENUE DIVISION v HANCOCK. (Docket No. 67025.) Leave to appeal denied November 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *David Brockman* and *David K. Foust,* Assistants Attorney General, for plaintiff-appellee. Danny Hancock, *in propria persona,* defendant-appellant. Case below, Court of Appeals No. 48023, per curiam opinion of March 23, 1981.

CHATEAU ESTATES v CLINTON TOWNSHIP. (Docket No. 68054.) Leave to appeal considered November 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Roy W. Rogensues* for plaintiff-appellee. *Cross, Wrock, Miller & Vieson* and *Ross & Bruff, P.C.,* for intervening defendants-appellants John P. Nebel, et al. Case below, Court of Appeals No. 59665, order of September 15, 1981.

STRANGE v CHRYSLER CORPORATION. (Docket No. 66994.) Leave to appeal denied November 13, 1981. *Dietrich & Cassavaugh, P.C.,* for plaintiff-appellant. *Lacey & Jones* for defendant-appellee. Case below, Court of Appeals No. 54688, order of March 19, 1981.

C DASH PLUMBING & HEATING, INC v DETROIT FEDERAL SAVINGS & LOAN ASSOCIATION. (Docket No. 66889.) Leave to appeal denied November 13, 1981. *Bodman, Longley & Dahling* for plaintiff-appellee Henry L. Lerman Corporation. *Butzel, Keidan, Simon, Myers & Graham* for defendant-appellant. Case below, Court of Appeals No. 46471, per curiam opinion of March 6, 1981.

PEOPLE v JAMESON JOHNSON. (Docket No. 67012.) Leave to appeal denied November 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting

Attorney, and *Annette M. Olejarz,* Assistant Prosecuting Attorney, for the people. *Patrick Michael Cleary* for defendant-appellant. Case below, Court of Appeals No. 49731, order of March 23, 1981.

PATTYN v FREZZA. (Docket No. 64430.) Leave to appeal reconsidered November 13, 1981, in light of the trial judge's supplemental opinion and findings of fact and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgments of the Court of Appeals and the circuit court. The complaint alleged a contract based on the defendant's promise to convey a house located in Warren in return for the plaintiffs' care of the defendant and her husband during their lives. The plaintiffs have the burden of establishing the contract by clear and convincing evidence. *Guzorek v Williams,* 300 Mich 633, 639 (1942). The supplemental findings of the trial judge state that what was established was that "title to the house was to pass upon the death of the spouse" of the defendant, possession of the house had already passed at that time, and the subject of the contract was the Warren house. The spouse died, however, on January 18, 1970, when all parties were living in the defendant's Detroit house and the Warren house was not obtained until some months later. The defendant could not therefore have promised to pass title on her husband's death of a house she did not own and the plaintiffs could not have been possessed of the house on the death of the defendant's spouse. Consequently, we conclude that the trial judge's findings of fact were clearly erroneous. *Tuttle v Highway Dep't,* 397 Mich 44, 46 (1976). We remand the case to the circuit court for further proceedings. *Joseph Mihelich* for plaintiffs-appellees. *Joseph N. Impastato* for defendant-appellant. Case below, Court of Appeals No. 78-4976, memorandum opinion of December 13, 1979.

PEOPLE v GEORGE WALKER. (Docket No. 66989.) Leave to appeal denied November 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. George Kenneth Walker, *in propria persona,* appellant. Case below, Court of Appeals No. 52447, order of March 23, 1981.

HITCHCOCK v DREYER. (Docket No. 66892.) Leave to appeal denied November 13, 1981. *Cholette, Perkins & Buchanan* and *Timothy J. Conroy* for plaintiff-appellee. *Baxter & Hammond* for defendants-appellants. Case below, Court of Appeals No. 50355, per curiam opinion of March 11, 1981.

PEOPLE v WEATHERSPOON. (Docket No. 67042.) Leave to appeal denied November 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John B. Huss,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Terence R. Flanagan,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 47661, memorandum opinion of February 12, 1981.

PEOPLE v CHERWINSKI. (Docket No. 67019.) Leave to appeal denied November 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William A. Werner,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Sheila N. Robertson,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 52133, order of March 23, 1981.

PEOPLE v HARRISON. (Docket No. 67020.) Leave to appeal considered November 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order of December 29, 1980, granting a motion to affirm, and remand the case to the Court of Appeals for plenary consideration. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 47554, order of December 29, 1980.

AVANT v BROHAN. (Docket No. 67024.) Leave to appeal denied November 13, 1981. *Alphonse Lewis, Jr.,* for plaintiff-appellant. *Lilly, Piatt & Doyle* for defendants-appellees. Case below, Court of Appeals No. 44545, per curiam opinion of March 18, 1981.

PALMER v KUTTNAUER MANUFACTURING COMPANY. (Docket No. 67051.) Leave to appeal denied November 13, 1981. *Manason & Ernstein, P.C.,* for plaintiff-appellee. *Jacobs & Miller* for defendants-appellants. Case below, Court of Appeals No. 50007, order of March 31, 1981.

PEOPLE v ANSLEY. (Docket No. 67094.) Leave to appeal denied November 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *Steven Gonzales,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 51490, memorandum opinion of March 13, 1981.

SUN PIPELINE COMPANY v WOLVERINE PIPELINE COMPANY. (Docket No. 66613.) Leave to appeal considered November 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the December 5, 1980 order of the Court of Appeals and remand the case thereto for plenary consideration as on leave granted. *Morris Friedman* for defendant-appellant R. L. Coolsaet Construction Company. Case below, Court of Appeals No. 52130, order of December 5, 1980.

FILION v ART HIMBAULT TRUCKING COMPANY. (Docket No. 66696.) Leave to appeal denied November 25, 1981. *Kozlow, Woll, Crowley & Berman, P.C.,* for plaintiff-appellee. *Sommers, Schwartz, Silver & Schwartz, P.C.,* for defendants-appellants. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for Michigan Self-Insurers Association as amicus curiae. Reported below: 103 Mich App 471.

COLEMAN, C.J., and RYAN, J., would grant leave to appeal.

SOAP & DETERGENT ASSOCIATION v NATURAL RESOURCES COMMISSION. (Docket No. 66789.) Leave to appeal granted November 25, 1981. *Dykema, Gossett, Spencer, Goodnow & Trigg* for plaintiffs-appellants. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman* and *Susan Peck Iannotti,* Assistants Attorney General, for defendants-appellees. Reported below: 103 Mich App 717.

MAY v WOLVERINE TRACTOR & EQUIPMENT COMPANY. (Docket No. 67495.) Upon reconsideration leave to appeal granted August 6, 1982. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for third-party-plaintiff-appellee International Harvester Company. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for third-party-defendant-appellant Oakland County Board of Road Commissioners. *John P. Cushman* for the County Road Association of Michigan as amicus curiae. Reported below: 107 Mich App 163.

Appeal dismissed on October 15, 1982, upon stipulation by the attorneys, with prejudice and without costs.

LORENZ SUPPLY COMPANY v AMERICAN STANDARD, INC. (Docket No. 66357.) Leave to appeal granted November 25, 1981. *Lampert, Fried & Levitt, P.C.,* for plaintiff-appellee. *Clark, Klein & Beaumont* for defendant-appellant. Reported below: 100 Mich App 600.

PEOPLE v FREDDY BROWN. (Docket No. 67114.) Leave to appeal granted November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James D. Norlander,* Prosecuting Attorney, and *John H. MacFarlane,* Chief Appellate Prosecutor, for the people, appellant. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellee. Reported below: 105 Mich App 58.

FRIEND v CAMPBELL. (Docket No. 66570.) Leave to appeal denied November 25, 1981. *Kendricks, Bordeau, Casselman, Adamini, Keefe & Smith, P.C.,* for plaintiffs-appellants. *Wisti & Jaaskelainen* for defendants-appellees Edward and Marjorie Nasser. *Petrucelli & Petrucelli* for defendant-appellee Sophie E. Bond. Reported below: 102 Mich App 778.

PEOPLE v HOWARD JOHNSON. (Docket No. 66474.) Leave to appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. *George C. Bush* for defendant-appellant. Case below, Court of Appeals No. 44742, per curiam opinion of January 7, 1981.

PEOPLE v ESTERS. (Docket No. 64265.) Leave to appeal granted November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. *Robert L. Segar,* for defendant-appellant. Case below, Court of Appeals No. 78-3132, per curiam opinion of November 13, 1979.

ROBBINS v RAY RIDGE CHEVROLET, INC. (Docket No. 66695.) Leave to appeal denied November 25, 1981. *Kozlow, Woll, Crowley & Berman, P.C.,* for plaintiff-appellee. *Sommers, Schwartz, Silver & Schwartz, P.C.,* for defendants-appellants. *Conklin, Benham, McLeod, Ducey &*

*Ottaway, P.C.,* for Michigan Self-Insurers Association as amicus curiae. Reported below: 103 Mich App 471.

COLEMAN, C.J., and RYAN, J., would grant leave to appeal.

PEOPLE v LARRY ARMSTRONG. (Docket No. 67041.) Leave to appeal and cross-appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Bleau,* Assistant Prosecuting Attorney, for the people, cross-appellant. State Appellate Defender, *F. Martin Tieber,* Deputy Defender, for defendant-appellant. Reported below: 100 Mich App 423.

PEOPLE v MCWILSON. (Docket No. 66929.) Leave to appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *Wesley L. McPeek,* Assistant Prosecuting Attorney, for the people. Benjamin McWilson, *in propria persona,* appellant. Reported below: 104 Mich App 550.

KAVANAGH, FITZGERALD, and RYAN, JJ., would grant leave to appeal.

PEOPLE v MCMURRY. (Docket Nos. 66385, 66386.) Leave to appeal considered November 25, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals for consideration of the issues raised for the first time in defendant's application for leave to appeal to this Court. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. Charles McMurry, *in propria persona,* appellant. Case below, Court of Appeals Nos. 28080, 28081, memorandum opinion of July 14, 1977.

PEOPLE v KRAAI (APPEAL OF STATE APPELLATE DEFENDER). (Docket No. 66962.) Leave to appeal assessment of court costs considered November 25, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we vacate the Court of Appeals order assessing costs because there is no record support for the assessments of costs in this case. State Appellate Defender, *Norris J. Thomas, Jr.,* Assis-

tant Defender, for appellant. Case below, Court of Appeals No. 55283, order of February 4, 1981.

PEOPLE v ELDER. (Docket No. 66952.) Leave to appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Rasdale,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellant. Reported below: 104 Mich App 651.

PEOPLE v RAYMOND OWENS. (Docket Nos. 67903, 67904.) Leave to appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Susan J. Smith,* Assistant Defender, for defendant-appellee. Reported below: 108 Mich App 600.

PEOPLE v O'CONNELL. (Docket Nos. 66893, 66894.) Leave to appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Daniel A. Burress* for defendant-appellant. Case below, Court of Appeals Nos. 51555, 51556, order of March 9, 1981.

PEOPLE v SCOTT. (Docket No. 66961.) Leave to appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Gail Rodwan,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46580, per curiam opinion of March 19, 1981.

Reconsideration granted 413 Mich 854.

LANKTON v KARCA. (Docket No. 66550.) Leave to appeal denied November 25, 1981. *Rabette & O'Dea, P.C.,* for plaintiff-appellee. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-

appellant. Case below, Court of Appeals No. 50460, per curiam opinion of January 14, 1981.

COLEMAN, C.J., and RYAN, J., would grant leave to appeal.

Reconsideration denied February 1, 1982. COLEMAN, C.J., and RYAN, J., would grant leave to appeal.

PEOPLE v OLDHAM. (Docket No. 67136.) Leave to appeal considered November 25, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand this case to the Oakland Circuit Court for the purpose of giving the prosecutor the opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide this matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975); *People v Johnson,* 411 Mich 50; 303 NW2d 442 (1981). Kevin De Marco Oldham, *in propria persona,* appellant. Case below, Court of Appeals No. 53350, memorandum opinion of March 13, 1981.

GRODIN v GRODIN. (Docket No. 66551.) Leave to appeal denied November 25, 1981 because the Court is not persuaded that the question presented should now be reviewed by this Court. *Charfoos, Christensen, Gilbert & Archer, P.C.,* for defendant-appellant. Reported below: 102 Mich App 396.

MARCOTTE v TAMARACK CITY VOLUNTEER FIRE DEPARTMENT. (Docket No. 66865.) Leave to appeal considered November 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Wisti & Jaaskelainen* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Patrick O. Landy,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 54229, order of March 2, 1981.

VANN v MARATHON OIL COMPANY. (Docket No. 66845.) Leave to appeal considered November 25, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the

Workers' Compensation Appeal Board. The board abused its discretion in denying the defendant's petition to take additional testimony. On remand, the board shall reconsider the record in light of the additional testimony adduced. We do not retain jurisdiction. *Butzel, Long, Gust, Klein & Van Zile* for defendant-appellant. Case below, Court of Appeals No. 52421, order of February 5, 1981.

PEOPLE v LADRIG and PEOPLE v AUSTIN (APPEAL OF STATE APPELLATE DEFENDER). (Docket Nos. 67930, 67940.) Leave to appeal the assessment of court costs for failure to file timely claims of appeal denied November 25, 1981. State Appellate Defender, *Norris J. Thomas, Jr.,* Chief Deputy Defender, for appellant. Case below, Court of Appeals Nos. 58274, 58271, orders of August 27, 1981.

PEOPLE v MCBRIDE. (Docket No. 64069.) Leave to appeal considered November 25, 1981. In lieu of granting leave to appeal, the Court, pursuant to GCR 1963, 853.2(4), reverses the defendant's convictions of assault with a dangerous weapon, MCL 750.82; MSA 28.277, for the reason that the trial court failed, at the time the defendant pled guilty, to inform the defendant of the maximum sentence possible for that crime. *People v Jones,* 410 Mich 407 (1981). In all other respects leave to appeal is denied. Leon McBride, *in propria persona,* appellant. Case below, Court of Appeals Nos. 45542, 45543, order of October 30, 1979.

RAVITZ v WAYNE COUNTY ELECTION COMMISSION. (Docket No. 68123.) Leave to appeal denied November 25, 1981. *Eaman & Ravitz, P.C.,* for plaintiff-appellant. *George H. Cross,* Corporation Counsel, and *W. B. McIntyre, Jr.,* Assistant Corporation Counsel, for defendant-appellee Wayne County Election Commission. *Sylvester Delaney,* Deputy Corporation Counsel, and *Kay D. Schloff, Nancy P. Vanderbeek,* and *Harnetha Williams-Jarrett,* Assistants Corporation Counsel, for defendant-appellee Detroit Director of Elections. *Dennis J. Harper* and *John E. Cross* for intervenor Joseph Chylinski. Case below, Court of Appeals No. 60459, order of October 16, 1981.

DEKIND v GALE MANUFACTURING COMPANY. (Docket No. 66801.) Leave to appeal and cross-appeal considered November 25, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction. *McCroskey, Libner, Van Leuven, Feldman, Cochrane & Brock, P.C.,* for plaintiff-appellant.

*Cholette, Perkins & Buchanan* for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 54250, order of March 2, 1981.

McKEE v DEHAAN. (Docket No. 66913.) Leave to appeal denied November 25, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendants-appellees. Case below, Court of Appeals No. 48231, per curiam opinion of March 9, 1981.

PEOPLE v CROSSMAN. (Docket No. 67017.) Leave to appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 43295, order of February 25, 1981.

PEOPLE v WALTER WILSON. (Docket No. 66555.) Leave to appeal considered November 25, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the guilty plea to felony-firearm in this case shall stand. If the prosecutor is unable to do so, the plea to felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96, 129 (1975). In all other respects leave to appeal is denied. Walter Scott Wilson, Jr., *in propria persona,* appellant. Case below, Court of Appeals No. 49153, per curiam opinion of January 28, 1981.

PEOPLE v MONK. (Docket No. 66870.) Leave to appeal considered November 25, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the matter to the Recorder's Court for the City of Detroit for resentencing after preparation of a proper presentence report in this matter. Use of a presentence report prepared in conjunction with another offense was erroneous. In all

other respects leave to appeal is denied. Raymond Jay Monk, *in propria persona,* appellant. Case below, Court of Appeals No. 52515, order of March 4, 1981.

BACHUS v WEST TRAVERSE TOWNSHIP and CUMMINGS v WEST TRAVERSE TOWNSHIP. (Docket Nos. 67597, 67598.) Leave to appeal considered November 25, 1981. Pursuant to GCR 1963, 865.1(5), we remand to the Emmet Circuit Court for an evidentiary hearing following which the trial judge shall make findings as to whether the plaintiffs were assessed and paid taxes on the parts of their land that the defendant claims by adverse possession. We retain jurisdiction. The findings and a transcript of the hearing shall be filed with this Court within 60 days of the date of this order. The motion for a stay is denied because the filing of the timely application for leave to appeal to this Court prevents the issuance of the final judgment of the Court of Appeals. *People v George,* 399 Mich 638 (1977). *Seberon Litzenburger* for plaintiffs-appellees Bachus. *Smith & Brooker, P.C.,* for plaintiffs-appellees Cummings, Smith, and Von Valtier. *Stephen B. Graham* for defendant-appellant. Reported below: 107 Mich App 743.

PEOPLE v WAKEFORD. (Docket No. 64385.) Leave to appeal granted November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Mardi Crawford,* Assistant Defender, for defendant-appellant. Reported below: 94 Mich App 249.

GREENBRIAR CONVALESCENT CENTER, INC v DEPARTMENT OF PUBLIC HEALTH. (Docket No. 67837.) Leave to appeal granted November 25, 1981. *Honigman, Miller, Schwartz & Cohn* for plaintiff-appellant. *Lavan, Hegarty & Harris* for intervening defendant-appellee Livingston Care Center, Inc. Reported below: 108 Mich App 553.

PEOPLE v SALVADOR GONZALES. (Docket No. 67765.) Leave to appeal granted November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Geoffrey H. Nickol,* Assistant Prosecuting Attorney, for the people, appellant. *Curtis G. Rundell, II,* for defendant-appellee. Reported below: 108 Mich App 145.

PEOPLE v BOUKNIGHT. (Docket No. 67760.) Leave to appeal granted November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecutng Attorney, for the people, appellant. Reported below: 106 Mich App 798.

PEOPLE v ROBIDEAU. (Docket Nos. 64548, 64549.) Leave to appeal granted November 25, 1981. Herbert M. Robideau, *in propria persona,* appellant. Reported below: 94 Mich App 663.

PEOPLE v RANDALL GRIFFIN. (Docket No. 66010.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Barker* and *People v Lynn,* 411 Mich 291 (1981); leave to appeal granted November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Doyle A. Rowland,* Prosecuting Attorney, and *Frederick S. VanTiem,* Chief Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-3343, per curiam opinion of August 14, 1980.

PEOPLE v IRVING. (Docket No. 66064.) Leave to appeal denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. Theodius Irving, *in propria persona,* appellant. Case below, Court of Appeals No. 43004, memorandum opinion of October 3, 1980.

PRAY v HOREFTIS. (Docket No. 66891.) Leave to appeal considered November 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the lower court judgments and remand the case for retrial before a jury because the trial court abused its discretion when it refused to consider a proposed settlement based on the reasons it gave, and when it denied the defendant's motion for jury trial. We retain no jurisdiction. *Robert H. Cleland,* Prosecuting Attorney, and *David M. Dean,* Assistant Prosecuting Attorney, for plaintiff-appellee. *Mogill, Bush, Posner, Cohen &*

*Weiss* for defendant-appellant. Case below, Court of Appeals No. 51597, per curiam opinion of February 11, 1981.

COLEMAN, C.J., and BLAIR MOODY, JR., J., would deny leave to appeal.

PEOPLE v HENRY ARMSTRONG. (Docket No. 67033.) Leave to appeal denied November 25, 1981. This order is without prejudice to defendant filing an application for delayed appeal in the Court of Appeals. See *People v Pickett,* 391 Mich 305, 316-317; 215 NW2d 695 (1974). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. Henry Armstrong, *in propria persona,* appellant. Case below, Court of Appeals No. 53125, order of March 17, 1981.

MICHIGAN ROOFING & SHEET METAL, INC v DUFTY ROAD PROPERTIES. (Docket No. 66411.) Leave to appeal denied November 25, 1981. *Schlussel, Lifton, Simon, Rands, Kaufman, Lesinski & Jackier* for defendant-appellee John Casey Development Company. *Dickinson, Wright, McKean, Cudlip & Moon* for defendant-appellant Continental Mortgage Investors. *Doyle, Ladd & Philipps* for Vernon Fry as amicus curiae. Reported below: *(On Remand)* 100 Mich App 577.

LEVIN, J., would grant leave to appeal.

BEARDSLEE v MICHIGAN CLAIM SERVICES, INC. (Docket No. 66707.) Leave to appeal denied November 25, 1981. *Thomas F. Brill* and *E. R. Whinham* for plaintiffs-appellants. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendants-appellees Michigan Claim Services, Inc., and Fred Nicoll. *Vanderveer, Garzia, Tonkin, Kerr & Heaphy, P.C.,* for defendant-appellee Casualty Reciprocal Exchange. Reported below: 103 Mich App 480.

BEARDSLEE v MICHIGAN CLAIM SERVICES, INC. (Docket Nos. 67079, 67096.) Leave to appeal denied November 25, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendants-appellants Michigan Claim Services, Inc., and Fred Nicoll. *Vanderveer, Garzia, Tonkin, Kerr & Heaphy, P.C.,* for

defendant-appellant Casualty Reciprocal Exchange. Reported below: 103 Mich App 480.

BALDWIN v WILLIAMS. (Docket Nos. 66779, 66808.) Leave to appeal denied November 25, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *William C. Gage, P.C.,* for plaintiffs-appellees. *Cholette, Perkins & Buchanan* for defendant-appellant Dale Williams. *Baxter & Hammond* for defendant-appellant Douglas Giese. Reported below: 104 Mich App 735.

CASTILLON v ROY. (Docket No. 66825.) Leave to appeal considered November 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the case to the Isabella Circuit Court for further proceedings. The trial court abused its discretion in quashing subpoenas without further inquiry into the circumstances. The record indicates that the deficiency which was the basis of the court's action (failure to include witness fees pursuant to GCR 1963, 506.5) could have been remedied by less severe means where the parties served had notice of the proceedings and were available to testify and present evidence, and where the evidence at issue was essential to a fair hearing of plaintiff's claim. See also GCR 1963, 506.1. *Alejandro C. Palacios* for plaintiff-appellant. *John J. DeVine, Jr.,* for defendant-appellee. Case below, Court of Appeals No. 53612, per curiam opinion of February 24, 1981.

KENDZIERSKI v AUTOMOTIVE SPRING CORPORATION. (Docket No. 66851.) Leave to appeal denied November 25, 1981. *Bockoff & Zamler, P.C.,* for plaintiff-appellee. *LaVasseur, Egan, Leslie & Johnson, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 54831, order of March 2, 1981.

PEOPLE v WISEMAN and PEOPLE v ALVIAR. (Docket Nos. 66937, 66938.) Leave to appeal denied November 25, 1981. *Varnum, Riddering, Wierengo & Christenson* for defendants-appellants. Case below, Court of Appeals Nos. 52743, 52744, order of February 3, 1981.

BISCHOFF v CHRYSLER CORPORATION. (Docket No. 67016.) Leave to appeal considered November 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to

the Court of Appeals for consideration as on leave granted. *Julius M. Grossbart* for plaintiff-appellee. *Lacey & Jones* for defendant-appellant. Case below, Court of Appeals No. 55260, order of March 26, 1981.

PEOPLE v KOHL. (Docket No. 67168.) Leave to appeal considered November 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to Kent Circuit Court for an evidentiary hearing to consider and make findings of fact concerning defendant's claim that his plea was involuntary due to representations by his attorney. *People v Ginther,* 390 Mich 436 (1973); *People v Hall,* 399 Mich 288, 291 (1976). The trial court's findings must be filed with the clerk of this Court within 60 days. We retain jurisdiction. James Warren Kohl, *in propria persona,* appellant. Case below, Court of Appeals No. 50603, memorandum opinion of April 17, 1981.

PEOPLE v WATSON. (Docket No. 66932.) Leave to appeal considered November 25, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order certified December 8, 1980, granting a motion to affirm, and remand the case to the Court of Appeals for plenary consideration. We do not retain jurisdiction. Bobby Leroy Woody Watson, *in propria persona,* appellant. Case below, Court of Appeals No. 49669, order of December 8, 1980.

PEOPLE v ROLAND. (Docket No. 66869.) Leave to appeal considered November 25, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the Court of Appeals order of April 18, 1981 denying the defendant's motion to remand. GCR 1963, 817.6. We direct the Court of Appeals to remand the case to Recorder's Court for the City of Detroit for the evidentiary hearing sought in that motion. We retain no further jurisdiction. Otis Roland, *in propria persona,* appellant. Case below, Court of Appeals No. 47907, order of April 18, 1981.

ISHPEMING-NEGAUNEE HOSPITAL ASSOCIATION, INC v MARQUETTE GENERAL HOSPITAL. (Docket No. 68163.) Leave to appeal denied December 1, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Zweig, Harkness & Kaser, P.C.,* for plaintiff-appellee. *Fraser, Trebilcock, Davis & Foster,*

P.C., and *Kendricks, Bordeau, Casselman, Adamini, Keefe & Smith, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 59081, order of September 29, 1981.

JEANETTE v STADIUM MANAGEMENT COMPANY. (Docket No. 66846.) Leave to appeal considered December 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals order of February 26, 1981, and remand the case to the Court of Appeals for summary treatment including a compendious statement of their findings and reasons for decision, accompanied by relevant authority. *Kalamazoo City Education Ass'n v Kalamazoo Public Schools,* 406 Mich 579, 605 (1979). We retain no further jurisdiction. *McCune & Miller* for plaintiffs-appellants. *Early, Starbuck & Lennon* for defendant-appellee. Case below, Court of Appeals No. 54319, order of February 26, 1981.

COX v LALONDE. (Docket No. 66936.) Leave to appeal denied December 1, 1981. *Willford & Hansen* for plaintiffs-appellants. *Francis, Wetmore & Groom, P.C.,* for defendant-appellee. Reported below: 101 Mich App 342.

KIMBROUGH v HARDAWAY. (Docket No. 67087.) Leave to appeal denied December 1, 1981. *Sommers, Schwartz, Silver & Schwartz, P.C.,* for plaintiff-appellant. *Bell & Hudson, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 52535, order of April 9, 1981.

GRAND BLANC TOWNSHIP SUPERVISOR v GENESEE COUNTY BOARD OF COMMISSIONERS. (Docket No. 66875.) Leave to appeal denied December 1, 1981. *Lyndon J. Lattie* for plaintiffs-appellants. *Ward Chapman,* Genesee County Corporation Counsel, for defendants-appellees. Reported below: 104 Mich App 260.

GRUNEWALD v DEPARTMENT OF TREASURY and WORTLEY v DEPARTMENT OF TREASURY. (Docket Nos. 66949, 66950.) Leave to appeal denied December 1, 1981. *Bodman, Longley & Dahling* for plaintiffs-appellants. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Terry P. Gomoll* and *Richard R. Roesch,* Assistants Attorney General, for defendant-appellee. *Miller, Canfield, Paddock & Stone* for Detroit Bank & Trust Company and *Warner, Norcross & Judd* for Old Kent Bank & Trust Company as amici curiae. Reported below: 104 Mich App 601.

VALENTINO v OAKLAND COUNTY. (Docket No. 67922.) Leave to appeal and cross-appeal denied December 1, 1981 because the Court is not persuaded that the questions should now be reviewed by this Court. *Fred L. Harris* for plaintiffs-appellees-cross-appellants. Oakland County Civil Counsel, *Jack C. Hays,* First Senior Assistant, for defendants-appellants. Case below, Court of Appeals No. 52781, per curiam opinion of August 12, 1981.

HEEMSTRA v BAY CITY SCHOOL DISTRICT. (Docket No. 67037.) Leave to appeal denied December 1, 1981. *Seward, Tally & Piggott, P.C.,* for plaintiff-appellee. *Lambert, Lesser, Fitzhugh & Hebert, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 54768, order of March 26, 1981.

DAVIS v LINDELL DROP FORGE. (Docket No. 67052.) Leave to appeal denied December 1, 1981. *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for plaintiff-appellant. *Anderson, Green & Vincent, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 52956, order of April 9, 1981.

FISHER v WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE. (Docket No. 67081.) Leave to appeal denied December 1, 1981. *William L. Fisher, in propria persona,* plaintiff-appellant. Case below, Court of Appeals No. 55149, order of February 24, 1981.

PEOPLE v FAVORS. (Docket No. 67164.) Leave to appeal considered December 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order of April 28, 1981, granting a motion to affirm, and remand the case to the Court of Appeals for plenary consideration. We retain no jurisdiction. Gene T. Favors, *in propria persona,* appellant. Case below, Court of Appeals No. 49443, order of April 28, 1981.

PEOPLE v CORBIN. (Docket No. 68009.) Leave to appeal denied December 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellee. Reported below: 109 Mich App 120.

CRESSMAN v WRIGHT. (Docket No. 67072.) Leave to appeal denied December 1, 1981. *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for plaintiff-appellant. *Fortino, Plaxton & Moskal* for defendant-appellee. Reported below: 105 Mich App 194.

PEOPLE v WOODS. (Docket No. 67014.) Leave to appeal denied December 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Mardi Crawford,* Assistant Defender, and *Clinton Lovett,* Research Assistant, for defendant-appellant. Case below, Court of Appeals No. 48551, per curiam opinion of March 23, 1981.

THOMPSON v T N. THOMPSON REALTORS, INC. (Docket No. 66711.) Leave to appeal denied December 1, 1981. *Robert L. O'Connell & Associates* for plaintiff-appellee. *Davidson, Breen & Doud, P.C.,* for defendants-appellants. Reported below: 103 Mich App 587.

PEOPLE v STEGALL. (Docket No. 66331.) Leave to appeal denied December 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. Jerry Wayne Stegall, *in propria persona,* appellant. Reported below: 102 Mich App 147.

PEOPLE v WARD. (Docket No. 67022.) Leave to appeal denied December 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Karl E. Kraus,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. Michael Charles Ward, *in propria persona,* appellant. Case below, Court of Appeals No. 55940, order of March 30, 1981.

ROJAS v FORD MOTOR COMPANY. (Docket No. 67035.) Leave to appeal denied December 1, 1981. *Carron & Carron* and *Gromek, Bendure & Thomas* for plaintiff-appellant. *Michael E. Paddon* and *Hayim I. Gross,* for defendant-appellee. Case below, Court of Appeals No. 55286, order of March 27, 1981.

ROWLAND v ROWLAND. (Docket No. 68040.) Leave to appeal denied December 1, 1981. *Joan Myers* for defendant-appellant. Case below, Court of Appeals No. 57706, order of August 31, 1981.

JOHNSON v WARDEN, MARQUETTE BRANCH PRISON. (Docket No. 67097.) Leave to appeal denied December 16, 1981. Artis Fadee Johnson, *in propria persona,* plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stephen F. Schuesler,* Assistant Attorney General, for defendant-appellee. Case below, Court of Appeals No. 49742, order of December 9, 1980.

LOW v DOUGLAS & LOMASON COMPANY. (Docket No. 67160.) Leave to appeal denied December 16, 1981. *William L. Fisher* for plaintiff-appellant. *Lacey & Jones* for defendants-appellees Douglas & Lomason Company and Michigan Mutual Insurance Company. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Joseph M. Binno,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 55214, order of March 23, 1981.

R A DEMATTIA COMPANY v ROCK TOOL & MACHINE CO. (Docket No. 68221.) Leave to appeal denied December 16, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Kerr, Russell & Weber* for plaintiff-counter-defendant-appellee. *Rockwell, Baker & Kotz, P.C.,* for defendants-counter-plaintiffs-appellants. Case below, Court of Appeals No. 60179, order of October 8, 1981.

PEOPLE v SHAVER. (Docket No. 63519.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. *George S. Buth* for defendant-appellant. Case below, Court of Appeals No. 77-456, memorandum opinion of May 7, 1979.

PEOPLE v JACK GRIFFIN. (Docket No. 68247.) Leave to appeal denied December 16, 1981. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant. Reported below: 108 Mich App 625.

JONES v FRENCH. (Docket No. 67113.) Leave to appeal denied December 16, 1981. *Willingham, Coté, Hanslovsky, Griffith & Foresman, P.C.,* for defendant-appellant Melvin Mishler. Case below, Court of Appeals No. 45090, per curiam opinion of March 6, 1981.

PEOPLE v COCHRAN. (Docket No. 68081.) Leave to appeal denied December 16, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Richard H. Browne,* Assistant Prosecuting Attorney, for the people. *Lawson & Lawson* for defendant-appellant. Case below, Court of Appeals No. 53447, memorandum opinion of September 18, 1981.

SAWYER v SAWYER. (Docket No. 67171.) Leave to appeal denied December 16, 1981 because the Court is not persuaded that the question presented should now be reviewed by this Court. *Patrick S. Werner* for plaintiff-appellee. *David W. Oberschmidt* for defendant-appellant. Case below, Court of Appeals No. 51808, per curiam opinion of April 16, 1981.

PEOPLE v RUFFIN. (Docket No. 67173.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people. *Frank D. Eaman* for defendant-appellant. Case below, Court of Appeals No. 51063, memorandum opinion of April 17, 1981.

PEOPLE v WALTERS. (Docket No. 68098.) Leave to appeal considered December 16, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the order of the trial court quashing the supplemental information and remand the case for further proceedings for the reasons given in Judge MACKENZIE'S dissenting opinion. 109 Mich App 741. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. *Jules N. Fiani* for defendant-appellee. Reported below: 109 Mich App 734.

PEOPLE v TROTTA. (Docket No. 67107.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 46225, per curiam opinion of April 13, 1981.

PEOPLE v MICHAEL CLARK. (Docket No. 67536.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Susan J. Smith,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46227, per curiam opinion of April 13, 1981.

PEOPLE v ANTHONY CLARK. (Docket No. 67163.) Leave to appeal denied December 16, 1981, because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Carolyn Schmidt,* Assistant Prosecuting Attorney, for the people. Anthony L. Clark, *in propria persona,* appellant. Case below, Court of Appeals No. 49461, order of August 27, 1980.

PEOPLE v WALTERS. (Docket No. 67065.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Jules N. Fiani* for defendant-appellant. Case below, Court of Appeals No. 50689, memorandum opinion of February 13, 1981.

PEOPLE v HUNTER. (Docket No. 66996.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Martin S. Holmes,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. Mariano J. Hunter, *in*

*propria persona,* appellant. Case below, Court of Appeals No. 52281, order of March 6, 1981.

BLUE CROSS & BLUE SHIELD OF MICHIGAN v CITY OF EAST DETROIT. (Docket No. 67089.) Leave to appeal denied December 16, 1981. *William Nole Evans* for plaintiff-appellee. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendants-appellants. Case below, Court of Appeals No. 78-2655, order of March 2, 1981.

PEOPLE v JANKOWSKI. (Docket No. 67095.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Rasdale,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 54339, order of February 9, 1981.

NEWMAN v NEWAYGO CIRCUIT JUDGE. (Docket No. 67129.) Leave to appeal denied December 16, 1981. Paul B. Newman, *in propria persona,* plaintiff-appellant. *Cholette, Perkins & Buchanan* for defendant-appellee. Case below, Court of Appeals No. 52299, order of April 10, 1981.

HEGEDUS v WHITEHEAD & KALES CORPORATION. (Docket No. 67156.) Leave to appeal denied December 16, 1981. *Bockoff & Zamler, P.C.,* for plaintiff-appellee. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellant. Case below, Court of Appeals No. 55910, order of April 16, 1981.

PEOPLE v MARSHALL JOHNSON. (Docket No. 67265.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people. *Vincent D. Giovanni* for defendant-appellant. Case below, Court of Appeals No. 52551, order of May 1, 1981.

SCOTT v HURD-CORRIGAN MOVING & STORAGE COMPANY. (Docket No. 67063.) Leave to appeal denied December 16, 1981 because the Court is not persuaded that the questions presented should now be reviewed

by this Court. *O'Hagan & Conlin, P.C.,* for plaintiff-appellant. *Denenberg, Tuffley, Thorpe, Bocan & Patrick* for defendant-appellee. Reported below: 103 Mich App 322.

PEOPLE v EARL SMITH. (Docket No. 67108.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Geoffrey H. Nickol,* Assistant Prosecuting Attorney, for the people. Earl Steven Smith, *in propria persona,* appellant. Case below, Court of Appeals No. 51426, order of November 20, 1980.

JACKSON v SECRETARY OF STATE. (Docket No. 67123.) Leave to appeal denied December 16, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Harry G. Iwasko, Jr.,* and *Warren R. Snyder,* Assistants Attorney General, for defendant-appellant. Reported below: 105 Mich App 132.

PEOPLE v MANUEL JOHNSON. (Docket No. 67181.) Leave to appeal considered December 16, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order of March 26, 1981, granting a motion to affirm, and remand the case to the Court of Appeals for plenary consideration. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. *Ashford, Edison, Jarrett, Lumumba & Ottison, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 47935, order of March 26, 1981.

PEOPLE v LEE BARNES. (Docket No. 68166.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people, appellant. *George S. Buth* for defendant-appellee. Case below, Court of Appeals No. 48723, per curiam opinion of October 8, 1981.

PEOPLE v COOK. (Docket No. 65176.) Defendant's application for leave to appeal held in abeyance pending decision in *People v McLemore,* 411 Mich 691 (1981); leave to appeal denied December 16,

1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Nels L. Olson,* Assistant Prosecuting Attorney, for the people. *Robert L. Ziolkowski* for defendant-appellant. Reported below: 95 Mich App 645.

CITY OF DETROIT v DETROIT FIRE FIGHTERS ASSOCIATION, LOCAL 344, IAFF, AFL-CIO. (Docket No. 67062.) Leave to appeal denied December 16, 1981. *Sylvester Delaney,* Acting Corporation Counsel, and *William Dietrich* and *Michael A. Hurvitz,* Assistants Corporation Counsel, and *Bernard J. Fieger,* Special Assistant Corporation Counsel, for plaintiff-appellant. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare* for defendant-appellee. Case below, Court of Appeals No. 51736, order of February 26, 1981.

PEOPLE v VINSON. (Docket No. 67090.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *Steven Gonzales,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellant. Reported below: 105 Mich App 583.

COLEMAN, C.J., not participating.

DEPARTMENT OF CIVIL RIGHTS *ex rel* GARCIA v MCGRAW-EDISON COMPANY. (Docket No. 67142.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Jack Blumenkopf,* Assistant Attorney General, for plaintiff-appellee. *Marcoux, Allen, Beaman & Cheney, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 46417, per curiam opinion of March 12, 1981.

COLEMAN, C.J., not participating.

PEOPLE v RUSSELL. (Docket No. 67143.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Jon W. Newman,* Prosecuting Attorney, and *Richard I. Dresser,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Robert C. Steinman* for defendant-appellant. Case below, Court of Appeals No. 53754, order of April 8, 1981.

PEOPLE v BACON. (Docket No. 67182.) Leave to appeal denied December 16, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. Prison Legal Services of Michigan, Inc., *Beatrice M. Friedlander,* Staff Attorney, for defendant-appellant. Case below, Court of Appeals No. 55211, order of March 25, 1981.

CZAPIEWSKI v SOLBERG. (Docket No. 67214.) Leave to appeal denied December 16, 1981. *Goldberg & Associates* for plaintiff-appellant. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellee. Case below, Court of Appeals No. 55911, order of April 28, 1981.

IN THE MATTER OF WILSON. (Docket No. 68105.) Leave to appeal denied December 16, 1981. *Caswell & Moore* for appellants Wilson. *J. Thomas Schaeffer,* guardian ad litem. *Conrad J. Sindt,* Prosecuting Attorney, and *Samuel I. Durham, Jr.,* Assistant Prosecuting Attorney, for appellee Department of Social Services. Case below, Court of Appeals No. 57436, order of August 4, 1981.

COLEMAN, C.J., not participating. y

PEOPLE v CRAWFORD. (Docket No. 65437.) Leave to appeal granted December 21, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellant. Reported below: 98 Mich App 309.

THE EVENING NEWS ASSOCIATION v CITY OF TROY. (Docket No. 66268.) Leave to appeal granted December 21, 1981. *Butzel, Long, Gust, Klein & Van Zile* for plaintiff-appellant. *William S. Wolanin,* City Attorney, and *John J. Martin, III,* Assistant City Attorney, for defendants-appellees. Reported below: 101 Mich App 650.

MORRIS v METRIYAKOOL. (Docket No. 67480.) Leave to appeal granted December 21, 1981. *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* for plaintiff-appellant. *Schureman, Frakes, Glass & Wulfmeir* for defendant-appellee Metriyakool. *Kitch, Suhrheinrich,*

*Smith, Saurbier & Drutchas, P.C.,* for defendant-appellee South Macomb Hospital. Reported below: 107 Mich App 110.

PEOPLE v ANDERSON. (Docket No. 68053.) Leave to appeal and cross-appeal granted December 21, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Donald J. McLennan,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant-cross-appellee. State Appellate Defender, *Richard G. Ginsberg,* Assistant Defender, for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 52147, per curiam opinion of September 16, 1981.

SAWKA v PROKOPOWYCZ. (Docket Nos. 67120, 67375.) Leave to appeal granted December 21, 1981. *Shrauger & Dunn, P.C.,* for plaintiffs-appellees. *Sullivan, Ward & Bone* for defendant-appellant Vladimir Prokopowycz. *Moll, Desenberg, Bayer & Behrendt* for defendant-appellant Heung Ki Kim. Reported below: 104 Mich App 829.

JACKSON v DETROIT MEMORIAL HOSPITAL. (Docket No. 68208.) Leave to appeal and cross-appeal granted December 21, 1981. *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* for plaintiff-appellee-cross-appellant. *Kitch, Suhrheinrich, Smith, Saurbier & Drutchas, P.C.,* for defendants-appellants. Reported below: 110 Mich App 202.

PEOPLE v HAMMER. (Docket No. 65478.) Leave to appeal denied December 22, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. *George S. Buth* for defendant-appellant. Reported below: 98 Mich App 471.

PEOPLE v MAYBERRY. (Docket No. 67118.) Leave to appeal considered December 22, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals decision of March 10, 1981 and its order certified April 6, 1981, and remand the case to the Court of Appeals for submission to the full panel originally assigned to decide the appeal, or to a panel including a substitute judge if one of the original panel is unavailable. GCR 1963, 800.1. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,*

Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Frank D. Eaman* for defendant-appellant. Case below, Court of Appeals No. 48907, per curiam opinion (after remand) of March 10, 1981.

SMITH v CITY OF DETROIT. (Docket No. 64956.) Leave to appeal denied December 22, 1981. *Bove, McKnight & Jacobs* for plaintiffs-appellees. *George W. Crockett, Jr.,* Corporation Counsel, and *Ronald Zajac,* Assistant Corporation Counsel, for defendants-appellants. Case below, Court of Appeals No. 78-2934, per curiam opinion of March 19, 1980.

VICIULIS v WESTERN PUBLISHING COMPANY. (Docket No. 63804.) Leave to appeal denied December 22, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Morrison R. Zack,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 44747, order of August 27, 1979.

SMITH v GENERAL MOTORS CORPORATION. (Docket No. 66960.) Leave to appeal denied December 22, 1981. *Lauck, Leto & Cavanaugh, P.C.,* for plaintiff-appellant. *Willard W. Wallace* and *William Nole Evans* for defendant-appellee. Case below, Court of Appeals No. 53269, order of March 19, 1981.

BALK v GOODYEAR TIRE & RUBBER COMPANY. (Docket No. 67036.) Leave to appeal denied December 22, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Wilfred F. Curley* for defendants-appellees. Case below, Court of Appeals No. 55379, order of March 27, 1981.

PINE KNOB INVESTMENT v INDEPENDENCE TOWNSHIP ZONING BOARD OF APPEALS. (Docket No. 67059.) Leave to appeal denied December 22, 1981 because the Court is not persuaded that the question presented should now be reviewed by this Court. *Hunt, Howell & Campbell* for plaintiffs-appellees. *Richard A. Campbell & Associates, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 55359, order of March 31, 1981.

PEOPLE v FISHER. (Docket No. 66767.) Leave to appeal considered December 22, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand the case to Genesee Circuit Court for a new probation violation hearing. *People v Ealey,* 411 Mich 987 (1981); *People v Jerry Adams,* 411 Mich 1070 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Janice K. Rundles,* Assistant Prosecuting Attorney, for the people. Carl Fisher, *in propria persona,* and *Robin L. Wheaton* for defendant-appellant. Case below, Court of Appeals No. 51086, per curiam opinion of February 24, 1981.

PEOPLE v OVEGIAN. (Docket No. 66988.) Leave to appeal denied December 22, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas A. Richards,* Assistant Prosecuting Attorney, for the people. *Freydl & Maxwell* for defendant-appellant. Case below, Court of Appeals No. 44542, per curiam opinion of March 18, 1981.

CHARPENTIER v CANTEEN CORPORATION. (Docket No. 67208.) Leave to appeal denied December 22, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendants-appellees. Reported below: 105 Mich App 700.

INDUSTRIAL STATE BANK & TRUST Co v PBJ Co, INC. (Docket No. 66634.) Leave to appeal and cross-appeal denied December 22, 1981, *Godfrey Vander Werff* for defendant-appellant PBJ Co, Inc. *Schmidt, Howlett, Van't Hof, Snell & Vana* for defendant-appellee-cross-appellant B & A, Inc. Case below, Court of Appeals No. 47852, per curiam opinion of December 5, 1980.

PEOPLE v BATTLES #1. (Docket No. 68038.) Leave to appeal denied December 22, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people, appellant.

State Appellate Defender, *Gail Rodwan,* Assistant Defender, for defendant-appellee. Reported below: 109 Mich App 384.

PEOPLE v EILEEN JOHNSON. (Docket No. 68001.) Leave to appeal considered December 22, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we stay the order amending probation entered by the Jackson Circuit Court on January 7, 1981. The Court of Appeals is directed to expedite its review of defendant's claim of appeal. Our stay shall remain in effect until the Court of Appeals enters its judgment. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 56490, order of August 11, 1981.

PEOPLE v LEMBLE. (Docket No. 66872.) Leave to appeal denied December 22, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *David A. King,* Assistant Prosecuting Attorney, for the people. *O'Brien, Moran & Dimond* for defendant-appellant. Reported below: 103 Mich App 220.

ZACCANELLI v LINCOLN COUNTRY CLUB, INC. (Docket No. 66956.) Leave to appeal considered December 22, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand the case to the Kent Circuit Court for a new trial. *Placek v City of Sterling Heights,* 405 Mich 638 (1979). *Idema & Pawlowski* for plaintiffs-appellants. *Wheeler, Upham, Bryant & Uhl* for defendant-appellee. Case below, Court of Appeals No. 78-5106, per curiam opinion of March 18, 1981.

CITY OF WARREN v WALKER. (Docket No. 67070.) Leave to appeal considered December 22, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *W. Thomas Marrocco, Jr.,* City Attorney, and *John J. Murray,* Chief Assistant City Attorney, for plaintiff-appellee. *Kenneth A. Webb* for defendant-appellant. Case below, Court of Appeals No. 52702, order of April 9, 1981.

PEOPLE v MCDONALD. (Docket No. 67130.) Leave to appeal denied December 22, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. *Counard, Kevelighan & Van Houten, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 50202, order of April 9, 1981.

CLAPHAM v YANGA. (Docket No. 66277.) Leave to appeal granted December 22, 1981. The parties are directed to include among the issues to be briefed whether the defendant should be liable for damages for failing to diagnose pregnancy and, if so, how the damages should be measured. Amicus curiae briefs are invited from the Michigan State Medical Society and the Negligence Section of the State Bar of Michigan. *Otis, Peters, Becker & Pietsch, P.C.,* for plaintiffs-appellees. *Sullivan, Ranger, Ward & Bone, P.C.,* for defendant-appellant. Reported below: 102 Mich App 47.

Appeal dismissed on June 8, 1982, upon stipulation by the parties, with prejudice and without costs.

METROPOLITAN LIFE INSURANCE COMPANY v FOOTE. (Docket No. 64694.) Leave to appeal denied December 22, 1981. *Dickinson, Wright, McKean, Cudlip & Moon,* for plaintiff-appellee. *Fraser, Trebilcock, Davis & Foster, P.C.,* for defendant-appellant. Reported below: 95 Mich App 399.

PEOPLE v SEPULVEDA. (Docket No. 66437.) Leave to appeal considered December 22, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals and of the Saginaw Circuit Court and we remand the matter to the Saginaw Circuit Court for a new trial. Notwithstanding the failure of the defendant to request an interpreter, it was error to fail to appoint an interpreter where the record clearly shows that the defendant spoke no English whatsoever. MCL 775.19a; MSA 28.1256(1). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Mardi Crawford,* Assistant Defender, for defendant-appellant. Reported below: 102 Mich App 777.

KOWALSKE v GENERAL MOTORS CORPORATION. (Docket No. 67103.) Leave to appeal considered December 22, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Miller, Cohen, Martens & Sugerman, P.C.,* for plaintiff-appellant. *Otis Smith,*

General Counsel, and *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 54638, order of February 26, 1981.

PEOPLE v NEWMAN. (Docket No. 67653.) Leave to appeal and cross-appeal denied December 22, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people, appellant-cross-appellee. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellee-cross-appellant. Reported below: 107 Mich App 535.

PEOPLE v IRA WHITE. (Docket No. 65868.) Leave to appeal considered December 22, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's convictions because he was not advised of the presumption of innocence. GCR 1963, 785.7(1)(g)(iii); *Guilty Plea Cases,* 395 Mich 96, 125 (1975). We remand the case to the Recorder's Court for the City of Detroit for further proceedings. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. Ira White, *in propria persona,* appellant. Case below, Court of Appeals No. 49938, order of August 15, 1980.

PEOPLE v THOMAS WHITE. (Docket No. 66569.) Leave to appeal considered December 22, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the defendant's convictions because he was not advised of the presumption of innocence. GCR 1963, 785.7(1)(g)(iii); *Guilty Plea Cases,* 395 Mich 96, 125 (1975). We remand the case to the Recorder's Court for the City of Detroit for further proceedings. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. Thomas Clifford White, *in propria persona,* and *Gerald S. Surowiec* for defendant-appellant. Case below, Court of Appeals No. 49626, order of January 15, 1981.

PEOPLE v KIMBALL. (Docket No. 68000.) Leave to appeal considered December 22, 1981. In lieu of granting leave to appeal, pursuant to

GCR 1963, 853.2(4), we modify the judgment of the Court of Appeals so as to remand the case to Leelanau Circuit Court for reconsideration and reevaluation by the trial judge of the original trial record in light of the opinion of the Court of Appeals in this case. On reconsideration, the trial judge shall render an opinion, including new findings of fact and conclusions of law, and shall enter a final judgment in conformity with that opinion. *People v Taskila,* 391 Mich 815 (1974). We express no opinion on the legal conclusions reached by the Court of Appeals, but rather find error in the relief granted by that Court in light of the conclusions it reached. Defendant's application for leave to appeal as cross-appellant is denied. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Joseph E. Deegan,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant-cross-appellee. *Thomas G. Power* for defendant-appellee-cross-appellant. Reported below: 109 Mich App 273.

FISHER v H F CAMPBELL COMPANY. (Docket No. 67489.) Leave to appeal prior to decision by the Court of Appeals denied December 22, 1981. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendants-appellants H. F. Campbell Company and Unit Products Corporation. *Moore, Sills, Poling, Wooster & Sinn, P.C.,* for defendant-appellee Argo Steel Construction Company. Case below, Court of Appeals No. 58002.

COOPER v H F CAMPBELL COMPANY. (Docket No. 67490.) Leave to appeal prior to decision by the Court of Appeals denied December 22, 1981. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendants-appellants H. F. Campbell Company and Unit Products Corporation. Case below, Court of Appeals No. 58000.

BRADLEY v CITY OF SAGINAW. (Docket No. 67083.) Leave to appeal denied December 29, 1981. *Reynolds H. Campbell* and *Leslie W. Bailey, Jr.,* for plaintiffs-appellants. *Howard I. Shifman,* General Counsel, and *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen,* for defendant-appellee Teamsters State, County & Municipal Workers Local 214. Case below Court of Appeals No. 48157, opinion of March 16, 1981.

COLEMAN, C.J., would grant leave to appeal and states:

I would grant to consider the authority of an arbitration panel to provide *in futuro* for a closed shop while mandating a "service fee" equal to dues to be paid retroactively to a date almost two years

previous to the decision and after the city and the union had stipulated that "agency shop dues and deductions" were noneconomic issues.

CREED v WALSH. (Docket No. 66857.) Leave to appeal considered December 29, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the case to the Missaukee Circuit Court for trial. The record reflects that the former administrator of the estate of the deceased was served by plaintiffs on August 28, 1978, within the three-year statute of limitations, MCL 600.5805; MSA 27A.5805. We treat plaintiffs' service upon defendant former administrator as a petition to reopen the decedent's estate and order that defendant Walsh be appointed successor fiduciary, *nunc pro tunc. Williams v Grossman,* 409 Mich 67, 88, 89; 293 NW2d 315 (1980). *Marcus, Ruck, Flynn & Wells, P.C.,* for plaintiffs-appellants. *Williams, Coulter, Cunningham, Davison & Read* for defendant-appellee. Case below, Court of Appeals No. 44892, per curiam opinion of January 8, 1981.

COLEMAN, C.J., dissents and states:

Although I respect the benevolent wish of my colleagues to "bend" the law in order to accommodate tardy claimants in their late effort to avoid the running of the statute of limitations, the precedent is contrary to the orderly administration of justice.

Defendant, administrator of the estate of Lewis Lanning Heaton, was discharged as fiduciary on May 12, 1976. Mr. Heaton had died as the result of an automobile-truck accident on August 28, 1975. Plaintiffs claimed damages as a result of the accident and filed suit in the circuit court, serving defendant former administrator on August 28, 1978. This was the last day of the three-year statute of limitations.

However, plaintiffs failed to petition the probate court to reopen the estate and appoint a successor administrator until September 18, 1978.

*Williams v Grossman,* 409 Mich 67; 293 NW2d 315 (1980), provides for a tolling of the statute by the filing of a petition to reopen an estate and appoint an administrator. The petition was not filed within the three-year statute of limitations and there was no administrator or special administrator of the estate to be served. Service on Mr. Walsh was a nullity.

By any application or extension of *Williams,* there was no defendant to be served, nor was the "swiftness of the probate" the cause of this problem. It was the dilatoriness of the plaintiffs.

I can see no valid application of a legal principle which should permit this order of the Court. To the contrary, it wipes away statutory protections and voids simple rules of procedure.

I would affirm.

PEOPLE v HILBURN. (Docket No. 66904.) Leave to appeal denied January 5, 1982. Grant Hilburn, *in propria persona,* appellant. Case below, Court of Appeals No. 52881, order of January 23, 1981.

PEOPLE v MASCIAS. (Docket No. 66935.) Leave to appeal denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Karla Kendall,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 50609, per curiam opinion of March 11, 1981.

PEOPLE v LAWS. (Docket No. 67169.) Leave to appeal denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. Robert Laws, *in propria persona,* appellant. Case below, Court of Appeals No. 46097, per curiam opinion of April 24, 1981.

SISSON v PLACHTA. (Docket No. 63685.) Plaintiff's application for leave to appeal held in abeyance pending decision in *Friedman v Dozorc,* 412 Mich 1 (1981); leave to appeal denied January 5, 1982. *Hillman, Baxter & Hammond* for plaintiff-appellant. Case below, Court of Appeals No. 78-4368, memorandum opinion of August 9, 1979.

PEOPLE v MURPHY. (Docket No. 66041.) Leave to cross-appeal denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert H. Cleland,* Prosecuting Attorney, and *C. Denton Wolf,* Chief Appellate Attorney, for the people, appellant. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-appellee-cross-appellant. Reported below: 100 Mich App 413.

PEOPLE v YOUNG. (Docket No. 67254.) Leave to appeal denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. Terry Young, *in propria persona,* appellant. Case below, Court of Appeals No. 55644, order of May 1, 1981.

LANE v BELLE ISLE RIDING ACADEMY, INC. (Docket No. 68318.) Leave to appeal denied January 5, 1982. *Fischer, Franklin, Ford, Simon & Hogg* for plaintiff-appellee. *David M. Jutkowitz* for defendants-appellants. Case below, Court of Appeals No. 57203, order of August 31, 1981.

LEVIN, J., not participating.

PEOPLE v LYSHER. (Docket No. 66984.) Leave to appeal considered January 5, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Jackson Circuit Court. *People v Urynowicz,* 412 Mich 137 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people, appellant. *Myron E. Sanderson* for defendant-appellee. Case below, Court of Appeals No. 47224, per curiam opinion of January 9, 1981.

HAMILTON v FITZGERALD BOARD OF EDUCATION. (Docket No. 67093.) Leave to appeal denied January 5, 1982. *William Ross* for plaintiff-appellant. *Clark, Hardy, Lewis, Fine & Pollard, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 52623, order of February 27, 1981.

PEOPLE v ABATE. (Docket No. 67124.) Leave to appeal denied January 5, 1982, because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Don L. Milbourn,* Chief Appellate Lawyer, and *Robert J. Berlin,* Assistant Prosecuting Attorney, for the people. *Kramer & Murray, P.C.,* for defendant-appellant. Reported below: 105 Mich App 274.

PEOPLE v CONKLIN. (Docket No. 67178.) Leave to appeal denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George Van Kula,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 51042, per curiam opinion of April 16, 1981.

FIFE v WARREN. (Docket No. 67212.) Leave to appeal denied January 5, 1982. *Emery & DeVine* for plaintiff-appellant. *Willingham, Coté, Hanslovsky, Griffith & Foresman, P.C.,* for defendant-appellee. Reported below: 105 Mich App 725.

MACDONALD v OAKLAND CIRCUIT JUDGES. (Docket No. 67249.) Leave to appeal denied January 5, 1982. *William L. Fisher* for plaintiff-appellant. *Robert P. Allen,* Civil Counsel, and *Linda E. Wasielewski,* Assistant, for defendants-appellees. Case below, Court of Appeals No. 55303, order of April 28, 1981.

PEOPLE v FINN. (Docket No. 68152.) Leave to appeal denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 53596, per curiam opinion of October 1, 1981.

STERNICKI v CHURCH OF SCIENTOLOGY OF MICHIGAN. (Docket No. 68271.) Leave to appeal denied January 5, 1982, because the Court is not persuaded that the question presented should now be reviewed by this Court. *Goodman, Eden, Millender & Bedrosian* for plaintiff-appellee. *Carson, Fischer & Potts* for defendant-appellant. Case below, Court of Appeals No. 60502, order of October 30, 1981.

CASTILLO v GENERAL MOTORS CORPORATION. (Docket No. 67211.) Leave to appeal denied January 5, 1982. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Anderson, Green & Vincent, P.C.,* for defendant-appellee. Reported below: 105 Mich App 776.

BELL FIBRE PRODUCTS CORPORATION v DIRECTOR, DEPARTMENT OF LABOR. (Docket No. 67258.) Leave to appeal denied January 5, 1982. *Michael F. Kelly, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Charles F. Keeley,* Assistant Attorney General, for defendants-appellees. Case below, Court of Appeals No. 54277, order of March 2, 1981.

PEOPLE v CENTERS and PEOPLE v MCINTOSH. (Docket No. 68435.) Leave to appeal denied January 5, 1982 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. *Richard J. Drew* for defendant-appellant Thaddeus Centers. *Mark McCabe* for defendant-appellant Charles McIntosh. *Sanford Kesten* for defendant-appellant Dwayne McIntosh. Case below, Court of Appeals No. 60461, order of November 13, 1981.

PEOPLE v THADDEUS JOHNSON. (Docket No. 66434.) Leave to appeal considered January 5, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's conviction of breaking and entering with intent to commit criminal sexual conduct in the second degree. Testimony bearing upon defendant's intent at the time of entry strongly suggests that defendant contemplated an assault upon a person other than complainant, a fact acknowledged by the prosecutor's belated and unsuccessful effort to amend the information in this regard. The evidence of this charge was insufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Hampton,* 407 Mich 354, 366 (1979), and *Jackson v Virginia,* 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). In all other respects leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D. Warner,* Prosecuting Attorney, and *Judith K. Simonson,* Assistant Prosecuting Attorney, for the people. Thaddeus Johnson, *in propria persona,* and *Jack M. Grimm* for defendant-appellant. Case below, Court of Appeals No. 48953, per curiam opinion of December 19, 1980.

MCCALL v GENERAL MOTORS CORPORATION. (Docket No. 67247.) Leave to appeal denied January 5, 1982. *Robert L. O'Connell & Associates* for plaintiff-appellant. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellee. Case below, Court of Appeals No. 55363, order of March 26, 1981.

EVERIDGE v MIDWEST FOUNDRY COMPANY. (Docket No. 67252.) Leave to appeal denied January 5, 1982. *Wilcox & Robison, P.C.,* for plaintiff-appellee. *Munroe & Nobach, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 54844, order of May 1, 1981.

MARYLAND ELECTRIC, INC v ROBERT DAVIS, INC. (Docket No. 68380.) Leave to appeal denied January 5, 1982, because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Spilkin, Shapiro & Klein, P.C.,* for plaintiffs-appellees. *Gromek, Bendure & Thomas* for defendants-appellants Barge, Inc., and Lansdowne, Inc. Case below, Court of Appeals No. 60535, order of November 4, 1981.

LANE v ROSENBERG. (Docket No. 68261.) Leave to appeal denied January 5, 1982, because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for plaintiffs-appellants. *Kaufman & Friedman, P.C.,* for defendants-appellees Robert Michael Semak and Grand Schaeffer North. Case below, Court of Appeals No. 58674, order of September 22, 1981.

PEOPLE v LUCAS. (Docket No. 67184.) Leave to appeal denied January 5, 1982, because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Talpos, Arnold & Rooyakker* for defendant-appellant. Case below, Court of Appeals No. 55151, order of March 10, 1981.

LILLY v MICHIGAN MUTUAL INSURANCE COMPANY. (Docket No. 67198.) Leave to appeal denied January 5, 1982. *McCroskey, Libner, VanLeuven, Feldman, Cochrane & Brock, P.C.,* for plaintiff-appellant. *Foster, Swift, Collins & Coey, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 55816, order of April 29, 1981.

PEOPLE v SEES. (Docket No. 67244.) Leave to appeal denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, and *Janis L. Blough,* Chief Appellate Attorney, for the people. James Ronald Sees, Sr., *in propria persona,* appellant. Reported below: 104 Mich App 477.

BRAVERMAN v LAPEER STATE HOME. (Docket No. 67270.) Leave to appeal denied January 5, 1982. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard F. Zapala,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 55812, order of April 29, 1981.

SMITH v LAKEY FOUNDRY CORPORATION. (Docket No. 67262.) Leave to appeal denied January 5, 1982. *McCroskey, Libner, Van Leuven, Feldman, Cochrane & Brock, P.C.,* for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard F. Zapala,* Assistant Attorney General, for defendants-appellants Lakey Foundry Corporation and Self-Insurers' Security Fund. *Smith, Haughey, Rice & Roegge* for defendants-appellees Cuyahoga Wrecking Corporation and Liberty Mutual Insurance Company. *Rhoades, McKee & Boer* for defendant-appellee Business Assets Corporation. Case below, Court of Appeals No. 50116, per curiam opinion of April 27, 1981.

PEOPLE v HOYE. (Docket No. 67231.) Leave to appeal denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Stuart Lev,* Assistant Defender, for defendant-appellant. Reported below: 105 Mich App 768.

PEOPLE v JONES. (Docket No. 68178.) Leave to appeal denial of bail bond denied January 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 54716, order of September 30, 1981.

PEOPLE v ZIMMERMAN. (Docket No. 67235.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. Edward Stephen Zimmerman, Sr., *in propria persona,* appellant. Case below, Court of Appeals No. 51120, memorandum opinion of March 13, 1981.

PETITPREN v TAYLOR SCHOOL DISTRICT. (Docket No. 66868.) Leave to appeal denied January 19, 1982. *Harry F. Vellmure, Victor T. Mitea,* and *Todd J. Mikesell,* for defendant-appellee Taylor School District. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald F. Young* and *Paul J. Zimmer,* Assistants Attorney General, for intervenor-appellant Attorney General. *Fieger & Fieger* for intervenor-appellee Taylor Federation of Teachers. Reported below: 104 Mich App 283.

PEOPLE v SANDERS. (Docket No. 67311.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. Dennis Sanders, *in propria persona,* appellant. Case below, Court of Appeals No. 52319, order of March 12, 1981.

WHEELER v NATIONAL TWIST & DRILL. (Docket No. 67159.) Leave to appeal denied January 19, 1982. *Ripple, Chambers & Steiner, P.C.,* for plaintiff-appellant. *Nelson, Payne & Peterson* for defendants-appellees National Twist & Drill and Liberty Mutual Insurance Company. *Lacy & Jones* for defendants-appellees National Twist & Drill and Travelers Insurance Company. Case below, Court of Appeals No. 55623, order of April 16, 1981.

PEOPLE v MARVIN OWENS. (Docket No. 67248.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 53124, order of April 3, 1981.

BICKHAM v GENERAL MOTORS CORPORATION. (Docket No. 67263.) Leave to appeal denied January 19, 1982. *Ripple, Chambers & Steiner, P.C.,* for plaintiff-appellant. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellee General Motors Corporation. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Joseph M. Binno,* Assistant Attorney General, for

defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 54961, order of April 28, 1981.

PEOPLE v TAYLOR. (Docket No. 67924.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people, appellant. *Parker & Buckley* for defendant-appellee. Case below, Court of Appeals No. 53331, per curiam opinion of August 26, 1981.

PEOPLE v CHARLES NEAL. (Docket No. 67289.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Annette M. Olejarz,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Lynn Chard* and *Stuart B. Lev,* Assistants Defender, for defendant-appellant. Case below, Court of Appeals No. 46873, per curiam opinion of April 24, 1981.

PEOPLE v MARGARET NEAL. (Docket No. 68188.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Annette M. Gray,* Assistant Prosecuting Attorney, for the people. Margaret A. Neal, *in propria persona,* appellant. Case below, Court of Appeals No. 46874, per curiam opinion of April 24, 1981.

BRANDON TOWNSHIP v NORTH-OAKLAND RESIDENTIAL SERVICES, INC. (Docket No. 68238.) Leave to appeal denied January 19, 1982. *Robert F. White* for plaintiff-appellant. *Jon R. Garrett* for defendants-appellees North-Oakland Residential Services, Inc., and Bradley J. Kotula. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Janis Meija* and *William K. Basinger,* Assistants Attorney General, for defendant-appellee Department of Social Services. Reported below: 110 Mich App 300.

PEOPLE v WALTON. (Docket No. 67366.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D. Warner,* Prosecuting Attorney, and *Judith K. Simonson,* Assistant Prosecuting Attorney, for the people. *Benjamin H. Logan, II,* for defendant-appellant. Case below, Court of Appeals No. 51097, per curiam opinion of April 28, 1981.

PEOPLE v MULLANEY. (Docket No. 67099.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *William D. Bond,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Reported below: 104 Mich App 787.

JACKSON v DETROIT BOARD OF CANVASSERS. (Docket No. 68182.) Leave to appeal denied January 19, 1982. *Craig, Farber & Downs, P.C.,* for plaintiff-appellant. *Sylvester Delaney,* Deputy Corporation Counsel, and *Kay D. Schloff, Harnetha Williams-Jarrett,* and *Nancy P. Vanderbeek,* Assistants Corporation Counsel, for defendants-appellees. Case below, Court of Appeals No. 60190, order of October 2, 1981.

PEOPLE v TEMPLETON. (Docket No. 65340.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. *Robert E. Slameka* for defendant-appellant. Case below, Court of Appeals No. 78-3038, per curiam opinion of March 6, 1980.

PEOPLE v CROSSLEY. (Docket No. 67141.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Sheila Hughes* for defendant-appellant. Case below, Court of Appeals No. 43659, per curiam opinion of March 18, 1981.

PEOPLE v SIMPSON. (Docket No. 68408.) Leave to appeal denied January 19, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people, appellant. *Kim D. Shaw* for defendant-appellee. Case below, Court of Appeals No. 56061, memorandum opinion of October 30, 1981.

PEOPLE v ASHLEY. (Docket Nos. 61385, 61576.) Reconsideration of the order of this Court of May 27, 1981 (411 Mich 953) denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. Carl Lee Ashley, *in propria persona,* appellant. Case below, Court of Appeals No. 77-2710, per curiam opinion of April 24, 1978.

Justice LEVIN would grant reconsideration and leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant the motion for reconsideration in this case and upon reconsideration vote to grant leave to appeal, limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v SULLIVAN. (Docket No. 65690.) Leave to appeal denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. Earl Sullivan, *in propria persona,* appellant. Reported below: 97 Mich App 488.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant leave to appeal limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v IRWIN. (Docket No. 66934.) Leave to appeal denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48770, order of July 10, 1980.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant leave to appeal limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v LANGSTON. (Docket No. 62340.) On reconsideration, leave to appeal considered May 26, 1982 and, pursuant to GCR 1963, 853.2(4), the judgment of the Court of Appeals is reversed and defendant's conviction of first-degree murder is reinstated. *People v Aaron,* 409 Mich 672, 735 (1980). *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *Juris Kaps,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. State Appellate Defender, *Chari Grove,* Assistant Defendant, for defendant-appellee. Reported below: 86 Mich App 656.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant leave to appeal, limited to consideration of the question

of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v IRON. (Docket No. 66955.) Leave to appeal denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *Steven Gonzales,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Gail Rodwan,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 53065, order of December 29, 1980.

FITZGERALD, J., not participating.

PEOPLE v LOVETT. (Docket No. 62123.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Aaron, People v Wright,* and *People v Thompson,* 409 Mich 672 (1980), and *People v Wilder,* 411 Mich 328 (1981); leave to appeal denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Linda Berns Wright,* Assistant Prosecuting Attorney, for the people. *Thomas J. Demetriou* for defendant-appellant. Reported below: 85 Mich App 534.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant leave to appeal, limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v DIETRICH and PEOPLE v COLE. (Docket No. 62405.) The people's application for leave to appeal and defendants' applications for leave to cross-appeal held in abeyance pending decision in *People v Wright* and *People v Thompson,* 409 Mich 672 (1980), and *People v Wilder,* 411 Mich 328 (1981); the applications are considered January 21, 1982, and pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals in part

and reinstate defendant Cole's conviction of first-degree murder. *People v Aaron,* 409 Mich 672 (1980). In all other respects the applications are denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Assistant Prosecuting Attorney, for the people, appellant. *Buth, Wood & Weidaw* for defendants-appellees-cross-appellants. Reported below: 87 Mich App 116.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant leave to appeal, limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v GLOVER. (Docket No. 61495.) Reconsideration of the order of this Court of May 27, 1981 (411 Mich 945) denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David E. McClernan,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Lick, Emery & DeVine* for defendant-appellant. Reported below: 83 Mich App 247.

Justice LEVIN would grant reconsideration and leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant the motion for reconsideration in this case and upon reconsideration vote to grant leave to appeal, limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v HILL. (Docket No. 62502.) Reconsideration of the order of this Court of May 27, 1981 (411 Mich 946) denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *Robert C. Mueckenheim,* for defendant-appellant. Case below, Court of Appeals No. 77-593, per curiam opinion of July 7, 1978.

Justice LEVIN would grant reconsideration and leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant the motion for reconsideration in this case and upon reconsideration vote to grant leave to appeal, limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v RONALD WILSON. (Docket No. 61928.) Reconsideration of the order of this Court of June 26, 1981 (411 Mich 990) denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Ward S. Hamlin, Jr.,* Prosecuting Attorney, *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. State Appellate Defender, *Mardi Crawford,* Assistant Defender, for defendant-appellee. Reported below: 84 Mich App 636.

Justice LEVIN would grant reconsideration and leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant the motion for reconsideration in this case and upon reconsideration vote to grant leave to appeal, limited to consideration

of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v TILL. (Docket No. 63311.) Reconsideration of the order of this Court of June 19, 1981 (411 Mich 982) denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Reported below: 80 Mich App 16.

LEVIN, J., would grant reconsideration and leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant the motion for reconsideration in this case and upon reconsideration vote to grant leave to appeal, limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v LONCHAR. (Docket No. 66009.) Reconsideration of the order of this Court of May 27, 1981 (411 Mich 923) denied January 21, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Stephen H. Naegele,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *John Nussbaumer,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-5193, memorandum opinion of June 11, 1980.

LEVIN, J., would grant reconsideration and leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant the motion for reconsideration in this case and upon reconsideration vote to grant leave to appeal, limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

PEOPLE v SHEPARD and PEOPLE v ULMER. (Docket Nos. 60776, 60777.) Reconsideration of the order of this Court of May 27, 1981 (411 Mich 949) denied January 22, 1982. State Appellate Defender, *Norris J. Thomas, Jr.,* Assistant Defender, for defendants-appellants. Cases below, Court of Appeals Nos. 19186, 19184, per curiam opinion of September 20, 1977.

LEVIN, J., would grant reconsideration and leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981).

KAVANAGH, J., concurs with LEVIN, J.

RYAN, J., dissents as follows:

For the reasons stated by Justice LEVIN in Parts I, III, and V of his statement of dissent in *People v Lonchar,* 411 Mich 923 (1981), I would grant the motion for reconsideration in this case and upon reconsideration vote to grant leave to appeal, limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672 (1980).

COMMISSIONER OF INSURANCE v BLUE CROSS & BLUE SHIELD OF MICHIGAN. (Docket No. 68695.) It appearing that the Court of Appeals has decided this case by order certified January 21, 1982, leave to appeal prior to decision of the Court of Appeals is denied January 27, 1982 as moot. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Harry G. Iwasko, Jr.,* Assistant Attorney General, for plaintiff-appellee. *Foster, Swift, Collins & Coey, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 62059, order of January 21, 1982.

PEOPLE v REDWINE. (Docket No. 64004.) Leave to appeal and the amplified opinion of the Court of Appeals are considered January 28, 1982. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to

appeal, we reverse the judgments of the Court of Appeals and of the trial court and remand the case to the trial court for further proceedings. We find no basis for concluding that the testimony adduced below established the existence of any exception to the requirement that a warrant be secured before a search may be conducted. Therefore, the vial and the contents thereof, which were seized in this matter should not have been received in evidence. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael Lehto,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-2666, per curiam opinion of May 1, 1980.

SNOW v FREEMAN. (Docket No. 67080.) Leave to appeal denied January 28, 1982. *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* for plaintiff-appellee. *Sullivan, Ward & Bone, P.C.,* for defendant-appellant Richard Freeman. *Cozadd, Shangle & Smith, P.C.,* for defendants-appellants Andre Parras and Outer Drive Hospital. Case below, Court of Appeals No. 50486, order of December 8, 1980.

RYAN, J., dissents and states as follows:

This medical malpractice case was tried in the Third Judicial Circuit Court for nine days. It resulted in a verdict of no cause of action.

The plaintiff's motion for a new trial was reluctantly granted by the trial judge who said he felt bound to do so by this Court's holding in *Javis v Ypsilanti Board of Education,* 393 Mich 689, 702-703 (1975). In *Javis* this Court held:

"We accordingly adopt a strict rule that we believe will provide economy in administration and fairness to the parties: Where there is an omission of, or deviation from an applicable and accurate SJI [Standard Jury Instruction], prejudicial error will be *presumed;* provided that the erroneously omitted SJI was properly requested at trial; and, provided that in those cases where error is charged as a result of a deviation from a SJI, said deviation was brought to the attention of the trial court prior to the commencement of jury deliberations." (Emphasis added.)

Here, the plaintiff requested that the trial court give SJI 1.05. That instruction reads as follows:

"When at least five of you agree upon a verdict, it will be received as your verdict. In your deliberations, you should weigh the evidence with due regard and consideration for the opinions of each other. You

should listen to each other's arguments with an open mind, and make every reasonable effort to reach a verdict."

Although plaintiff's counsel requested the foregoing instruction, the trial court, in its lengthy and highly detailed jury charge, omitted the last two sentences of the instruction and instead told the jury:

"Then when five of the six of you have agreed upon a verdict for this case that will be the verdict for your jury because five of six constitutes the legal requirement. A unanimous opinion, unanimous decision, is no longer required under our law."

After the jurors retired, but before they began their deliberation, plaintiff's counsel timely objected to the court's failure to include the omitted language.

Thus, for the failure to tell the jurors, as provided in SJI 1.05, that they must weigh the evidence with due regard for the opinions of fellow jurors, listen to the arguments of other jurors with an open mind and make every reasonable effort to reach a verdict, the verdict in a complex nine-day medical malpractice trial, reached after less than two hours of deliberation, is held for naught and the case is ordered retried.

By its order today, this Court declines to grant the defendant's delayed application for leave to appeal.

I dissent.

In addition to the forceful reasons for overruling *Javis* which were advanced by the Chief Justice in her dissent in *Socha v Passino,* 405 Mich 458 (1979), to which I subscribed, there are at least two reasons why this Court should reverse the trial court's order for a new trial in this case, even without overrulement of *Javis.*

First, the trial judge, in ordering a new trial, misapprehended the *Javis* rule. That case declared that when there is a failure to give an applicable and accurate Standard Jury Instruction which has been requested and the omission brought to the attention of the trial court, "prejudicial error will be *presumed".* 393 Mich 689, 702-703. (Emphasis added.) The Court has not said whether that presumption is rebuttable or irrebuttable.

It is plain from a reading of the trial court's bench opinion and order in this case reluctantly granting a new trial that, while not articulating the point in terms of a rebuttable or irrebuttable presumption, the court was plainly of the view that the automatic penalty for failure to include the two omitted sentences of SJI 1.05 was a mandatory new trial because, according to *Javis,* error "will be presumed" despite the trial court's view that the omission was harmless error. Since this Court has not held the presumption of error for a *Javis* violation to be irrebuttable, it should be treated as rebuttable.

An irrebuttable presumption of prejudicial error mandating reversal and new trial of all civil litigation, no matter how lengthy or complex, for failure to recite every line of even the most inconsequential or innocuous portion of an arguably "applicable and accurate" SJI, defies common sense and surely cannot have been the intention of the *Javis* Court. In treating the omission of the language of the SJI in question here as though it resulted in an irrebuttable presumption of error, and in failing to determine whether the omission resulted in unfair prejudice to the plaintiff, the trial court erred.

Second, the language of SJI 1.05 which was omitted was of no significance whatever in the context of this trial and could not have worked to the unfair prejudice of any party.

The new trial is ordered for the court's failure to give the omitted portion of the instruction *prior to the jury's retirement to deliberate.* There was no suggestion at that time, and no reason whatever to believe, that any jury member was disinclined to listen to the views of fellow jurors or would fail to make every reasonable effort to reach a verdict. The jurors had just been told by the trial judge that it was their duty to "begin your deliberations. Then when five of the six of you have agreed upon a verdict for this case, that will be the verdict for your jury". How else could six people reach a verdict which they had been told must reflect the views of at least five of them? Many years of trial court experience, including recitation of the language of SJI 1.05 hundreds of times, suggests most compellingly that telling six jurors who have served together as an inseparable unit for a nine-day medical malpractice case that "[i]n your deliberations, you should weigh the evidence with due regard and consideration for the opinions of each other" and "[y]ou should listen to each other's arguments with an open mind, and make every reasonable effort to reach a verdict" is tantamount to, and about as necessary as, telling them that all of them are members of the jury and may participate in the deliberative process.

Had this been a case in which, after lengthy deliberation, the jurors returned to the courtroom requesting additional or clarifying instructions, or suggested inability to reach a verdict, the omission of the two sentences of SJI 1.05 in question would be significant and the need to give such instructions evident. Failure to give such an instruction at that point might well amount to prejudicial error. That was not the case here, however.

Nullification of this jury's verdict, reached in less than two hours following a nine-day medical malpractice trial, for the court's failure to tell the jurors to have due regard for one another's views with an open mind and to make every reasonable effort to reach a verdict by calling the omission prejudicial error is a misreading of *Javis* and, in

my view, the wooden, unreasoned and unfair misapplication of a procedural hypertechnicality.

PEOPLE v GLOETZNER. (Docket No. 66804.) Leave to appeal denied January 29, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Joseph E. Deegan,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. *Michael J. Haley* for defendant-appellee. Case below, Court of Appeals No. 43363, per curiam opinion of February 19, 1981.

RYAN, J., dissents and states as follows:

I dissent from the Court's order in this case because I am persuaded the decision of the Court of Appeals in reversing the defendant's conviction on the grounds that the trial judge abused his discretion in refusing the defendant's mid-trial request for an extended continuance was clearly erroneous.

The trial court's finding of fact that the defendant's request to extend still further the nine-day continuance ordered by the court after the third day of trial was "a delaying tactic" is amply supported in the record. The court's refusal to further delay the trial was not, therefore, an abuse of discretion.

PEOPLE v GONYEA. (Docket No. 68438.) Leave to appeal denial of bail bond considered February 1, 1982. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the Court of Appeals orders certified October 27 and November 13, 1981, revoking defendant's bond, and order that defendant be admitted to bail pending the determination of his appeal in the Court of Appeals or until further order of the Court of Appeals. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Theodore O. Johnson,* Prosecuting Attorney, and *Michael A. Nickerson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 57379, orders of October 27 and November 13, 1981.

DUNHAM v VETERANS OF FOREIGN WARS CLUB OF MUSKEGON. (Docket No. 67341.) Leave to appeal denied February 1, 1982, because the Court is not persuaded that the question presented should now be reviewed by this Court. *Marcus, Ruck, Flynn & Wells, P.C.,* for plaintiffs-appellees. *O'Toole, Stevens, Johnson, Knowlton, Potter & Rolf* for defendant-appellant. Reported below: 104 Mich App 541.

PEOPLE v FIELDS. (Docket No. 67348.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 53611, per curiam opinion of April 29, 1981.

PEOPLE v FLEMING. (Docket No. 61413.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. *George R. Darrah* for defendant-appellant. Case below, Court of Appeals No. 77-2113, memorandum opinion of April 11, 1978.

PEOPLE v HOWARD BROWN and PEOPLE v RANGEL. (Docket Nos. 67148-67155.) Leave to appeal considered February 1, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the case for retrial for the reasons stated by Judge MAHER in dissent. *People v Brown* and *Rangel,* 104 Mich App 803 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Patrick O. Duggan,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Reported below: 104 Mich App 803.

PEOPLE v JAMES SMITH. (Docket No. 67255.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael R. Smith,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. James Smith, *in propria persona,* appellant. Case below, Court of Appeals No. 49657, order of August 21, 1980.

PEOPLE v ALLEN. (Docket No. 68075.) Leave to appeal and cross-appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Nora J. Pasman,* Assistant De-

fender, for defendant-appellee-cross-appellant. Reported below: 109 Mich App 147.

PEOPLE v COTTEC. (Docket No. 68224.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Geoffrey H. Nickol,* Assistant Prosecuting Attorney, for the people. *Charles J. Booker* for defendant-appellant. Case below, Court of Appeals No. 59260, order of October 23, 1981.

PEOPLE v WAITS. (Docket No. 62938.) Leave to appeal granted February 1, 1982. The parties are directed to include among the issues to be briefed whether this Court should adopt, implement, and apply in this case a procedure for appellate review of criminal sentences and, if necessary, overrule *Cummins v People,* 42 Mich 142 (1879). The trial court is requested to forward to the clerk of this Court the presentence report in this case. The motion for bail pending appeal is denied. Persons or groups interested in the determination of the question may apply to the Court for permission to file briefs amicus curiae. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. *Lawson & Lawson, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 78-58, memorandum opinion of February 28, 1979.

DAYHUFF v GENERAL MOTORS CORPORATION. (Docket No. 66622.) Leave to appeal denied February 1, 1982. *Marvin L. Failer, David G. Moore,* and *M. Bushnell Trembley* for plaintiffs-appellees. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* and *Otis M. Smith,* General Counsel, for defendant-appellant. Reported below: 103 Mich App 177.

RINGLE EXPRESS, INC v PUBLIC SERVICE COMMISSION. (Docket No. 67060.) Leave to appeal considered February 1, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *McFarland & Bullard* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Arthur E. D'Hondt* and *S. David Kutinsky,* Assistants Attorney General, for

defendants-appellees. Case below, Court of Appeals No. 54312, order of February 26, 1981.

SUTINEN v THE SUSSEX HOUSE, INC. (Docket No. 67158.) Leave to appeal considered February 1, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the opinion of the Workers' Compensation Appeal Board and remand the case to the board for further proceedings. The "crucial" conclusion of the board, identifying the time sequence between plaintiff's last employment and the occurrence of myocardial infarction is dependent upon quoted medical testimony of Dr. Schuchter, which was given in response to a hypothetical question propounded by defense counsel. The question failed to acknowledge undisputed record evidence indicating that an EKG performed on March 11, 1972, revealed cardiac insufficiency *(i.e.,* "nonspecific myocardial damage") and made the unsupported assumption that CPK testing was undertaken prior to March 13, 1972, and did not indicate myocardial infarction. We retain no jurisdiction. *Tercha & Daavettila* for plaintiff-appellant. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 55766, order of April 15, 1981.

FISER v CITY OF ANN ARBOR. (Docket No. 66951.) Leave to appeal granted February 1, 1982. The parties are directed to include among the issues to be briefed: (1) whether the decision by police to pursue and to continue pursuit of a traffic violator is "discretionary" or "ministerial", and (2) whether the evidence in this case gave rise to questions of fact as to whether an emergency existed to justify a pursuit and to continue pursuit; as to whether there was negligence on the part of the defendants; and as to whether the acts of the defendants were a proximate cause of plaintiff's injuries. *Erwin A. Salisbury* for plaintiff-appellant. *John K. Van Loon,* Chief Assistant City Attorney, for defendants-appellees City of Ann Arbor, David Miller, Donald Terry, and Walter Lunsford. *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* for Michigan Trial Lawyers Association as amicus curiae. Reported below: 107 Mich App 367.

WAYNE COUNTY v STATE TREASURER. (Docket No. 67518.) Leave to appeal denied February 1, 1982. The stay of proceedings previously ordered by this Court is hereby dissolved. *George H. Cross,* Corporation Counsel, and *Robert H. Schuch,* Assistant Corporation Counsel, for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Milton I. Firestone* and *Regina*

Ann King, Assistants Attorney General, for defendants-appellants. Reported below: 105 Mich App 249.

PEOPLE v WILLEY. (Docket No. 66692.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Joseph T. Barberi,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, James Krogsrud, Assistant Defender. Reported below: 103 Mich App 405.

SACHTELEBEN v SEALED POWER CORPORATION. (Docket No. 67250.) Leave to appeal denied February 1, 1982. *McCroskey, Libner, Van Leuven, Feldman, Cochrane & Brock, P.C.,* for plaintiff-appellee. *Smith, Haughey, Rice & Roegge,* for defendants-appellants. Case below, Court of Appeals No. 55703, order of April 29, 1981.

RYAN, J., would grant leave to appeal.

PEOPLE v JAMES WILSON. (Docket No. 68197.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 49617, per curiam opinion of October 8, 1981.

PEOPLE v MEYERS. (Docket Nos. 68108, 68109.) Leave to appeal considered February 1, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals. The matter is remanded to the Court of Appeals which shall, while retaining jurisdiction, remand the matter to the Oakland Circuit Court for an evidentiary hearing and findings as to whether there was good cause for not bringing the defendants to trial within 120 days of their arrival in Michigan and whether the resulting continuances were necessary and reasonable. MCL 780.601(c); MSA 4.147(1)(c). The transcript of the hearing and the circuit court's findings shall be filed with the Court of Appeals, which shall thereafter reconsider this matter in light of the findings of the trial court. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and

*Thomas S. Richards,* Assistant Prosecuting Attorney, for the people, appellant. *Lawrence G. Kaluzny* for defendant-appellee Daniel Meyers. *Cooper, Shifman, Gabe & Quinn* for defendant-appellee Charles Meyers. Reported below: 109 Mich App 719.

PEOPLE v COLES. (Docket No. 60641.) Leave to appeal granted February 1, 1982. The parties are directed to include among the issues to be briefed whether this Court should adopt, implement, and apply in this case a procedure for appellate review of criminal sentences and, if necessary, overrule *Cummins v People,* 42 Mich 142 (1879). The trial court is requested to forward to the clerk of this Court the presentence report in this case. Persons or groups interested in the determination of the question may apply to the Court for permission to file briefs amicus curiae. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. *Murphy, Burns & McInerney* for defendant-appellant. Reported below: 79 Mich App 255.

PEOPLE v JOSEPH GONZALES. (Docket No. 60893.) Leave to appeal granted February 1, 1982. The parties are directed to include among the issues to be briefed whether this Court should adopt, implement, and apply in this case a procedure for appellate review of criminal sentences and, if necessary, overrule *Cummins v People,* 42 Mich 142 (1879). The trial court is requested to forward to the clerk of this Court the presentence report in this case. Persons or groups interested in the determination of the question may apply to the Court for permission to file briefs amicus curiae. Joseph E. Gonzales, *in propria persona,* appellant. Case below, Court of Appeals No. 30460, order of November 23, 1977.

PEOPLE v TERLISNER. (Docket No. 65128.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Ward S. Hamlin, Jr.,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Reported below: 96 Mich App 423.

LEVIN, J., dissents and says:

This is a direct appeal of a felony-murder conviction of a look-out/getaway driver for the participants in a robbery. The question of the

retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), has been raised.

I do not intend to suggest here that the Court reconsider its decision not to apply *Aaron* retroactively to appeals claiming instructional error. I have already expressed my dissenting view in that regard. See *People v Lonchar,* 411 Mich 923 (1981).

This case involves a distinct issue: whether *Aaron* retroactivity should be denied where there is *no* evidence from which a jury could infer malice or participation in a concert of action involving malice—where there is insufficient evidence to even submit the question of malice to the jury, regardless of the instruction.

In most of the cases where the issue of *Aaron* retroactivity has been presented, there is at least evidence from which a properly instructed jury might infer, at a minimum, "reckless" malice as defined in *Aaron:* "wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm". In those cases although there is no evidence that the defendant actually killed the victim, there is evidence that the defendant at least knew that his cohorts were armed with deadly weapons. It is arguable that a jury could infer "wanton and willful disregard" from the defendant's assisting in a felony knowing that the perpetrators were armed with deadly weapons.

In this case, however, there is no evidence that the defendant knew his co-felons were armed or that they were even in fact armed. This is one of the few cases of which I am aware in which there was insufficient evidence to allow the question of malice to be submitted to the jury. This insufficiency of evidence presents a clear distinction between this case and others in the abeyance pipeline. No difficult questions of line-drawing according to the degree of culpability in the killing are thus involved.

While this defendant like those in the abeyance cases was properly convicted pre-*Aaron* of first-degree murder, were we to have granted new trials in the other pending cases of those convicted pre-*Aaron* many would again be convicted of first-degree murder. But this defendant could not be convicted of first-degree murder post-*Aaron.*

Further, the evidence linking this defendant to the crime is comprised almost entirely of the defendant's own statements. Thus, the burden on the prosecution of a retrial, and the risk that its case would be impaired by missing or unavailable witnesses, faded memories, or the like, is minimal.

In this case,[1] the defendant Terlisner, Wayne Wilson, Arthur

[1] The facts as described here are culled from the testimony of the police officer who interrogated the defendant over three days. A taped

Bozart and three or four women were drinking in the victim Swetay's bar the night before the killing when Wayne Wilson said he would like to rob Swetay of his day's receipts. The three men left in Terlisner's car, dropped Arthur Bozart at his home, and proceeded to the home of Wayne Wilson's mother. There they apparently met a man identified only as "Nutty" or "Nummie". Terlisner, Wayne Wilson and Nutty then left in Terlisner's car. They discussed the robbery, arranging that Terlisner should drop them off near Swetay's home (next to his tavern) and position himself near the back door as a look-out as soon as it appeared that Swetay had closed his bar.

At his look-out position, Terlisner apparently heard screaming and a terrific commotion inside. Thinking he was being called for help, Terlisner entered the house. As he did so, he saw a police car cruising the street and screamed "come on, the fuzz is here", or something to that effect. He then went to the door of the living room, saw the blood and disarray, again screamed that the police were there and to get out, and then ran out the back door. He got in his car and drove away, without his companions. He returned soon afterward, saw Nutty running down the street, and picked him up. Nutty said, "Get out of here, we got to find some help, we got to find Wayne [Wilson]. There was a hell of a fight in the residence, and I think we killed Joe [Swetay]".

The medical examiner testified that Swetay died of loss of blood from numerous injuries. The injuries were apparently caused by three different types of weapons: a blunt object, a poker-like instrument, and a knife. From the stab wounds, it appeared that a knife measuring about 1-1/2 inches by 10 to 12 inches was used. No weapons were marked or received as exhibits at trial. Wayne Wilson and Nutty had not, apparently, been apprehended.

While the evidence against Wilson and Nutty tends to show intent to kill, the evidence against Terlisner shows no more than an intent to participate in an unarmed robbery.[2] There is insufficient evidence to allow the question of Terlisner's malice to be submitted to the jury. Even if it is permissible to allow a jury to infer malice from participation in a felony where one knows (or should know?) one's co-felons are

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statement of the defendant was also obtained on a fourth day. This tape was played to the jury.

[2] The only evidence that force was contemplated appears from Terlisner's recollection (as, again, related by the interrogating police officer) of the initial discussion in the bar when Wayne Wilson suggested robbing Swetay: that Wilson "would like to rob him for his day's receipts, wait for him after he got off work and hit him over the head". This does not indicate, however, that deadly force was contemplated.

armed, this case, unlike most of those held in abeyance for the *Aaron* retroactivity question, does not present such facts.

Justice requires the very limited retroactive application of *Aaron* to this case. This case provides a textbook example of the injustice which led this Court to reject the felony-murder doctrine. A bright-line distinction exists between this case and others requesting retroactive application.

The question of instructional error need not be addressed. The burden of a retrial on the prosecutor is minimal because the evidence against the defendant is almost exclusively derived from his own statements (whose truth he denied at trial), and thus the loss or memory lapse of witnesses is not a major concern. Finally, unlike some of the cases presenting the *Aaron* retroactivity question, this case is before the Court on direct appeal.

We could, and I think should, reverse and remand for a new trial stating that our decision in *Aaron* to deny retroactivity to cases tried before *Aaron* was made in the context of cases claiming instructional error in failing to charge on malice and was not meant to preclude retroactivity in a case where the issue is raised on direct appeal and concerns the sufficiency of evidence of malice.

PEOPLE v POLICK. (Docket No. 62424.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Michael J. Modelski,* Assistant Prosecuting Attorney, for the people. *Richard A. Campbell* for defendant-appellant. Case below, Court of Appeals No. 31357, per curiam opinion of November 8, 1978.

RYAN, J., dissents and states as follows:

For the reasons stated by Justice LEVIN in Parts I, III and V of his statement of dissent in *People v Lonchar,* 411 Mich 923; 308 NW2d 103 (1981), I would grant leave to appeal limited to consideration of the question of the retroactivity of the rule announced in *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980).

LEVIN, J., would grant leave to appeal and says:

Here, as in *People v Terlisner, ante,* 917, there is not sufficient evidence that the defendant intended to kill the victim.

For the reasons set forth in my dissent in *Terlisner,* this Court's holding in *People v Aaron,* 409 Mich 672 (1980), should, at least in such a case, be applied retroactively.

I

Defendant John Polick and his brother, Thomas Polick, were charged with first-degree felony murder and breaking and entering alleged to have occurred on October 30, 1975. The evidence tended to show, without dispute, that the defendant and his brother, Thomas Polick, broke and entered the premises of the deceased, a 67-year-old woman, and that Thomas Polick severely beat the deceased. The deceased died on November 4, 1975.

Both John and Thomas Polick were bench tried and convicted of first-degree felony murder and breaking and entering. The Court of Appeals affirmed in an unpublished per curiam opinion the felony-murder conviction but vacated the breaking and entering conviction on grounds of double jeopardy.

Although John Polick suggests that the trial judge applied an incorrect standard of law in determining that the beating caused the deceased's death and that there is insufficient evidence to support such a conclusion, I agree that no error occurred in this regard.

II

At trial, several witnesses presented evidence potentially bearing on the extent of John Polick's involvement in the beating.

Mr. Wyers, the person who discovered the deceased, testified:

"I asked her did she see who did it. She said, 'No' and I says, 'What happened?' She says, 'The first thing I knew, somebody was yanking me out of bed; another one was standing there with a flashlight while I was being beat.' "

Patrick Dixon testified that John Polick and Thomas Polick came to his house at 1 a.m. on October 30. They brought a television set with them. Mr. Dixon helped wash blood off the hands, arms and hair of Thomas Polick. He did not see any blood on John Polick.

Mr. William Vodry testified that John Polick and Thomas Polick came to his house at 2 p.m. on October 30. He said that Thomas Polick told him that they had "pulled a b & e that night and while they were in there, a couple guys jumped out on them". The next day, John Polick and Thomas Polick returned and asked Mr. Vodry to dispose of some clothes, which he did. Subsequently, Thomas Polick admitted to Mr. Vodry that he had assaulted a woman who lived on Mapleleaf (deceased's street).

"Tom told me that when they first went in the house, they just took her purse and then they left. O.K., when they come back, Tom had told John to stay outside. When Tom went back in, he said somebody had jumped out from behind him and Tom just spun around and hit. He didn't know who or what, you know, it was. Then he grabbed a pillow and kept hitting her. That is the part that Tom had told me."

Mr. Vodry then asked John Polick about the extent of his participation in the incident:

"O.K., I asked him, 'John, did you hit her?' He said, 'No, Ed, I did not' so then he laid the story on me. First, they went in and they took the purse. Then they left. They got $4 was in there. Then, when Tom and John came back, Tom told John to stay outside. John said he was out there 10, 15 minutes, then he heard a scream. So John run in to see what was going on, and seen Tom beating—you know. And John yelled at him, 'Come on, Tom, come on.' And Tom said a foul word, 'F— it, John,' and John just grabbed the TV and took off."

Elizabeth Shuck testified that John Polick and Thomas Polick came into the Food Fair Market where she worked at 1:30 or 2:00 a.m. on October 30. Thomas Polick asked her to wash the blood out of his hair and she did. She also washed a small spot of blood out of John Polick's hair. Thomas Polick told her they had gotten into a fight "with four guys".

Detective Richard Finkbeiner testified that he took a confession from Thomas Polick on November 5, 1975. The confession was admitted into evidence. In deference to the *Bruton* rule, *Bruton v United States,* 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), all references to John Polick by name were stricken from the confession. Thomas Polick admitted that he and John Polick broke into the deceased's house and that he, Thomas Polick, hit the deceased with his hand, although not recalling how many times he hit her. Thomas Polick stated that no flashlight was used in the breaking and entering. He also stated that John Polick did not touch the deceased and, in fact, "I forgot he was even there until he flipped on the light and I turned around. I think I told him to shut the Goddamn think *[sic]* off."

III

The trial judge found both John Polick and Thomas Polick guilty of burglary. The judge also found Thomas Polick guilty of first-degree murder upon either a theory that he intentionally inflicted great bodily harm on the decedent resulting in death, thereby constituting the requisite malice aforethought for murder, or that a murder was committed during the perpetration or attempt to perpetrate a burglary in which Thomas Polick was involved. The judge went on to find John Polick also guilty of first-degree murder:

"By statute, all murder committed in the perpetration or the attempt to perpetrate any of the crimes enumerated in the statute, of which burglary is one of them, that type of murder, by statute, is murder in the first degree.

"And all parties knowingly aiding or abetting in the participation of the enumerated crime so resulting, are equally guilty. * * *

"Now, robbery is one of the enumerated crimes in the felony-murder statute, and so is burglary.

"In this case, the court finds that the people have proven, beyond a reasonable doubt, that both of these defendant *[sic]* participated in the burglary and that they did so knowingly. And although the defendant, Thomas Polick, was the defendant who committed the beating of Mrs. Petit; that, at the very least, the defendant, John Polick, did knowingly participate in that burglary. * * *

"It is true that mere presence, even with knowledge that criminal offense is about to be committed or is being committed or has been committed, is not enough, alone, to support a conviction for aiding and abetting. But this court, however, finds that the defendant, John Polick, knowingly engaged in the burglary, and was present at the time of the beating of Mrs. Petit.

"And, although he did not commit the actual beating, he nevertheless knowingly participated in the burglary of Mrs. Petit's home in the nighttime with intent to commit larceny in that building.

"And, under our law, he is equally guilty, with his brother, Thomas Polick. In addition, by holding the flashlight at the time of the beating, John Polick aided and assisted in the beating."

From the judge's statements, it is apparent that he believed that John Polick was guilty of first-degree murder upon either of two theories: (1) John Polick aided and abetted in the commission of a burglary and was responsible under the felony-murder doctrine for any subsequent killing occurring in the course of that burglary; or (2) John Polick, "by holding the flashlight at the time of the beating", aided and abetted his brother (who had the requisite malice aforethought because he intended to commit great bodily harm) in committing the murder of the deceased. The former rationale, supporting John Polick's conviction on a theory of felony murder, was overruled in *Aaron* for "all trials in progress and those occurring after the date of this opinion". 409 Mich 734.

The latter rationale, based on the judge's finding that John Polick aided and abetted in the commission of the beating, is not supported by the evidence. The judge relied on the following evidence to support his finding: (1) Elizabeth Shuck's testimony that John Polick had a spot of blood in his hair; and (2) Mr. Wyers' testimony that the deceased told him that "another one was standing there with a flashlight while I was being beat".

The evidence that John Polick had a spot of blood in his hair in no way reveals he shared his brother's intent to commit a beating or that he aided his brother in committing the beating. There is abundant evidence in this case that Thomas Polick was absolutely splattered with blood. It is possible that the single spot of blood on John

Polick's hair came from contact, perhaps at some subsequent time, with Thomas Polick. Or, if Mr. Vodry's testimony is to be believed, it may have come from that moment when John Polick entered the room upon hearing the deceased scream. Or if, as Thomas Polick indicated in his confession, John Polick was merely present for some period during the commission of the beating, though without aiding in the beating, blood may have splattered on him then. At most, the evidence may demonstrate that John Polick was present at the time of the beating. Yet, as this Court has said:

" 'Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval sufficient, nor passive acquiescence or consent.' " *People v Burrel,* 253 Mich 321, 323; 235 NW 170 (1931).

Accord, LaFave & Scott, Criminal Law (2d ed), § 64, p 503. While presence, either actual or constructive, is a necessary requisite for any conviction of aiding and abetting, it must also be demonstrated "that the defendant supported or encouraged the principal in the commission of the charged offense, and * * * that the defendant himself entertained the requisite intent of the charged offense". *People v Burgess,* 67 Mich App 214, 220; 240 NW2d 485 (1976). Accord, *People v Knapp,* 26 Mich 112 (1872); *People v McKeighan,* 205 Mich 367; 171 NW 500 (1919); *People v Poplar,* 20 Mich App 132; 173 NW2d 732 (1969); *Meister v People,* 31 Mich 99 (1875).

Nor is it reasonable to infer from deceased's statement that "another one was standing there with a flashlight while I was being beat" that John Polick intended to support, encourage or aid Thomas Polick's beating of the deceased. The judge apparently inferred from this statement that John Polick was shining the flashlight on the deceased to help Thomas Polick see her while beating her. The deceased's statement is simply too ambiguous to permit the inference. The deceased did not indicate how long the other person was standing there or whether the flashlight was being shined upon her. To extrapolate from the deceased's statement that John Polick was using the flashlight to aid Thomas Polick in committing the beating is sheer speculation. This is unacceptable particularly because the judge was not in a position to infer what the deceased really meant by observing her demeanor. Again, it is important that even if John Polick was standing at the scene with a flashlight, unless he intentionally took action designed to encourage or further the beating the mere fact of his presence and acquiescence is insufficient to support a conviction for aiding and abetting the beating. There is no reason to believe that a beating or one of this severity was pursuant to the initial common

design to break and enter. This is not a case where weapons are brought along in contemplation of resistance thereby giving rise to a permissible inference of a common design to use the weapons. There are two separate crimes here and aiding and abetting must be established as to each. There is no evidence supporting the aiding and abetting charge with respect to the beating.

Consequently, since the only theory supporting defendant's conviction is the felony-murder doctrine, I would, for the reasons set forth in *Terlisner,* grant leave to appeal with a view to applying *Aaron* retroactively in this case where the evidence was insufficient to support a finding of intent to kill. If the murder conviction were to be set aside, then, on application of the people, John Polick's breaking and entering conviction should be reinstated.

STROEBEL-POLASKY CO v SLACHTA. (Docket No. 67368.) Leave to appeal denied February 1, 1982. *Albert C. Reinert* for plaintiff-appellant. *Walter Martin, Jr.,* for defendants-appellees. Reported below: 106 Mich App 538.

PEOPLE v KEENUM. (Docket No. 67085.) Leave to appeal considered February 1, 1982 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals so that it may further explain its path to decision. The decision to grant a motion for new trial is one within a trial court's discretion, reviewable for an abuse of that discretion. *People v Hampton,* 407 Mich 354, 373 (1979). It is unclear from the Court of Appeals order in the case whether that review standard was used. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, and *Joseph P. Ciaramitaro, Jr.,* and *Robert W. Donaldson,* Assistant Prosecuting Attorneys, for the people. *Felice V. Iafrate, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 56384, order of April 6, 1981.

PEOPLE v ZAPATA. (Docket No. 67140.) Leave to appeal denied February 1, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John M. Huss,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Nora J. Pasman* and *John Nussbaumer,* Assistant Defenders, for defendant-appellant. Case below, Court of Appeals No. 48878, per curiam opinion of January 28, 1981.

PEOPLE v CHARLES WILLIAMS. (Docket No. 66847.) Leave to appeal considered February 1, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the September 3, 1980 order of the Recorder's Court for the City of Detroit, which order denied defendant an evidentiary hearing. We remand this case to the Recorder's Court for the City of Detroit for an evidentiary hearing to determine whether the pretrial identification of the defendant by witness Conover was impermissibly suggestive and, if so, whether there exists any independent basis for his in-court identification. If it is found that the pretrial identification was impermissibly suggestive and that there exists no independent basis for the in-court identification, a new trial should be granted. In all other respects, leave to appeal is denied because this Court is not persuaded that the questions presented should now be reviewed by this Court. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 53583, order of March 10, 1981.

FITZGERALD, J., not participating.

ANDREWS v GENERAL MOTORS CORPORATION. (Docket No. 65521.) Leave to appeal denied February 1, 1982. *Manason & Ernstein, P.C.,* for plaintiff-appellee. *Otis M. Smith,* General Counsel, and *Willard W. Wallace* for defendant-appellant. Reported below: 98 Mich App 556.

RYAN, J., states as follows:

I dissent from the order denying the appellant's application for leave to appeal.

The plaintiff-appellee has been awarded workers' compensation benefits for injuries suffered in a fistfight with a fellow employee which the plaintiff started, after he failed to persuade the co-employee to engage in the illegal work slowdown the plaintiff had been advocating for some time.

Injuries suffered at the work place from a fistfight emanating from name calling, triggered by the plaintiff's unsuccessful efforts to initiate an illegal labor dispute in order to prevent the employer's work from being done, is not, in my view, an injury occurring "out of and in the course of" one's employment.

PEOPLE v WARREN. (Docket No. 67000.) Leave to appeal considered February 1, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the matter is remanded for consideration as a calendar case to be heard at session, GCR 1963, 816.2(1). See also GCR 1963, 815.1(5) and GCR 1963, 815.3. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45231, per curiam opinion of February 6, 1981.

PEOPLE v BOYD. (Docket No. 66339.) Leave to appeal denied February 3, 1982 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Priscilla S. Burnham* for defendant-appellant. Reported below: 102 Mich App 112.

LEVIN, J., would grant leave to appeal and states as follows:

Although this Court does not ordinarily grant interlocutory appeals, I would do so in the instant case because the issues of statutory construction appear to be recurring. See *People v Wingo,* 95 Mich App 101 (1980).

The statute (MCL 750.197c; MSA 28.394[3]) requires that the assault involve the use of violence, which is not an element of all criminal assaults. The assault here was offensive but not violent.

Appellant's further contention that the statute is limited to assaults for the purpose of escape raises a second substantial issue deserving of the Court's consideration.

PEOPLE v MARSH. (Docket No. 66449.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46128, per curiam opinion of December 17, 1980.

KAVANAGH, J., would grant leave to appeal.

LEVIN, J., would grant leave to appeal and states:

I would grant leave to appeal to consider whether in consequence of the denial of defendant's motion for a separate trial she was denied a fair trial in light of the paucity of evidence of her involvement in a concert of action to rob and kill and the innuendo of the redacted statement of a codefendant who did not testify.

PEOPLE v CARL JOHNSON. (Docket No. 65795.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Ward S. Hamlin,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *DeVries & Lamb, P.C.,* for defendant-appellant. Reported below: 99 Mich App 547.

WILLIAMS, J., concurs in denying leave to appeal and states:

I join the trial judge and the Court of Appeals in condemning the practice in this police station of handcuffing a prisoner to a shoulder-high bar.

PEOPLE v MIDGYETTE. (Docket No. 67310.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. Homer Midgyette, *in propria persona,* appellant. Case below, Court of Appeals No. 55971, order of May 4, 1981.

PEOPLE v CAMPBELL. (Docket No. 67349.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49875, per curiam opinion of April 15, 1981.

DAHN v SHEETS. (Docket No. 67257.) Leave to appeal denied February 5, 1982. *Fortino, Plaxton & Moskal* for plaintiffs-appellees. *Robert G. Chaklos* for defendants-appellants. Reported below: 104 Mich App 584.

TEDFORD v STOUFFER'S NORTHLAND INN. (Docket No. 67332.) Leave to appeal denied February 5, 1982. *Sommers, Schwartz, Silver &*

*Schwartz, P.C.,* for plaintiff-appellant. Reported below: 106 Mich App 493.

BAILEY v GENERAL MOTORS CORPORATION. (Docket No. 67347.) Leave to appeal denied February 5, 1982. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellee. *Anderson, Green & Vincent, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 56090, order of May 11, 1981.

BIGOS v NATIONWIDE MOBILE HOME PARKS, INC. (Docket Nos. 67350, 67353.) Leave to appeal denied February 5, 1982. *Egnor, Hamilton & Muth* for plaintiffs-appellants. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Edwin M. Bladen,* Assistant Attorney General, for intervening plaintiff-appellant Attorney General. *Bodman, Longley & Dahling,* for defendants-appellees. Reported below: 105 Mich App 11.

WILLIAMS v GENERAL MOTORS CORPORATION. (Docket No. 67399.) Leave to appeal denied February 5, 1982. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellee. *Anderson, Green & Vincent, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 56141, order of May 12, 1981.

GAUTHIER v SHOREWOOD INDUSTRIES, INC. (Docket No. 67408.) Leave to appeal denied February 5, 1982. *Wisti & Jaaskelainen* for plaintiff-appellee. *Vairo, Mechlin, Tomasi, Johnson & Manchester* for defendant-appellant Travelers Insurance Company. *Weis & Cossi, P.C.,* for defendants-appellees G & S Bottle Gas Company and Hartford Insurance Company. Case below, Court of Appeals No. 56113, order of May 26, 1981.

PEOPLE v HARRIS. (Docket No. 67621.) Leave to appeal considered February 5, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order certified May 28, 1981, granting the motion to affirm, and remand the case to the Court of Appeals for plenary consideration. On remand the Court of Appeals shall consider, among other issues, the questions: (1) whether the trial court's reliance on plea advice given defendant at a prior plea satisfied the requirements of GCR 1963, 785.7; and (2) whether defendant's sentence of five years for his felony-firearm convictions is inconsistent with *People v Sawyer,* 410

Mich 531 (1981). This Court does not retain jurisdiction. William E. Harris, *in propria persona,* appellant. Case below, Court of Appeals No. 55011, order of May 28, 1981.

PEOPLE v TALSMA. (Docket No. 67370.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Richard S. Allen,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Cholette, Perkins & Buchanan* for defendant-appellant. Case below, Court of Appeals No. 51402, order of May 19, 1981.

PEOPLE v GIST. (Docket No. 67299.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *David W. King,* Assistant Prosecuting Attorney, for the people. *Hatchett, DeWalt, Hatchett, Mitchell, Morgan & Hall* for defendant-appellant. Case below, Court of Appeals No. 54841, order of May 1, 1981.

LANG v GENERAL MOTORS CORPORATION (SOUTHWELL v GENERAL MOTORS CORPORATION). (Docket No. 67326.) Leave to appeal considered February 5, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the case to the Workers' Compensation Appeal Board for reconsideration. The Workers' Compensation Appeal Board erred in its *de novo* review by considering documentary evidence which was not in existence at the time of the hearing before the administrative law judge where neither party requested that the board consider the additional evidence. MCL 418.859; MSA 17.237(859). Compare *Fawley v Doehler-Jarvis Division of National Lead Company,* 342 Mich 100 (1955). *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard F. Zapala,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 53464, per curiam opinion of May 12, 1981.

ANDERSON v GENERAL MOTORS CORPORATION. (Docket No. 67390.) Leave to appeal denied February 5, 1982. *Rosenberg & Vigiletti, P.C.,* for plaintiff-appellant. *O'Rourke, Goldstein, Joseph & Kelly, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 55192, order of May 26, 1981.

PEOPLE v YEO. (Docket No. 66681.) Leave to appeal denied February 5, 1982. *Cummings, McClorey, Davis & Acho, P.C.,* for plaintiff-appellee. *Richard P. McClure* and *David C. Sloan* for defendant-appellant. Reported below: 103 Mich App 418.

PEOPLE v SILER. (Docket No. 67246.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. *James H. Davies* for defendant-appellant. Case below, Court of Appeals No. 52726, order of April 28, 1981.

JANES v JANES. (Docket No. 67355.) Leave to appeal denied February 5, 1982. *Davidson, Staiger, Adair, Hill, Mosier & Devendorf* for plaintiff-appellee. *Bush, Luce, Henderson & Bankson* for defendant-appellant. Case below, Court of Appeals No. 50782, per curiam opinion of March 25, 1981.

PEOPLE v PROCTOR. (Docket No. 67503.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *Gerald M. Lorence* for defendant-appellant. Case below, Court of Appeals No. 49882, per curiam opinion of June 8, 1981.

PEOPLE v HAVER. (Docket No. 67354.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. Douglas Charles Haver, Jr., *in propria persona,* appellant. Case below, Court of Appeals No. 54572, order of May 12, 1981.

PEOPLE v FAISON. (Docket No. 67145.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. Stanley

Faison, *in propria persona,* appellant. Case below, Court of Appeals No. 50671, order of December 30, 1980.

PEOPLE v WHIGHAM. (Docket No. 67241.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. Reginald Whigham, *in propria persona,* appellant. Reported below: 102 Mich App 96.

PEOPLE v ALLEY. (Docket No. 64370.) Leave to appeal denied February 5, 1982. Jessie W. Alley, *in propria persona,* appellant. Case below, Court of Appeals No. 77-1192, memorandum opinion of September 13, 1979.

PEOPLE v DONALD WALKER. (Docket No. 67176.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. Donald L. Walker, *in propria persona,* appellant. Case below, Court of Appeals No. 54371, order of March 11, 1981.

CHESAPEAKE & OHIO RAILWAY COMPANY v DEPARTMENT OF TREASURY. (Docket Nos. 67185-67190.) Leave to appeal denied February 5, 1982. *Dykema, Gossett, Spencer, Goodnow & Trigg* for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard R. Roesch* and *Charles E. Liken,* Assistants Attorney General, for defendant-appellant. Reported below: *(After Remand)* 105 Mich App 467.

BLUE CROSS & BLUE SHIELD OF MICHIGAN v INSURANCE BUREAU. (Docket Nos. 67201-67204.) Leave to appeal denied February 5, 1982. *Foster, Swift, Collins & Coey, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Harry G. Iwasko, Jr.,* and *E. John Blanchard,* Assistants Attorney General, for defendant-appellee Insurance Bureau. *George H. Weller,* Assistant Attorney General, for intervening defendant-appellee Attorney General. Reported below: 104 Mich App 113.

REED v TOP NOTCH FENCE INSTALLERS. (Docket No. 67274.) Leave to appeal denied February 5, 1982. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendants-appellees Top Notch Fence Installers and Hastings Mutual Insurance. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard F. Zapala,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Reported below: 106 Mich App 248.

WINGLE v MELLING FORGING. (Docket No. 67315.) Leave to appeal denied February 5, 1982 because the Court is not persuaded that the question presented should now be reviewed by this Court. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Nelson, Payne & Peterson* for defendant-appellee Melling Forging. *Denfield, Timmer & Taylor* for defendants-appellees Melling Forging and Travelers Insurance Company. Case below, Court of Appeals No. 55918, order of May 7, 1981.

PEOPLE v YACKS. (Docket No. 67400.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. Ricky G. Yacks, *in propria persona,* appellant. Case below, Court of Appeals No. 53238, order of April 3, 1981.

FISHER v OAKLAND CIRCUIT JUDGE. (Docket No. 67402.) Leave to appeal denied February 5, 1982. *William L. Fisher, in propria persona,* plaintiff-appellant. *Linda E. Wasielewski,* Oakland County Assistant Civil Counsel, for defendant-appellee. Case below, Court of Appeals No. 55826, order of April 28, 1981.

DAGWELL v FIRESTONE PROPERTIES, INC. (Docket No. 68554.) Leave to appeal denied February 5, 1982 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Philo, Atkinson, Steinberg, Walker & White,* for plaintiff-appellee. *Barbier, Goulet & Petersmarck, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 60326, order of December 18, 1981.

VERT v VERT. (Docket No. 68581.) Leave to appeal denied February 5, 1982 because the Court is not persuaded that the question presented should now be reviewed by this Court. *Sinas, Dramis, Brake, Boughton, McIntyre & Reisig, P.C.,* for plaintiff-appellee. *Starr & Cornell* for defendant-appellant. Case below, Court of Appeals No. 60903, order of December 15, 1981.

PEOPLE v ESTES. (Docket No. 66923.) Leave to appeal considered February 5, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order of March 10, 1981 granting the motion to withdraw and affirming the defendant's conviction. We remand the case to the Court of Appeals for plenary consideration of the issues raised in the application filed with this Court. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *Wesley L. McPeek,* Assistant Prosecuting Attorney, for the people. *Richard G. Chosid* for defendant-appellant. Case below, Court of Appeals No. 48972, order of March 10, 1981.

PEOPLE v BILLUPS and PEOPLE v ROBERT BARNES. (Docket No. 65905.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. *Robert E. Slameka* for defendants-appellants. Reported below: 100 Mich App 59.

KAYE v TOBY. (Docket No. 68433.) Leave to appeal denied February 5, 1982. *Lawrence J. Stockler, P.C.,* for plaintiff-appellant. *S. Lee Elliott & Associates, P.C.,* for defendants-appellees Louis J. Toby and Carol F. Toby. *Ivan M. Forbes* for defendant-appellee First Federal Savings & Loan Association of Oakland. Case below, Court of Appeals No. 60772, order of November 13, 1981.

KYSOR INDUSTRIAL CORPORATION v ALTENBERG. (Docket No. 66964.) Leave to appeal denied February 5, 1982. *David R. Kratze, P.C.,* for plaintiff-appellee. *Bassey, Selesko, Couzens & Murphy, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 55927, order of March 17, 1981.

PEOPLE v DELEON. (Docket No. 67049.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Reported below: 103 Mich App 225.

Reconsideration denied June 3, 1981.

MIMS v WESTERN ELECTRIC. (Docket No. 67232.) Leave to appeal denied February 5, 1982. *Benjamin & Goldfine* for plaintiff-appellant. *Lacey & Jones* for defendant-appellee. Case below, Court of Appeals No. 55760, order of May 1, 1981.

KEEL v TRAVCO CORPORATION. (Docket No. 67304.) Leave to appeal denied February 5, 1982. *Levine & Benjamin, P.C.,* for plaintiff-appellee. *Neal & Lengauer* for defendants-appellants. Case below, Court of Appeals No. 55708, order of May 14, 1981.

PEOPLE v COLBY. (Docket No. 68493.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. *Raymond A. MacDonald* for defendant-appellant. Case below, Court of Appeals No. 47092, per curiam opinion of October 8, 1981.

PEOPLE v BURKS. (Docket No. 68409.) Leave to appeal considered February 5, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the case to the Court of Appeals for consideration of the other issues raised by the defendant. The defendant was advised on the record of this proceeding that he was going to be sentenced to life in prison. There is no greater sentence and the defendant was thus adequately advised of the maximum possible sentence. *People v Jones,* 410 Mich 407; 301 NW2d 822 (1981); *Guilty Plea Cases,* 395 Mich 96, 118; 235 NW2d 132 (1975); GCR 1963, 785.7(1)(b). We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people, appellant. *Thomas A. Law* for defendant-appellee. Case below, Court of Appeals No. 54368, per curiam opinion of October 28, 1981.

HUDSON v JACKSON PLATING COMPANY. (Docket No. 67193.) Leave to appeal denied February 5, 1982 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Rappleye, Wilkins & Arcaro* for plaintiff-appellee. *Stanton, Bullen, Nelson, Moilanen & Klaasen, P.C.,* for defendants-appellants. Reported below: 105 Mich App 572.

PEOPLE v HEARD. (Docket No. 67199.) Leave to appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Jack J. Kraizman* for defendant-appellant. Reported below: 103 Mich App 571.

LEVIN and FITZGERALD, JJ., not participating.

CURRY v HACKLEY HOSPITAL. (Docket No. 67392.) Leave to appeal denied February 5, 1982. *McCroskey, Libner, Van Leuven, Feldman, Cochrane & Brock, P.C.,* for plaintiff-appellee. *Smith, Haughey, Rice & Roegge* for defendants-appellees Hackley Hospital and Travelers Insurance Company. *Hayim I. Gross* for defendant-appellant Hackley Hospital and Employers Mutual Liability Insurance Company of Wausau. Case below, Court of Appeals No. 56344, order of June 2, 1981.

PEOPLE v BROADNAX. (Docket No. 68350.) Leave to appeal and cross-appeal denied February 5, 1982. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellee-cross-appellant. Reported below: 111 Mich App 46.

PEOPLE v GREENE. (Docket Nos. 66924, 66925.) Leave to appeal considered February 5, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the February 25, 1981 judgments of the Court of Appeals and vacate the May 5, 1980 orders of the Court of Appeals which denied defendant's motions to remand. Since the defendant's motions to remand identify issues sought to be reviewed on appeal which should be initially decided by the trial

judge, the Court of Appeals should have granted defendant's motions to remand to the trial court. GCR 1963, 817.6. The matter is remanded to the Court of Appeals which shall, while retaining jurisdiction, remand the matter to the Washtenaw Circuit Court for a hearing on defendant's allegations. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people. Jimmy Greene, *in propria persona,* and *Douglas R. Coskey,* for defendant-appellant. Case below, Court of Appeals Nos. 46642, 46643, memorandum opinions of February 25, 1981.

TINSEY v HEDGLIN. (Docket No. 67339.) Leave to appeal denied February 5, 1982. Warren Tinsey and Lucille Billings, *in propriis personis,* plaintiffs-appellants. Case below, Court of Appeals No. 49299, order of May 14, 1981.

PEOPLE v TOLAND. (Docket Nos. 67009, 67010.) Leave to appeal considered February 19, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Recorder's Court for the City of Detroit for resentencing consistent with *People v Sawyer,* 410 Mich 531 (1981). *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. Case below, Court of Appeals No. 51879, order of January 8, 1981.

BUTLER v CITY OF DETROIT (IN THE MATTER OF ATTORNEY FEES). (Docket No. 67406.) Leave to appeal denied February 19, 1982. *Cockrel, Cooper, Spearman & King,* appellant. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Janis Meija* and *Erica Weiss Marsden,* Assistants Attorney General, for appellee Department of Social Services. Case below, Court of Appeals No. 56302, order of May 27, 1981.

PEOPLE v ROBERT. (Docket No. 67417.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Daniel A. Burress* for defendant-appellant. Case below, Court of Appeals No. 51357, per curiam opinion of May 27, 1981.

PEOPLE v NOLEN. (Docket No. 68060.) Leave to appeal denied February 19, 1982 because the Court is not persuaded that the questions should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Janice K. Rundles,* Assistant Prosecuting Attorney, for the people. Clyde C. Nolen, *in propria persona,* appellant. Case below, Court of Appeals No. 54776, order of September 11, 1981.

WILLIAMS v CHRYSLER CORPORATION. (Docket No. 67147.) Leave to appeal denied February 19, 1982. *Stephen M. Friedman* for plaintiff-appellant. *Lacey & Jones* for defendant-appellee. Case below, Court of Appeals No. 48586, per curiam opinion of April 14, 1981.

PRICE BROTHERS COMPANY v CHARLES J ROGERS CONSTRUCTION COMPANY. (Docket No. 67243.) Leave to appeal denied February 19, 1982. *Robert R. Nix, II,* and *Richard D. Weber* for plaintiff-appellee. *Merle R. Jenkins* for defendants-appellants. Reported below: 104 Mich App 369.

PEOPLE v NELSON JOHNSON. (Docket No. 67411.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Carolyn M. Schmidt,* Assistant Prosecuting Attorney, for the people. Nelson Johnson, *in propria persona,* appellant. Case below, Court of Appeals No. 55829, order of June 3, 1981.

FREEMAN v ASSOCIATED PUBLISHERS, INC. (Docket No. 67266.) Leave to appeal denied February 19, 1982. *Perlman, Garber & Holtz, P.C.,* for plaintiffs-appellees. *Merrill, Tatham & Rosati, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 54625, order of March 23, 1981.

PEOPLE v APARICIO. (Docket No. 67317.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people. *Glendon & Evashevski, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 44863, per curiam opinion of May 7, 1981.

STREIDL v KEY INTERNATIONAL. (Docket No. 67333.) Leave to appeal denied February 19, 1982. *Joseph Crystal* for plaintiff-appellant. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 55955, order of May 13, 1981.

LINTZ v ALPENA BOARD OF EDUCATION. (Docket No. 68744.) Leave to appeal denied February 19, 1982. *Russell L. Rhynard* for plaintiffs-appellants. *Boyce, White & Werth* for defendant-appellee Alpena Board of Education. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Gerald F. Young* and *Paul J. Zimmer,* Assistant Attorneys General, for defendants-appellees State Board of Education. *Foster, Swift, Collins & Coey, P.C.,* for Michigan Educational Support Personnel Association as amicus curiae. *Hiller, Larry & Hoekenga* for Alpena Education Association as amicus curiae. Case below, Court of Appeals No. 61738, order of January 6, 1982.

PEOPLE v JANDO. (Docket No. 67432.) Leave to appeal denied February 19, 1982. Bobby Jando, *in propria persona,* appellant. Case below, Court of Appeals No. 52514, order of November 18, 1980.

JORDAN v DEPARTMENT OF CORRECTIONS. (Docket No. 67358.) Leave to appeal considered February 19, 1982 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the orders of the Court of Appeals which denied plaintiff's motion to waive fees and dismissed plaintiff's appeal, and remand the case to the Court of Appeals for further consideration. Under the circumstances, information which showed plaintiff may not have been indigent in May or October, 1980, was insufficient in itself to overcome plaintiff's affidavits relating to his indigency in April, 1981. GCR 1963, 120.3. On remand, the defendant may provide the Court with information indicating that plaintiff is not presently indigent. GCR 1963, 120.6. We retain no jurisdiction. Ronald L. Jordan, *in propria persona,* plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Peter J. Treleaven,* Assistant Attorney General, for defendant-appellee. Case below, Court of Appeals No. 57315, orders of May 20, 1981 and September 8, 1981.

PEOPLE v NUNN. (Docket No. 67374.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. *Sheldon Halpern* for defendant-

appellant. Case below, Court of Appeals No. 45932, order of December 9, 1980.

PEOPLE v JAKUPAJ. (Docket No. 67401.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 55729, order of June 3, 1981.

PEOPLE v WILKES. (Docket No. 67431.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *Sheldon Halpern* for defendant-appellant. Case below, Court of Appeals No. 52790, order of January 19, 1981.

MILLER v THE GREAT ATLANTIC & PACIFIC TEA COMPANY. (Docket No. 67507.) Leave to appeal denied February 19, 1982. *Hedberg & Schultz* for plaintiff-appellee. *Davidson, Breen & Doud, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 55838, order of June 11, 1982.

MOYLE v LAKES SUPER MARKET. (Docket No. 67496.) Leave to appeal denied February 19, 1982. *Thercha & Daavettila* for plaintiff-appellant. *Vairo, Mechlin, Tom[illegible], Johnson & Manchester* for defendants-appellees. Case below, Court of Appeals No. 56482, order of June 16, 1981.

OAKLAND COUNTY BOARD OF ROAD COMMISSIONERS v WEBER. (Docket No. 67460.) Leave to appeal denied February 19, 1982. *L. W. McEntee* for plaintiff-appellee. *Milton F. Cooney* for defendants-appellants. Case below, Court of Appeals No. 58147, order of June 16, 1981.

PEASE v DIRECTOR, DEPARTMENT OF SOCIAL SERVICES. (Docket No. 67424.) Leave to appeal denied February 19, 1982. *Michigan Legal Services, Edward J. Hoort,* and *Legal Aid of Central Michigan, Christopher L. Campbell* and *Timothy Vogel* for plaintiff-appellant.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Janis Meija* and *William K. Basinger,* Assistants Attorney General, for defendant-appellee. Reported below: 105 Mich App 689.

LARA v MONTGOMERY WARD & COMPANY, INC. (Docket No. 67413.) Leave to appeal denied February 19, 1982. *Eric E. Kauma* for plaintiff-appellant. *Crippen, Urquhart, Cmejrek & Weber* for defendant-appellee Montgomery Ward & Company, Inc. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Ray W. Cardew, Jr.,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 56245, order of May 26, 1981.

EGGERT v MAROSI. (Docket No. 67409.) Leave to appeal denied February 19, 1982. *Allen C. Ingle* for defendants-appellants. Case below, Court of Appeals No. 49248, memorandum opinion of April 17, 1981.

MACDONALD v THE DETROIT NEWS, INC. (Docket No. 67403.) Leave to appeal denied February 19, 1982. *William L. Fisher* for plaintiff-appellant. *Butzel, Long, Gust, Klein & Van Zile* for defendant-appellee. Case below, Court of Appeals No. 51102, order of March 23, 1981.

TORETTA v BEHNKE. (Docket No. 67360.) Leave to appeal denied February 19, 1982. *Moher, Andary & Cannello* for plaintiffs-appellants. Case below, Court of Appeals No. 49272, per curiam opinion of December 5, 1980.

PEOPLE v LEITNER. (Docket No. 67295.) Leave to appeal denied February 19, 1982. John Leitner, *in propria persona,* appellant. Reported below: 105 Mich App 681.

MATTS v HOMSI. (Docket No. 67369.) Leave to appeal denied February 19, 1982. *Bell & Hertler, P.C.,* for plaintiff-appellant. *Carpenter, Fenner, Barney & Hofmann* for defendants-appellees. Reported below: 106 Mich App 563.

PEOPLE v PARKS. (Docket No. 68432.) Leave to appeal and cross-appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *O. Paul Schendel,* Prosecuting

Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 54662, per curiam opinion of November 9, 1981.

PEOPLE v HOLLINS. (Docket No. 68459.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people, appellant. *Darcelle D. Kanoyton* for defendant-appellee. Case below, Court of Appeals No. 49932, per curiam opinion of November 19, 1981.

PEOPLE v ROGERS. (Docket No. 68460.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. Prison Legal Services, *James S. Wilber,* Director, for defendant-appellant. Case below, Court of Appeals No. 60065, order of November 16, 1981.

PEOPLE v ANDERS. (Docket No. 68574.) Leave to appeal denied February 19, 1982 because the Court is not persuaded that the question presented should now be reviewed by this Court. *Frank F. Loomis, III,* for defendant-appellant. Case below, Court of Appeals No. 61093, order of December 23, 1981.

PEOPLE v WASHINGTON. (Docket No. 67327.) Leave to appeal considered February 19, 1982 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals as on leave granted to allow the defendant to pursue an appeal of right. It appears that defendant's petition for appellate counsel was filed in Recorder's Court on December 27, 1977, within 60 days of sentencing, but that defendant's counsel erroneously informed the Court of Appeals that the petition was not filed until February 8, 1978. As a consequence, defendant was deprived of his appeal of right. On remand the Court of Appeals shall, while retaining jurisdiction, remand the case to the Recorder's Court for the City of Detroit for the appointment of counsel. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal

Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people. Nathaniel Washington, *in propria persona,* appellant. Case below, Court of Appeals No. 78-4681, order of April 19, 1979.

CAMPBELL v CADILLAC OVERALL SUPPLY COMPANY. (Docket No. 67821.) Leave to appeal denied February 19, 1982 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Cicinelli, Mossner, Majoros & Alexander, P.C.,* for plaintiff-appellant. *Barbier, Goulet & Petersmarck, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 57333, order of August 7, 1981.

CLARK v GENERAL MOTORS CORPORATION. (Docket No. 67428.) Leave to appeal denied February 19, 1982. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Anderson, Green & Vincent, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 55764, order of May 27, 1981.

PEOPLE v BASS. (Docket No. 67394.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. *Ashford, Edison, Jarrett, Lumumba & Ottison, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 49264, per curiam opinion of February 11, 1981.

POKLADOWSKI v VIBROFLOTATION FOUNDATION COMPANY. (Docket No. 67418.) Leave to appeal denied February 19, 1982. *Green, Renner, Weisse, Rettig, Rademacher & Clark* for plaintiff-appellant. *Hansley, Neiman, Peterson, Beauchamp, Stupak & Bergman, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 55858, order of June 2, 1981.

PEOPLE v MORRIS. (Docket No. 67466.) Leave to appeal denied February 19, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. Will Morris, *in propria persona,* appellant. Case below, Court of Appeals No. 50854, memorandum opinion of December 23, 1980.

INSURANCE COMMISSIONER v BLUE CROSS & BLUE SHIELD OF MICHIGAN. (Docket No. 68876.) Leave to appeal granted February 25, 1982. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Harry G. Iwasko, Jr.,* Assistant Attorney General, for plaintiff-appellant. Case below, Court of Appeals No. 62426, order of February 17, 1982.

BLUE CROSS & BLUE SHIELD OF MICHIGAN v GOVERNOR. (Docket No. 68903.) On order of the Court, on its own motion, leave to appeal is granted February 25, 1982, from the orders of the Ingham Circuit Court in Case No. 81-26748 dated April 2, 1981, enjoining the enforcement of 1980 PA 350, as amended, and dated July 31, 1981, directing the parties to comply with 1939 PA 108 and 1939 PA 109, as amended.

INSURANCE COMMISSIONER v BLUE CROSS & BLUE SHIELD OF MICHIGAN and BLUE CROSS & BLUE SHIELD OF MICHIGAN v GOVERNOR. (Docket Nos. 68876, 68903.) Blue Cross & Blue Shield of Michigan has filed and this Court has considered, on March 3, 1982, motions for reconsideration of the orders of February 25, 1982, arguing *inter alia* that this Court lacks jurisdiction to take the action indicated in Case No. 68903, that this Court should provide a period of time in which the Governor might address to this Court an executive message requesting early determination of important public law questions involved in that case, and consenting, in part on terms and conditions specified, to the issuance of an order by this Court which would, for a period of time, prevent possible harm to the subscribers of Blue Cross & Blue Shield of Michigan and otherwise largely preserve the status quo during the pendency of this litigation. The Attorney General has filed responses to the motions, opposing any delay in the argument and submission of these cases and arguing *inter alia* that this Court is empowered to take the action which it did by the order of February 25, 1982, in Case No. 68903.

Blue Cross & Blue Shield of Michigan having consented to the entry of an order regarding its unilateral increase in Blue Shield insurance rates for its individual lines of coverage (nongroup, group conversion, and other than group complementary), purporting to have been made effective February 1, 1982, prior to approval by the Commissioner of Insurance (the "rate increase"), it is ordered that Blue Cross & Blue Shield of Michigan may not, before April 5, 1982, (1) take any action to require payment by any subscriber of the rate increase, (2) cancel or terminate any subscriber because the subscriber has failed to pay the rate increase, or (3) cancel or terminate

any subscriber for failure to pay the premium due February 1, 1982, before giving the subscriber 10 days written notice that the subscriber need only pay the amount of the premium applicable before the rate increase. it is further ordered that Blue Cross & Blue Shield of Michigan shall notify former subscribers whose individual line coverage has lapsed or been cancelled since February 1, 1982, that the coverage may be reinstated by paying the charges due according to the rates in effect before the rate increase by March 15, 1982.

The Court takes under advisement the motions filed by Blue Cross & Blue Shield of Michigan to reconsider this Court's orders of February 25, 1982, the Attorney General's responses, and the proposal by Blue Cross & Blue Shield of Michigan that, after the receipt of an executive message under GCR 1963, 797.1(a) by March 15, 1982, it would cancel the rate increase and credit or refund to subscribers payments made pursuant to the rate increase, and would not cancel subscribers for failure to pay the rate increase or further increase rates without prior approval by the Commissioner of Insurance. The Court will take further action on these matters by April 5, 1982, regardless of whether an executive message has been received. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Harry G. Iwasko, Jr.,* Assistant Attorney General for Commissioner of Insurance, Governor, and Attorney General. *Foster, Swift, Collins & Coey, P.C.,* and *Butzel, Long, Gust, Klein & Van Zile* for Blue Cross & Blue Shield of Michigan.

WHEELER v CONSUMERS POWER COMPANY. (Docket No. 65776.) Leave to appeal considered March 4, 1982 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgment of the Workers' Compensation Appeal Board and remand the case to the board to consider whether the plaintiff is totally and permanently disabled by virtue of loss of the industrial use of his legs because use of his legs triggers an employment-related injury that causes pain *or other condition* that prevents use of both legs in industry. *Burke v Ontonagon County Road Comm,* 391 Mich 103, 114 (1974). Comparison of the board's opinion and our statement in *Burke* shows that the board regarded "disabling pain" as essential to finding loss of industrial use of the plaintiff's legs. The central question here, however, is whether use of the plaintiff's legs triggers his balance and mobility problems *(i.e.,* an "other condition" under *Burke)* or whether those problems exist without regard to whether the plaintiff uses his legs. The board's analysis under *Burke* is thus incomplete. We do not retain jurisdiction. *Robert L. O'Connell & Associates* for plaintiff-appellant. *C. D. Dawson* for defendant-appellee Consumers Power Company. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solici-

tor General, and *Morrison Zack,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 49623, order of August 20, 1980.

COLEMAN, C.J., and RYAN, J., dissent and state:

The order of remand extends too far the holding in *Burke v Ontonagon County Road Comm,* 391 Mich 103, 114 (1974). We would affirm the Court of Appeals and the WCAB. Alternatively, we would grant leave to appeal.

Plaintiff seeks total and permanent disability for loss of the industrial use of both legs because he sometimes is dizzy and has a balance problem. He attributes this condition to what is described by WCAB as a "minor bump on his head which did not result either in a cut or swelling". The board found that plaintiff was disabled "in the performance of his work" but that the testimony did not support the claim of loss of industrial use of both legs.

The order of remand cites the *Burke* criteria for determining loss of industrial use of legs. In *Burke,* the Court stated:

"There is permanent and total loss of industrial use of both legs where, *inter alia,*

"1. An employment-related injury in one or both legs causes pain or other condition that prevents use of both legs in industry.

"2. The use of one or both legs, whether or not injured, triggers an employment-related injury or malady in any part of the body, including one or both legs, that causes pain or other condition that prevents use of both legs in industry." 391 Mich 114.

The order of remand asks consideration of whether use of plaintiff's legs triggers an "other condition". We suppose the question is whether use of the legs triggers dizziness. It is a bit like asking whether walking triggers shortness of breath in a heart patient (and therefore there is loss of industrial use of legs).

This case has not been briefed or argued. The assumption inherent in the question assigned to WCAB may carry broad implications of liability not appropriate to this peremptory disposition.

Therefore, we dissent.

# 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.

NOVEMBER 4, 1981

IN THE MATTER OF SMITH. (Docket No. 66523.) Leave to appeal considered and in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we strike from the Attorney Discipline Board's judgment the words "and until the closing of the estate". In all other respects leave to appeal is denied. *Michael Alan Schwartz,* Grievance Administrator, and *Eugene N. LaBelle,* Deputy Grievance Administrator, for appellee Attorney Grievance Commission. *Robert L. Douglas* for appellant.

IN THE MATTER OF GRIMES. (Docket No. 66527.) Leave to appeal granted. *Michael Alan Schwartz,* Grievance Administrator, and *Eugene N. LaBelle,* Deputy Grievance Administrator, for appellant Attorney Grievance Commission. *Milliken, Magee & Yuille* for appellee.

RUSINEK v SCHULTZ, SNYDER & STEELE LUMBER COMPANY. (Docket No. 65509.) Rehearing denied. *Bennett S. Engelman* for plaintiffs-appellants. Reported at 411 Mich 502.

BAILEY v GRAVES. (Docket No. 63604.) Rehearing denied. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellee. *Sylvester Delaney,* Deputy Corporation Counsel, and *William B. Daniel* and *Hurticene Hardaway,* Assistants Corporation Counsel, for defendants-appellants. Reported at 411 Mich 510.

PEOPLE v HUGHES. (Docket No. 64131.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *William F. Delhey,* Prosecuting Attorney, for the people. *Arthur J. Tarnow* for defendant-appellant. Reported at 411 Mich 517.

PROPOSED AMENDMENT OF GCR 1963, 785. On order of the Court, this is to advise that the Court is considering whether to amend GCR 1963, 785. Before determining whether the amendment 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, the text of which is as follows:

(The language to be added is italicized:)

RULE 785. CRIMINAL PROCEDURE.

.1—.6 (Unchanged.)

.7 Pleas of Guilty and Nolo Contendere. A defendant may plead guilty or nolo contendere only with the court's consent. Before accepting the plea, the court shall personally carry out subrules 785.7(1)-(4).

(1) An Understanding Plea. Speaking directly to the defendant, the court shall tell him:

(a) (Unchanged.)

(b) the maximum possible prison sentence for the offense, *including that possible from consecutive sentences;*

(c)-(g) (Unchanged.)

(2)-(6) (Unchanged.)

.8—.13 (Unchanged.)

> 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

*Staff Comment:* The proposed amendment recognizes the requirement of ABA Standards Relating to Guilty Pleas, § 1.4(c)(i), that the defendant be advised of the maximum possible sentence, "including that possible from consecutive sentences".

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

NOVEMBER 25, 1981

HARRIS v ATTORNEY GRIEVANCE COMMISSION. (Docket No. 66866.) Petitioner's complaint for mandamus granted. It appearing to this Court that the fee charged may have been solely for obtaining the insurance proceeds in question and not for other legal matters as well, the case is remanded to the Attorney Grievance Commission to consider whether the fee covered only the matter addressed in petitioner's complaint, and if so, whether the fee was clearly excessive. In making this determination, the commission shall consider the factors outlined in DR 2-106(B), requiring further response from the attorney if necessary. We do not retain jurisdiction. Julia Harris, *in propria persona,* petitioner. *Louis Rosenzweig,* Counsel to Grievance Administrator, for respondent.

LEVIN, J., dissents.

PEOPLE v POWELL (CONTEMPT OF KING). (Docket No. 60761.) An order was entered by this Court on September 10, 1981, directing attorney Richard King to show cause within 30 days why he should not be held in contempt of court for failing to file an application for leave to appeal in the 19 months during which he was assigned to represent the defendant for that purpose. A response to the order to show cause was filed on October 13, 1981. The Court has considered that response and the record in this case.

It is ordered that attorney Richard King pay to the clerk of this Court the sum of $250 in court costs, payable to the State of Michigan, within ten days of the clerk's certification of this order. These costs are assessed because of the needless additional work required of this Court by the failure of Mr. King to file an application for leave to appeal or seek to withdraw as the defendant's attorney within a reasonable time after his appointment.

It is the express finding of this Court from the record before it that after Richard King was appointed by the Genesee Circuit Court on January 30, 1980, to file an application for leave to appeal pursuant to an order of this Court entered February 6, 1979, he failed to file any pleading or brief on the defendant's behalf until August 1981 and then he filed a motion to withdraw as counsel for the defendant in the Genesee Circuit Court. As a consequence, the defendant's appeal to this Court has been unreasonably delayed.

The clerk shall deposit the costs paid pursuant to this order with the State Treasurer for credit to the State General Fund. The costs are personal to the attorney and may not be charged back to the county. *Richard King, in propria persona,* respondent. Reported below: 77 Mich App 237.

DECEMBER 22, 1981

IN THE MATTER OF BENNETT. (Docket No. 67116.) Leave to appeal denied. *Michael Alan Schwartz,* Grievance Administrator, petitioner-appellee. *H. Eugene Bennett, in propria persona,* respondent-appellant.

LEVIN, J., would reduce the discipline imposed to a suspension from the practice of law for three years, in light of appellant's previously unblemished record and the equities of this particular case.

JANUARY 29, 1982

PEOPLE v KING. (Docket No. 65247.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. *Reese W. Stipes* for defendant-appellant. Reported *ante,* 145.

COLEMAN, C.J., and BLAIR MOODY, JR., J., would grant rehearing.

FEBRUARY 1, 1982

*In re* CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS OF THE SIXTH CIRCUIT (KARL v BRYANT AIR CONDITIONING COMPANY). The questions certified by the United States Court of Appeals for the Sixth Circuit are considered and, pursuant to GCR 1963, 797.2, the briefs and appendix in xerographic form are accepted, and the Court accepts the request to answer the certified questions. *Ronald R. Stempien* for plaintiff-appellant. *Sally Steinhart* for defendants-appellees.

FEBRUARY 3, 1982

SHAVERS v ATTORNEY GENERAL. (Docket Nos. 57916, 57931, 57934, 57935.) On order of the Court, the opinion in *Shavers v Attorney General,* 402 Mich 554 (1978), subsequent acts of the Michigan Legislature (1979 PA 145 and 1979 PA 147), the briefs of the parties, the oral argument in this Court, and the opinion of the Wayne Circuit Court after our November 21, 1979 (407 Mich 1153) remand order are considered. Because there has been no further claim that this act, as recently amended, is unconstitutional, we decline to so hold. However, this order should not be construed as foreclosing future attacks on the constitutionality of the act based upon the concerns expressed in our opinion. For the reason just stated, the judgment of the trial court in this case is affirmed. *Harry G. Iwasko, Jr.,* Assistant Attorney General, *Tom Downs* and *Michael A. Zagaroli (Downs, Pirich & Downs, P.C.), Lawrence D. Owen (Reid, Reid, Mackay, Emery & DeVine, P.C.), John K. Cooper, Jr., James D. Tracy (Dykema, Gossett, Spencer, Goodnow & Trigg),* and *Theodore Souris (Bodman, Longley & Dahling),* arguing for the proposition that recent amendments to the no-fault insurance act cure due process deficiencies. *Sheldon L. Miller (Lopatin, Miller, Bindes, Freedman, Bluestone, Erlich & Rosen)* and *Harry M. Philo* arguing that they do not.

LEVIN, J., dissents and states as follows:

In *Shavers v Attorney General,* 402 Mich 554, 593, 607-610 (1978), this Court remanded this matter to the trial court retaining jurisdiction and stated:

"The first and most important issue before us, stated in its general terms, is whether § 3101(1) of the act, which requires registrants and operators of motor vehicles to maintain *compulsory* personal injury protection insurance, property damage insurance, and residual liability insurance, is constitutional.

* * *

"*At a minimum,* this Court holds that no-fault insurance does not satisfy constitutional due process unless:

"1. The Legislature and/or the Commissioner of Insurance (pursuant to his present rule-making authority, MCL 500.2484; MSA 24.12484), give substantial meaning to the statutory standards 'Rates shall not be excessive, inadequate or unfairly discriminatory'. See MCL 500.2403; MSA 24.12403; MCL 500.3340; MSA 24.13340.

"2. A filed rate, or a rate determined on administrative or judicial review, provides and sets forth:

"a) premiums reasonable to insured and insurer for the specific insurance coverage without regard to factors assertedly warranting differences in premiums among those insured;

"b) the factors which properly may be considered by the insurer in differentiating premiums among those insured; and

"c) the amount of differential appropriate for each such factor.

"3. Such information for each insurer is publicized in such a manner that every person affected can readily ascertain the factors and amounts of differentials applicable to him and calculate the premium the insurer may charge.

"4. Every motorist has the opportunity to obtain a prompt and effective administrative review of an insurer's calculation of the factors, differentials and premium applicable to him and a prompt and effective administrative review of the basis for the refusal or cancellation of insurance.

"(4) Our holding the no-fault act's 'compulsory insurance requirement' unconstitutional because of the inadequacies that exist in the present statutory system for making no-fault insurance available at fair and reasonable rates raises crucial jurisprudential and social considerations.

"We are deeply aware that our holding not only directly affects the problems of motorists and the insurance business in this state, but that it also substantially affects our entire system of civil justice.

"We also assume that, because of our otherwise constitutional approval of the general statutory schemata under the no-fault act (*e.g.*, the personal injury protection insurance and property damage protection insurance schemata), the Legislature and the Commissioner of Insurance will seek to remedy the constitutional deficiencies articulated *supra*.

"We therefore believe it best, for purposes of the general jurisprudence, the general welfare of the public, and the administration of justice in our state to hold the 'compulsory insurance requirement' of the no-fault act unconstitutional (for the reasons articulated *supra) effective as of 18 months from the issuance of this opinion.*

"At an appropriate time before 18 months from the issuance of this opinion, we will re-examine the constitutional status of the no-fault act in terms of remedying the present due process deficiencies. Any party or person wishing to file briefs or be heard shall make timely inquiry of the clerk as to the proper procedure. This Court will take whatever action appears appropriate at that time."

Subsequently, the Legislature amended the Insurance Code by enacting the Essential Insurance Act, 1979 PA 145 and 1979 PA 147. This Court then entered the following order:

"By order of June 8, 1978 (402 Mich 554), this Court reserved ruling on the question of the constitutionality of § 3101(1) of 1972 PA 294 for a period of 18 months. The Legislature has enacted and the Governor signed 1979 PA 145 in which concerns expressed in this Court's opinion have been addressed. The Court has received briefs and heard

oral argument on the question of whether deficiencies mentioned in this Court's 1978 opinion have been corrected. The Court being of the opinion that assessment of the 1979 legislation as well as the Insurance Commissioner's Rules would be advanced by an evidentiary record, it is hereby ordered that this cause is remanded to the Wayne Circuit Court for purposes of taking proofs on such issues concerning the 1979 legislation and the Insurance Commissioner's Rules as may be raised on remand and rendering judgment as to the constitutionality of § 3101(1) of 1972 PA 294 in light of the recently enacted 1979 PA 145 by the trial judge who rendered the declaratory judgment in this cause. Proofs should commence to be taken within 60 days of the date of this order. To facilitate review of the trial court judgment the period during which this Court reserves ruling on the constitutionality of § 3101(1) is extended until the further order of this Court.

"COLEMAN, C.J., and RYAN, J., state: We concur in the Court's order in all respects save that provision thereof which directs trial court consideration of the 'Insurance Commissioner's Rules' because the referenced rules have not been approved and adopted pursuant to the provisions of the Administrative Procedures Act, 1969 PA 306, effective July 1, 1970, as amended." 407 Mich 1153-1154.

Thereafter, the circuit judge, in an opinion dated June 16, 1980, said:

"Subsequent to the receipt of this order, this court held two pretrial conferences, one on Thursday, December 13, 1979, and one on Wednesday, January 9, 1980. At these pretrial conferences, it was agreed by all parties that, with the exception of two remotely possible factual matters, there were no factual issues to be adjudicated on remand.

"Four issues of law were agreed upon. These issues are:

"1. Do 1979 Public Acts 145 and 147 and/or the relevant regulations of the Commissioner of Insurance give substantial meaning to the statutory standards, 'Rates shall not be excessive, inadequate, or unfairly discriminatory?'

"2. Do 1979 Public Acts 145 and 147 and/or the relevant regulations of the Commissioner of Insurance provide a mechanism which would require that filed rates, or rates determined on administrative or judicial review provide:

"(a) Premiums reasonable to insured and insurer for the specific insurance coverage without regard to factors assertedly warranting differences in premiums among those insured;

"(b) The factors which properly may be considered by the insurer in differentiating premiums among those insured; and

"(c) The amount of differentials appropriated for each such factor.

"3. Do 1979 Public Acts 145 and 147 and/or the relevant regulations of the Commissioner of Insurance require each insurer to publish information in such a manner that every person affected can readily ascertain the facts and amounts of differentials applicable to him or her, and calculate the premium the insurer may charge.

"4. Do 1979 Public Acts 145 and 147 and/or the relevant regulations of the Commissioner of Insurance provide every motorist the opportunity to obtain a prompt and effective administrative review of an insurer's calculation of factors, differentials, and total premiums applicable to him or her, and a prompt and effective administrative review of the basis for refusal or cancellation of insurance.

"Briefs were filed by all parties, and oral argument was held on Monday, March 24, 1980.

"At oral argument, it was determined that the relevant regulations of the Commissioner of Insurance have not been approved by the Legislature, and it was agreed by all parties that the case would be decided only on the statute.

"In addition, all parties agreed that Act 145 adequately addressed Issues 3 and 4, and that the answers to these questions were yes. Therefore it is not necessary to consider whether Public Act 145 adequately remedies the defects of § 3101(1) in these two respects. The questions in Issues 3 and 4 are answered in the affirmative, and Public Act 145 does require each insurer to publish information in such a manner that every person affected can readily ascertain the factors and amounts of differentials applicable to him or her, and calculate the premium the insurer may charge. Further, the act does provide every motorist the opportunity to obtain a prompt and effective administrative review of an insurer's calculation of factors, differentials, and total premiums applicable to the insured. There is also prompt and effective administrative review of the basis for refusal or cancellation of insurance."

After discussing the contentions of the parties regarding Issues 1 and 2, the circuit judge concluded "that the answers to Issues 1 and 2 are yes. Public Act 145 has cured the defects ordered to be cured by *Shavers*."

The Court today decides the question of whether the 1979 amendments adequately resolve the concerns set forth in *Shavers* without the benefit of any presentation by counsel for the parties following the filing of the circuit judge's opinion. To be sure, this Court did say in *Shavers* "[a]ny party or person wishing to file briefs or be heard shall make timely inquiry of the clerk as to the proper procedure. This Court will take whatever action appears appropriate at that time." Footnote 34 reads: "The Legislature, in whatever manner it

deems appropriate, is invited to be represented at this Court's re-examination of the constitutional status of the no-fault act."

Counsel for Shavers may, therefore, have been under an obligation to "make timely inquiry of the clerk as to the proper procedure". I would think, however, that this Court would desire the benefit of the assistance of counsel before deciding any question, especially one as complex and important as the question that it today decides without the benefit of such assistance.

I dissent because I would express no opinion without adversary briefing and oral argument. See *Rennell v City of Birmingham,* 406 Mich 967 (1979), where this Court entered the following order:

"Leave to appeal considered June 5, 1979. The Court of Appeals erred in failing to provide an opportunity for defendant to respond to findings of fact and conclusions of law which had been returned, after the case had been orally submitted, pursuant to a remand order. Therefore, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we vacate the Court of Appeals judgment and remand the case to the Court of Appeals for plenary consideraton by a panel of the Court of Appeals composed of judges other than those who determined this case. We retain no jurisdiction."

*In re* APPORTIONMENT OF STATE LEGISLATURE—1982. (Docket No. 68777.) On order of the Court, the petition for submission of proposed apportionment plans for the Michigan Legislature and the response thereto are considered. Mich Const 1963, art 4, § 6 provides for consideration by this Court of a "proposed plan" submitted by a "member of the commission, individually or jointly with other members" "if a majority of the commission cannot agree on a plan". No "proposed plan" has been submitted nor have we received official notice from the commission that a majority of the commission cannot agree on a plan. Accordingly, the relief prayed for in the petition and in the response thereto is denied.

LEVIN, J., dissents and states as follows:

The Republican members of the Commission on Legislative Apportionment filed a petition with this Court on January 29, 1982, stating that "to date the commission has been unable to agree upon a plan" for the reapportionment of the Legislature, that "in the opinion of your petitioners" the "commission is deadlocked in its deliberations and there remains no reasonable likelihood that the commission will be able to resolve its differences and adopt the necessary redistricting plans", that "more than 180 days has elapsed since all of the necessary census information was made available to the commission", and that "it is necessary for the protection of all parties and for the

orderly administration of justice that this Court issue a preliminary order establishing the procedure to be followed for the submission of plans for review by this Court".

Petitioners asked this Court to "assume jurisdiction of this proceeding under" Const 1963, art 4, § 6, and to issue a "preliminary order" in the form of Exhibit A hereto.

The Democratic members of the Apportionment Commission filed a response with this Court on February 2, 1982 agreeing "that the Court accept jurisdiction in the premises as prayed by petitioners, except that the Court's preliminary order should provide as" set forth in Exhibit B hereto. The response of the Democratic members admits the allegation that to date the commission has been unable to agree but asserts that "because of the intended and executed impasse by petitioners Sanderson, et al. [the Republican members], the opportunity for achieving accommodation was foreclosed". They agree with the allegations that in the opinion of the petitioners the commission is deadlocked and there remains no reasonable likelihood that it will be able to resolve its differences and adopt redistricting plans but assert that this is "for the reason that petitioners Sanderson, et al., have by their actions evidenced an intention not to resolve such differences". They deny that more than 180 days has elapsed, asserting that all necessary census information did not become available, as contemplated by the constitution, until November 20, 1981. They "admit, despite the unclean hands of petitioners, that it is necessary for the protection of all parties and for the orderly administration of justice that this Court issue a preliminary order establishing the procedure to be followed for the submission of plans for review by this Court".

The pertinent provision of the constitution reads as follows:

"If a majority of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in this section." Const 1963, art 4, § 6.

The constitution thus requires an impasse, defined as when "a majority of the commission cannot agree on a plan", before any member of the commission may submit a proposed plan to this Court and that one or more plans be submitted before this Court can determine "which plan complies most accurately with the constitutional requirements". The constitution does not prescribe the manner in which there shall be determined whether there is an impasse or

preclude this Court from acting, before receipt of a proposed plan, on a claim that there is an impasse.

In the instant case the claim that there is an impasse is made by four members of the commission. Without the agreement of at least one of them there would be an inability of a majority of the commission to agree on a plan.

The Court's decision in *In re Apportionment of State Legislature—1972,* 387 Mich 442, 451 (1972), that a proposed plan may be submitted to the Court although it was not submitted to or considered by the commission means that it is likely that the plan representing the "last best offer" of each side will be submitted at the last possible moment so that it cannot be improved upon by the other side. Consequently, any plan that may be submitted to the Court before the last plan submitted by each side is likely to be at least somewhat disingenuous.

For this and perhaps other reasons both sides agree that this Court should establish a timetable for submission of plans. There is no reason to require the *pro forma* submission of a *pro forma* plan which will be replaced by the real plan. Both sides are understandably reluctant to put forth a disingenuous plan. The constitution does not require the performance of a meaningless act.

For the foregoing reason, I do not think that the absence of a proposed plan is a substantial basis for declining to consider the petition. The absence of a plan does not affect this Court's "jurisdiction" unless it so declares. It is unwise for the Court to so declare if for no other reason than that neither side may be willing to offer a *pro forma* plan and as the days, weeks and months go by it may become clear that there is an impasse and that it is essential for the Court to establish a timetable for the submission of proposed plans in order to obtain the filing of any plan. Also, circumstances may develop following some future census such that it becomes manifest that the Court should act on its own initiative. We should not preclude a future court from so acting by today adopting a limiting construction making the Court's "jurisdiction" dependent on the filing of a proposed plan.

I appreciate that the language of the petition and of the response can be read as not precluding the possibility of the two sides yet achieving agreement, and that one side asserts that the 180-day period has not expired. One side or another may be attempting to involve the Court as a screen for negotiations that are continuing. I would make no such assumption and would accept the petition and response at face value.

If the Court were to assume "jurisdiction" it would not be reaching out to involve itself in this matter. Both sides have asked the Court to

assume jurisdiction. The Court should not, on insubstantial grounds, avoid its responsibility to address the question so duly presented to it.

I would issue an order directing both sides to appear at the earliest possible date to state their views on the unresolved issues so that the Court can determine what would be an appropriate disposition of the petition.

The foregoing views should not be understood as an expression of opinion on the continuing viability of Const 1963, art 4, § 6. See *In re Apportionment of State Legislature—1964,* 373 Mich 243, 258 (1964) (SOURIS, J.) and *In re Apportionment of State Legislature—1972,* 387 Mich 442, 492 (1972) (T. G. KAVANAGH, J.).

EXHIBIT A

PROPOSED PRELIMINARY ORDER
SUBMITTED BY REPUBLICAN MEMBERS
OF COMMISSION

1. That any commissioner or commissioners wishing to present a plan to this Court for its consideration must present such plan in an electronic format readable by Secretary Austin and must submit such plan to the other members of the commission, and to Secretary Austin, for audit, on or before a date to be determined by the Court.

2. That the Court accept only plans that have been submitted in accordance with paragraph 1, above. In addition, any plan submitted to the Court shall be in written form and shall be accompanied by a copy of Secretary Austin's audit report. Written form shall mean that each plan must consist of:

a. A statewide map showing the proposed election districts;

b. A list of the census geography contained within each proposed district;

c. A statement of population count for each proposed district;

d. An analysis of minority population (as reported by the Bureau of Census, U. S. Department of Commerce) for each proposed district;

e. An analysis of the number of counties and minor civil divisions (hereinafter "MCD") (as defined by the Bureau of Census, U. S. Department of Commerce) which fall into more than one proposed district, and for each such county and/or MCD, the number of districts into which it falls;

f. A statement that all proposed districts are contiguous. Secretary Austin's audit report shall verify and confirm all of the above.

3. That the presenter or presenters of any such plan shall have not less than three days to correct any errors discovered by Secretary Austin in his audit.

4. That the Court establish a date certain by which all plans must be audited and submitted to the Court.

5. That the Court provide a reasonable time of not less than two weeks during which any commissioner may file briefs in support of or opposition to the various plans which have been submitted.

6. That the Court provide for oral argument in support of or opposition to the various plans that have been submitted.

7. That the Court provide for such other preliminary matters which it may deem necessary or proper in the circumstances.

EXHIBIT B

PROPOSED PRELIMINARY ORDER
SUBMITTED BY DEMOCRATIC MEMBERS
OF COMMISSION

1. Any commissioner, individually or jointly with other commissioners, may submit a proposed plan ("plan") to this Court for its consideration after the plan has been audited by the Secretary of State, as provided below. The plan(s) shall be delivered to the Secretary of State for such audit within two weeks from the date of this order.

2. Any plan shall be delivered to the Secretary of State in an electronic format readable by electronic facilities available to him. It shall also be delivered in written form.

3. "Written form" shall mean that each plan shall consist of:

a. A statewide map showing the proposed election districts;

b. Maps of individual counties, cities and townships which have been divided by the proposed districts. These divisions shall be shown on the maps of such political subdivisions which were prepared by the Secretary of State for use by the commission;

c. A list of the census geography contained within each proposed district;

d. A statement of the population count for each proposed district;

e. A statement of the minority population (as reported by the Bureau of Census, U. S. Department of Commerce) for each proposed district (provided that this requirement for the production of such data shall be without prejudice to all claims and defenses with respect to the use thereof);

f. An analysis of the number of counties, cities and townships which have district lines crossing their boundaries;

g. A statement that all proposed districts are contiguous.

4. The Secretary of State's audit shall verify and confirm the provisions of ¶ 2 and 3, above.

5. The Secretary of State shall notify each commissioner presenting a plan of the results of the Secretary's audit of that plan and shall notify all commissioners of the date on which all audits have been completed and all commissioners were notified of the audits of their plans. Each commissioner may submit the plan to the Court with concurrent service on all other commissioners in the same electronic format and written form, on a common date certain, to be prescribed by the Court, no later than three days after receipt of the notice from the Secretary of State that all audits have been completed and all commissioners notified. Each plan submitted to the Court and to the other commissioners shall be accompanied by a brief in support thereof.

6. Any commissioner wishing to reply to another commissioner's brief shall file such reply with the Court and serve copies on all other commissioners within two weeks after receipt of plans and briefs.

7. Oral argument in support of or in opposition to submitted plans shall be had on a date not less than one week after the due date for the submission of replies to briefs.

8. The Court may provide for such other preliminary matters which it may deem necessary or proper in the circumstances.

FEBRUARY 18, 1982

*In re* APPORTIONMENT OF STATE LEGISLATURE—1982. (Docket No. 68777.) A second petition for submission of proposed apportionment plans for the Michigan Legislature, submitted by four members of the Commission on Legislative Apportionment, and a response thereto, submitted by the other four members of the commission, have been received and considered. No proposed apportionment plan accompanied the petition or response and none has, to date, been filed with the Court. The petition expressly states that it is believed that this Court has not "ruled that the submission of such a proposed plan is a jurisdictional requisite for the granting of preliminary relief, or for the assumption of jurisdiction by this Court".

We view our brief order in this same matter, dated February 3, 1982, as a clear statement that the submission of such a proposed plan is a prerequisite for action in this matter by this Court. Because action by this Court is again requested by all of the members of the commission and may otherwise be delayed to the detriment of all concerned, the following conditional invitation is issued.

Each party to this matter who has filed a proposed apportionment plan on or before 4 p.m., Monday, February 22, 1982, is invited to appear, by counsel or otherwise, at the Supreme Court hearing room

at 10:30 a.m., on Tuesday, February 23, 1982, to address this Court on the matters contained in the petitions and response heretofore submitted to this Court and to address the following questions:

1. If this Court acquires responsibility in the subject matter of reapportionment on the filing of one or more plans by a member or members of the commission after suitable proof that a majority of the commission cannot agree on a plan, is this Court's authority to act limited to "determining which plan complies most accurately with the constitutional requirements" and directing that such plan "be adopted by the commission and published as provided" in the constitution?

2. If this Court should vote on each of several plans submitted by members of the commission and determine that no such plan complies most accurately with the constitutional requirements, is the Court's responsibility in the subject matter exhausted thereby? If the Court's responsibility is not thereby exhausted what alternatives are open to it?

LEVIN, J., concurs in part and dissents in part and states as follows:

I join in the Court's invitation to the parties to address the Court next Tuesday on the matters described in the Court's invitation.

I would not, however, for the reasons expressed in my dissent from the order of February 3, 1982, condition the invitation upon the submission of a plan.

The Court is, by issuing an invitation, concededly taking "action" although no plan has been received; I agree, as stated on February 3, that the Court can so act although it cannot, to be sure, without the submission of plans, "determine which plan complies most accurately with the constitutional requirements". Const 1963, art 4, § 6.

One or both parties may understandably regard the conditional invitation as tantamount to an order; and, if that is the effect of the Court's invitation, then in essence it has issued an order to file a plan although it ruled on February 3 and today again rules that it cannot take "action" without a plan.

"The Court's decision in *In re Apportionment of State Legislature—1972*, 387 Mich 442, 451 (1972) that a proposed plan may be submitted to the Court although it was not submitted to or considered by the commission means that it is likely that the plan representing the 'last best offer' of each side will be submitted at the last possible moment so that it cannot be improved upon by the other side. Consequently, any plan that may be submitted to the Court before the last plan submitted by each side is likely to be at least somewhat disingenuous.

"For this and perhaps other reasons both sides agree that this Court should establish a timetable for submission of plans. There is

no reason to require the *pro forma* submission of a *pro forma* plan which will be replaced by the real plan. Both sides are understandably reluctant to put forth a disingenuous plan. The constitution does not require the performance of a meaningless act.

"For the foregoing reason, I do not think that the absence of a proposed plan is a substantial basis for declining to consider the petition. The absence of a plan does not affect this Court's 'jurisdiction' unless it so declares. It is unwise for the Court to so declare if for no other reason than that neither side may be willing to offer a *pro forma* plan and as the days, weeks and months go by it may become clear that there is an impasse and that it is essential for the Court to establish a timetable for the submission of proposed plans in order to obtain the filing of any plan. Also, circumstances may develop following some future census such that it becomes manifest that the Court should act on its own initiative. We should not preclude a future court from so acting by today adopting a limiting construction making the Court's 'jurisdiction' dependent on the filing of a proposed plan." *In re Apportionment of State Legislature—1982, ante,* 1109, LEVIN, J., *dissenting* (order dated February 3, 1982).

FEBRUARY 24, 1982

*In re* APPORTIONMENT OF STATE LEGISLATURE—1982. (Docket No. 68777.) On Feburary 12, 1982, the Secretary of State, the constitutionally designated Secretary of the Commission on Legislative Apportionment, notified this Court that the commission could not agree upon an apportionment plan. On February 22, 1982, two proposed apportionment plans were submitted to the Court by individual members of the commission, one by Richard H. Sanderson and the other by Erma Lurvey.

Four members of the commission have submitted petitions asking the Court to assume jurisdiction of further proceedings and to enter a preliminary order that would govern the form, manner and time for submission of additional proposed apportionment plans. Responses have been submitted by the other four members of the commission indicating they have no objection to the detailed preliminary order sought by petitioners, with one exception. The parties appeared at a hearing on February 23, 1982, and, reiterating their positions as indicated, joined in seeking from this Court the described detailed preliminary order.

NOW THEREFORE THE FOLLOWING ORDER, in general providing the specific relief sought by both parties, but omitting the provision

objected to by respondents, and with modifications designed to expedite the completion of these proceedings is issued:

1. Any commissioner, individually or jointly with other commissioners, may submit an additional proposed plan to this Court for its consideration, in accordance with the following requirements and not otherwise.

2. Any plan shall be delivered to the Secretary of State for audit by 4 p.m., Monday, March 1, 1982. Any plan delivered after this time will not be accepted by the Secretary of State or considered by this Court.

3. A total of 14 copies of any plan shall be delivered to the Secretary of State.

4. Any plan shall be delivered to the Secretary of State in an electronic format readable by electronic facilities available to him. It shall also be delivered in written form.

5. "Written form" shall mean that each plan shall consist of:

(a) A statewide map showing the proposed election districts;

(b) Maps of individual counties, cities and townships which have been divided by the proposed districts. These divisions shall be shown on the maps of such political subdivisions which were prepared by the Secretary of State for use by the commission. Such other maps or graphic presentations as the submitter may desire, without limitation on the right of a submitter to present other graphic presentations in briefs or argument before this Court.

(c) A list of the census geography contained within each proposed district;

(d) A statement of the population count for each proposed district;

(e) Such statement of the minority population (as reported by the Bureau of Census, U. S. Department of Commerce) for each proposed district as the submitter shall desire to present (provided that this statement shall be without prejudice to all claims and defenses with respect to the use thereof);

(f) A statement that all proposed districts are contiguous.

6. The Secretary of State audit reports shall verify and confirm the provisions of paragraphs 4 and 5 above with respect to each plan submitted; and in addition shall contain a statement of the entire minority population (as reported by the Bureau of Census, U. S. Department of Commerce) for each proposed district.

7. By 4 p.m., Thursday, March 11, 1982, the Secretary of State shall notify each commissioner presenting a plan of the results of the Secretary's audit of that plan and shall notify all commissioners of the date on which all audits were completed and all commissioners notified of the audits of their plans. Each commissioner shall have

until 4 p.m., Tuesday, March 16, 1982, to correct any errors discovered by the Secretary in his audit. Such corrections shall be submitted to the Secretary of State and shall be responsive only to errors discovered by him. By 4 p.m., Thursday, March 18, 1982, a final audit report shall be furnished to each commissioner presenting a plan, notifying such commissioner of the results of that audit; and the Secretary shall then certify to the Court and all commissioners that his audits have been completed, and the date on which all commissioners were so notified. Thereupon the Secretary of State shall submit 10 complete copies of each plan to this Court with concurrent service to the attorney for respondents of 3 complete copies of each plan submitted by a member or members of the commission who are petitioners herein, and to the attorney for petitioner of 3 complete copies of each plan submitted by a member or members of the commission who are respondents herein. The Secretary of State and his employees shall not disclose the contents of any plan or his audit results to any person other than as herein provided.

8. The proponent(s) of any plan shall file 17 copies of a typewritten brief in support thereof with this Court by 4 p.m., Monday, March 22, 1982, with concurrent actual service of 3 copies on the attorney for opposing proponent(s). Proof of such actual service shall be filed with this Court as soon as practicable.

9. Any proponent wishing to reply to another proponent's brief shall file such reply (17 copies) with the Court by 9:30 a.m., Thursday, March 25, 1982, with concurrent service of three copies on the opposing attorney as described in paragraph 8 above.

10. Oral argument in support of or in opposition to submitted plans is hereby scheduled in this Court at 10 a.m., Thursday, March 25, 1982.

11. IT IS HEREBY FURTHER ORDERED that by 4 p.m., Tuesday, March 2, 1982, both petitioners and respondents shall file with this Court with concurrent actual service of 3 copies on opposing counsel, 17 typewritten copies of briefs addressed to the following questions:

(a) Do the authority and responsibility of the Apportionment Commission and this Court survive invalidation of the weighted land/population formula, and

(b) If the commission's and this Court's authority and responsibility are not thereby superseded, what are the "constitutional requirements" within the meaning of Const 1963, art 4, § 6?

Reply briefs shall be filed with this Court (17 copies) by 10 a.m., Friday, March 5, 1982, with concurrent actual service of 3 copies on opposing counsel.

Oral argument by petitioners and respondents on the questions stated in this paragraph is hereby scheduled in this Court at 11 a.m., Friday, March 5, 1982.

12. IT IS HEREBY FURTHER ORDERED that the motion to intervene heretofore filed in this matter by Coleman A. Young and the Detroit Branch, NAACP, is considered as a motion for leave to file a brief amicus curiae on the questions stated in paragraph 11 above. So considered the motion is granted provided 17 typewritten copies of such brief are filed with the Court by 4 p.m., Tuesday, March 2, 1982, and one copy actually concurrently served on the attorney for the petitioners herein and the attorney for the respondents herein. By copy of this order the Attorney General is also invited and requested to file and serve a brief amicus curiae on the questions stated in paragraph 11, on the same terms and conditions specified in this paragraph.

FEBRUARY 26, 1982

PEOPLE v CARTER. (Docket No. 66273.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Reported *ante,* 214.

RASKA v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN. (Docket No. 63507.) Rehearing denied. *Jack C. Chilingirian* for plaintiffs-appellants. Reported *ante,* 355.

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ATTORNEY AND CLIENT.
1. The view in an appellate brief of a lawyer representing a regulatory commission charged with the administration of an act should not be accepted by the Court as an authoritative construction by the agency. *Attorney General v MPSC,* 412 Mich 385.

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*See, also,* ADMINISTRATIVE LAW 1; JUDGES 11; SUPERINTENDING CONTROL 2.

APPEAL—Cont'd

APPEAL BOND.

1. The purpose of a supersedeas or stay bond is to protect the appellee from losses that may result from the inability to enforce the judgment while it is stayed pending appeal; therefore, a bond on appeal of a money judgment from a lower court to the circuit court is required only if the appellant seeks a stay of proceedings to enforce the lower court's judgment (GCR 1963, 701.8[a][2][A]). *Wright v Fields,* 412 Mich 227.

APPEAL BOND—*See*
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*See, also,* ADMINISTRATIVE LAW 1; MALICIOUS PROSECUTION 1.

COMMON LAW.

1. The adversary system intends and expects lawyers to probe the outer limits of the bounds of the law, ever searching for a more efficacious remedy, or a more successful defense. *Friedman v Dozorc,* 412 Mich 1.

DISCIPLINE OF LAWYERS.

2. The power to discipline members of the State Bar, except a proper adjudication of contempt, particularly the power to limit or preclude an attorney from practicing law, is reserved to the Supreme Court (Const 1963, art 6, § 5; MCL 600.904; MSA 27A.904). *Matter of Hague,* 412 Mich 532.

DUTY.

3. An attorney owes a client a duty which is broader than the obligation of reasonable investigation before bringing a civil action on the client's behalf, and which concerns decisions made on behalf of, often in consultation with, the client regarding the manner of proceeding with the client's cause. *Friedman v Dozorc,* 412 Mich 1.

MALICIOUS PROSECUTION.

4. Lack of probable cause on the part of a lawyer in initiating, defending, or continuing proceedings on behalf of a client may be found where the lawyer proceeded with knowledge that the claim had no factual or legal basis, but there is no obligation to investigate if the lawyer could reasonably believe the facts to be as the client alleges. *Friedman v Dozorc,* 412 Mich 1.

5. The rule in actions for malicious prosecution of civil proceedings initiated by a layperson that malice may be inferred from

ATTORNEY AND CLIENT—Cont'd

the facts that establish want of probable cause, although the jury is not required to draw that inference, fails to make sufficient allowance for the lawyer's role as advocate and should not be applied in determining whether a lawyer acted for an improper purpose. *Friedman v Dozorc,* 412 Mich 1.

6. A finding, in an action for malicious prosecution of civil proceedings, of an improper purpose on the part of the unsuccessful attorney must be supported by evidence independent of the evidence establishing that the action was brought without probable cause. *Friedman v Dozorc,* 412 Mich 1.

7. *The delicate relation among attorneys, clients, and the judicial system requires a careful definition of the elements of probable cause and improper purpose when attorneys are sued for malicious prosecution of civil proceedings. Friedman v Dozorc,* 412 Mich 1.

8. *An attorney, in complying with the duties to make legal counsel available and to represent a client zealously within the bounds of the law, should be prepared to represent clients with doubtful, but tenable claims; the threat of liability for wrongful use of civil proceedings must not force an attorney to choose between advancing substantial costs to investigate a claim with some merit and refusing to take it. Friedman v Dozorc,* 412 Mich 1.

9. *A lawyer is not liable for malicious prosecution of civil proceedings if he acts primarily for the purpose of obtaining a proper adjudication of the claim. Friedman v Dozorc,* 412 Mich 1.

NEGLIGENCE.

10. An attorney owes no actionable duty of care to an adverse party in litigation. *Friedman v Dozorc,* 412 Mich 1.

11. An attorney ought not to be held liable to the adverse party in a civil proceeding for negligence in beginning or continuing the lawsuit on behalf of a client because the creation of a duty in favor of an adversary would create a conflict of interest which would seriously hamper the attorney's effectiveness as counsel for his client. *Friedman v Dozorc,* 412 Mich 1.

12. The public policy of maintaining a vigorous adversary system outweighs the asserted advantages of finding a duty of care owing to an attorney's opponent in litigation. *Friedman v Dozorc,* 412 Mich 1.

13. Recognition of an action by an adverse party against an attorney for negligence in bringing a civil action on behalf of a client might unduly inhibit attorneys from bringing close cases or advancing innovative theories, or taking action against defendants who can be expected to retaliate, and would work against the public policy of encouraging free access to the courts. *Friedman v Dozorc,* 412 Mich 1.

14. There can be neither reliance by a party in litigation on the quality of services performed by an attorney who represents that party's adversary, nor benefit intended by the attorney or the adversary to that party, because the relation of the parties is adversarial; the absence of reliance distinguishes the case

ATTORNEY AND CLIENT—Cont'd
from those in which professional persons have been held liable for negligence in performing professional services which affect third parties. *Friedman v Dozorc,* 412 Mich 1.

PROFESSIONAL MISCONDUCT.

15. Whether a lawyer abused his duty to represent his client's interests zealously is not a matter of what a hypothetical reasonable practitioner would have done in the same circumstances, but of whether the lawyer's conduct was beyond the limits of reason or the bounds of the law, although another reasonable lawyer might not have acted similarly. *Friedman v Dozorc,* 412 Mich 1.

ATTORNEYS—*See*
JUDGES 1-3

AUTOMOBILES.
*See, also,* INSURANCE 1-4, 8.

INSURANCE.

1. *The no-fault act requires an insurer to provide its insured with residual liability coverage for certain losses caused by the use of a motor vehicle, and precludes an exclusion of coverage where an accident involves the insured's use of a vehicle owned by or registered in the name of a relative residing in the same household or a vehicle furnished or available for the frequent or regular use of the named insured. State Farm v Ruuska,* 412 Mich 321.
2. *The relevant sections of the no-fault act, when construed together, make it plain that the Legislature intended that a person* using *a motor vehicle that causes certain kinds of damages shall remain liable in tort, that an insurance policy in this state shall afford coverage for such liability, and that an owner or registrant of a motor vehicle shall purchase such a policy (MCL 500.3101, 500.3131, 500.3135; MSA 24.13101, 24.13131, 24.13135). State Farm v Ruuska,* 412 Mich 321.
3. *Exclusion from the definition of "non-owned automobile" of an automobile owned by any relative residing in the same household in a no-fault insurance policy generally providing residual liability coverage while the insured is operating a non-owned automobile is repugnant to the clear directive of the no-fault act that a policy provide residual liability coverage for the* use *of a motor vehicle (MCL 500.3101, 500.3131, 500.3135; MSA 24.13101, 24.13131, 24.13135). State Farm v Ruuska,* 412 Mich 321.
4. *A no-fault insurance policy with an exclusionary clause which is invalid because it conflicts with the requirement of liability coverage of the no-fault act must be read so as to provide the required coverage. State Farm v Ruuska,* 412 Mich 321.
5. *Exclusion from the definition of "non-owned automobile" of an automobile furnished or available for the frequent and regular use of the named insured in a no-fault insurance policy generally providing residual liability coverage while the insured is*

AUTOMOBILES—Cont'd

*operating a non-owned automobile is repugnant to the requirement of the no-fault act that a policy provide residual liability coverage for the* use *of a motor vehicle (MCL 500.3101, 500.3131, 500.3135; MSA 24.13101, 24.13131, 24.13135). State Farm v Ruuska,* 412 Mich 321.

6. The obligation to obtain residual liability coverage is imposed by the no-fault act on an owner or registrant of a motor vehicle, but not on a licensed driver who does not own a vehicle (MCL 500.3101; MSA 24.13101). *State Farm v Ruuska,* 412 Mich 321.

7. The obligation to obtain residual liability coverage does not extend to one driving the vehicle of another for which the residual liability required by the no-fault act has been provided (MCL 500.3101; MSA 24.13101). *State Farm v Ruuska,* 412 Mich 321.

8. It is contrary to the legislative intent of the no-fault act, to provide a minimum insurance fund at low cost for residual tort liability retained by the act, to construe the act as requiring an owner of one vehicle to carry residual liability coverage when operating another owner's vehicle, on which an independent obligation to provide the coverage has been imposed (MCL 500.3131; MSA 24.13131). *State Farm v Ruuska,* 412 Mich 321.

9. The policy of the no-fault act of providing fixed limits on the amount of required coverage, except for medical care, for all injured persons and their survivors at an affordable cost does not require residual liability coverage varying in amount depending upon the circumstances of who is driving whose automobiles and how many automobiles the driver owns. *State Farm v Ruuska,* 412 Mich 321.

10. *Definition of "non-owned automobile" in a no-fault insurance policy providing residual liability coverage so as to exclude an automobile furnished or available for the frequent and regular use of the named insured ascribes a special meaning to a term which has an obvious and easily understood meaning, and is unenforceable where there is no evidence that the insured knew of the exclusion and where it was embedded in a separate definition of the apparently unambiguous term, rather than mentioned in the statement of exclusions (MCL 500.3101, 500.3135; MSA 24.13101, 24.13135). State Farm v Ruuska,* 412 Mich 321.

11. *The reasonable expectation of the purchaser of non-owned automobile liability insurance is that there would be coverage regardless of whose car the purchaser is driving, and not that although it is in effect when he drives some non-owned vehicles, it will not be in effect when he drives a family member's automobile. State Farm v Ruuska,* 412 Mich 321.

12. *Exclusion of an automobile furnished or available for the frequent and regular use of the named insured in a no-fault insurance policy providing residual liability coverage goes beyond reason and good conscience to exclude liability beyond the need for the exclusion, which is to protect the insurer against a policyholder failing to buy coverage on another vehicle he owns*

AUTOMOBILES—Cont'd

*or a regularly used leased automobile (MCL 500.3101, 500.3135; MSA 24.13101, 24.13135). State Farm v Ruuska,* 412 Mich 321.

13. *Definition of "non-owned automobile" in a no-fault insurance policy providing residual liability coverage so as to exclude an automobile furnished or available for the frequent and regular use of the named insured is unenforceable, because it is unconscionable and contrary to the reasonable expectations of an insured where the insured, driving a family member's automobile not owned or leased by him, has not been offered, and has not declined to purchase, coverage for "frequent", "regular", or other atypical use of non-owned automobiles (MCL 500.3101, 500.3135; MSA 24.13101, 24.13135). State Farm v Ruuska,* 412 Mich 321.

14. *An unambiguous exclusion in a no-fault insurance policy providing residual liability coverage is not unenforceable as contrary to the reasonable expectations of the insured where there is no allegation that the insured was uninformed of the exclusion or of the opportunity to purchase additional coverage. State Farm v Ruuska,* 412 Mich 321.

15. *Exclusion from the definition of "non-owned automobile" of an automobile furnished or available for the frequent and regular use of the named insured in a no-fault insurance policy providing residual liability coverage is neither ambiguous nor contrary to the no-fault act (MCL 500.3101, 500.3135; MSA 24.13101, 24.13135). State Farm v Ruuska,* 412 Mich 321.

16. The "owned vehicle" exclusion clause in an endorsement providing disability income benefits in a family automobile liability policy which denies such coverage for injuries incurred by the named insured while occupying an automobile owned by or furnished for the regular use of the named insured or any relative is not ambiguous where a capitalized reference on the first side of the endorsement to provisions on the second side and a capitalized heading "Exclusions" on the second side of the endorsement leave no doubt that the use of a vehicle not named in the policy which is either owned by the insured or furnished for his or her regular use is excluded from coverage. *Raska v Farm Bureau Ins Co,* 412 Mich 355.

17. *The "owned vehicle" exclusion clause in an endorsement providing disability income benefits in a family automobile liability policy which denies such coverage for injuries incurred by the named insured while occupying an automobile owned by the named insured or any relative other than one defined as an owned vehicle in the policy on the second side of the endorsement, after providing apparently unlimited coverage on the first side, should be construed against the insurer as ambiguous. Raska v Farm Bureau Ins Co,* 412 Mich 355.

18. *An endorsement providing disability income benefits in a family automobile liability policy which undertakes, by an unconditional statement of coverage on the face of the endorsement, to provide coverage for the insured who sustains bodily injury while occupying or through being struck by an automobile would lead the insured logically to assume that it provides*

AUTOMOBILES—Cont'd

*complete portability of the coverage for the named insured; such a reasonable expectation of coverage should not be defeated by the obscurant drafting of an "owned vehicle" exclusion clause on the second side of the endorsement. Raska v Farm Bureau Ins Co,* 412 Mich 355.

19. *The average consumer of insurance does not reasonably expect that an automobile owned by a family member or a vehicle owned by an unrelated person but furnished for his regular use would be considered by the insurer not to be a non-owned automobile, but the equivalent of an automobile owned by the insured for which he should obtain insurance, especially when he has purchased optional coverage for injuries caused by non-owned vehicles; such an exclusion from the expected coverage of the endorsement providing disability income benefits in a family automobile liability policy, without explaining or offering the additional coverage the insured should purchase for protection in the excluded situation, is to set a trap for the policyholder. Raska v Farm Bureau Ins Co,* 412 Mich 355.

20. *An insurer can rightfully insist on being paid for the additional risk when the use of a non-owned automobile by the insured is not occasional but regular, but it is unconscionable for the insurer to sell coverage for non-owned automobiles in the endorsement providing disability income benefits in a family automobile liability policy and then to exclude from coverage a vehicle "furnished for the regular use" of the insured without explanation or without offering the excepted coverage. Raska v Farm Bureau Ins Co,* 412 Mich 355.

NO-FAULT INSURANCE.

21. A person injured in a motor vehicle accident involving a motor vehicle owned by the United States and not required to be registered in Michigan may be entitled to no-fault insurance benefits from his own insurer (MCL 257.216, 500.3101, 500.3105; MSA 9.1916, 24.13101, 24.13105). *Lee v DAIIE,* 412 Mich 505.

22. It is the policy of the no-fault insurance act that persons, not motor vehicles, are insured against loss (MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.). Lee v DAIIE,* 412 Mich 505.

23. A decision that for an insurer to incur liability under the no-fault act there must, at a minimum, be an accident involving a vehicle intended to be covered by the statute is erroneous because it reads into the no-fault act a more restrictive meaning of the expression "motor vehicle" than was adopted by the Legislature (MCL 500.3101, 500.3105; MSA 24.13101, 24.13105). *Lee v DAIIE,* 412 Mich 505.

24. The provision of the no-fault insurance act which declares what the expression "motor vehicle" means when used as a term of art throughout the statute and that which provides what category of persons is required to carry no-fault coverage and for what duration are concerned with entirely different aspects of the applicability of the no-fault act (MCL 500.3101, 500.3105; MSA 24.13101, 24.13105). *Lee v DAIIE,* 412 Mich 505.

25. The no-fault insurance act declares that entitlement to bene-

AUTOMOBILES—Cont'd
fits depends, in part, on the use of a motor vehicle "as a motor vehicle"; there is no requirement that the motor vehicle involved be insured or covered by no-fault insurance (MCL 500.3101, 500.3105; MSA 24.13101, 24.13105). *Lee v DAIIE,* 412 Mich 505.
26. The meaning of the expression motor vehicle is explicitly declared by the no-fault insurance act; there is no language limiting the definition to a vehicle required to be registered by the Secretary of State in Michigan or a vehicle for which no-fault security must be maintained (MCL 500.3101[2][c]; MSA 24.13101[2][c]). *Lee v DAIIE,* 412 Mich 505.
27. The provisions of the no-fault insurance act suggest strongly that the Legislature intended that benefits be provided whenever an insured is injured in a motor vehicle accident and that the injured person's own insurer stand primarily liable for the benefits (MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.). Lee v DAIIE,* 412 Mich 505.

BAD GENERAL CHARACTER—*See*
CRIMINAL LAW 24, 27

BENCH TRIALS—*See*
CRIMINAL LAW 8, 12-14

BENEFITS—*See*
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BIAS—*See*
CRIMINAL LAW 27, 28

BUILDERS—*See*
LARCENY 4, 5

BULGE IN CLOTHING—*See*
SEARCHES AND SEIZURES 1

BURDEN OF PROOF—*See*
CIVIL RIGHTS 13
WORKERS' COMPENSATION 5

CHANGE OF LAW—*See*
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CRIMINAL LAW 24-27

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PROCESS 1, 2

CIVIL RIGHTS.
*See, also,* CONSTITUTIONAL LAW 3; ELECTIONS 4.

CIVIL RIGHTS—Cont'd

FAIR EMPLOYMENT PRACTICES ACT.

1. *Neither the State Fair Employment Practices Act nor the Constitution of 1963 requires the assimilation into Michigan law of whatever Congress enacts, federal agencies promulgate or federal courts decide on the issue of discrimination in employment; whether a particular policy or rule of federal law should be incorporated into Michigan law should be decided as the issue arises (Const 1963, art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

RELIGIOUS DISCRIMINATION.

2. The State Fair Employment Practices Act does not impose a duty on an employer to make reasonable accommodation to the religious needs of employees (MCL 423.301 *et seq.;* MSA 17.458[1] *et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.
3. *The Civil Rights Commission cannot legislate or impose substantive duties or penalties beyond the scope of its authority under the State Fair Employment Practices Act to proscribe religious discrimination in employment (MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.
4. *To construe the State Fair Employment Practices Act to require an employer to make reasonable accommodation to the religious practices of an employee goes beyond the legislative mandate (MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.
5. The State Fair Employment Practices Act does not impose a separate obligation upon an employer to meet the religious needs of employees (MCL 423.301 *et seq.;* MSA 17.458[1] *et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.
6. *It is the duty of the Civil Rights Commission, under the Constitution of 1963, to investigate allegations of discrimination because of religion in the enjoyment of the right to an opportunity to be employed, which is a civil right guaranteed by the State Fair Employment Practices Act, and to secure the equal protection of that right without religious discrimination (Const 1963, art 1, § 2; art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.
7. *The term religious discrimination, under the State Fair Employment Practices Act, includes practices that are fair in form, but discriminatory in operation; an employer may be obliged to act affirmatively to avoid a discriminatory effect (Const 1963, art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.
8. *There is no present reason for reading the State Fair Employment Practices Act as imposing a duty upon an employer to make reasonable accommodation to the religious needs of an employee where that can be done without undue hardship to the conduct of the employer's business (Const 1963, art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.
9. A decision that the State Fair Employment Practices Act does not impose a duty on an employer to make reasonable accom-

CIVIL RIGHTS—Cont'd

modation to the religious needs of an employee as a matter of law does not preclude a finding of religious discrimination, as a matter of fact, based on evidence that an employer failed to act affirmatively to avoid the discriminatory effect of a facially neutral practice (Const 1963, art 5, § 29; MCL 423.303; MSA 17.458[3]). *Civil Rights Dep't v GMC,* 412 Mich 610.

10. *The statutory duty under the State Fair Employment Practices Act to refrain from religious discrimination in employment imposes a duty on an employer to make reasonable accommodation to the religious needs of an employee where that can be done without undue hardship to the conduct of the employer's business (MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

11. *An administrative guideline or interpretation of the State Fair Employment Practices Act concerning religious discrimination may not exceed the power expressly given to the Civil Rights Commission by statute or the constitution, and any such guideline, under the Administrative Procedures Act, does not have the force or effect of law, but is merely explanatory (Const 1963, art 5, § 29; MCL 24.207[h], 423.301 et seq.; MSA 3.560[107][h], 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

12. *An administrative guideline concerning religious discrimination promulgated by the Civil Rights Commission under the State Fair Employment Practices Act is due some particular deference because of the constitutional establishment of the commission (Const 1963, art 5, § 29; MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

13. *The burden of proving, under the State Fair Employment Practices Act, that a reasonable accommodation to an employee's religious practices cannot be made by an employer without undue hardship to the conduct of the employer's business is on the employer (MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

14. *The prohibition against religious discrimination in employment embraces the concept of religious practice as well as that of religious belief, and the Legislature necessarily included both concepts in the State Fair Employment Practices Act; it follows that a duty to make reasonable efforts to accommodate religious practices arose with the enactment of the law in order to achieve fully the prohibition of religious discrimination in employment (US Const, Am I; Const 1963, art 1, § 4; MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

15. *The failure of the Legislature to amend the State Fair Employment Practices Act specifically to incorporate the substance of an administrative guideline by the Civil Rights Commission interpreting the statutory prohibition against religious discrimination in employment does not raise the inference that the Legislature intended to disapprove that construction of the statute (MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

CIVIL RIGHTS—Cont'd

16. *The good-faith effort which an employer must make to reasonably accommodate the religious needs of an employee, as part of the proscription of the Fair Employment Practices Act against religious discrimination, cannot be given a hard and fast meaning; each case necessarily depends on its own facts and circumstances, which the trier of fact is in the best position to weigh (MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

17. *An employee who was dismissed from employment because her observance of the Sabbath as a Seventh-day Adventist conflicted with her assigned hours of work has made a prima facie showing of religious discrimination against her religious needs and the need for reasonable accommodation of them under the State Fair Employment Practices Act where the employer took the position that it had no duty of reasonable accommodation to the requirement of her religion to perform no work between sunset on Friday and sunset on Saturday (MCL 423.301 et seq.; MSA 17.458[1] et seq.). Civil Rights Dep't v GMC,* 412 Mich 610.

SUNDAYS AND HOLIDAYS.

18. *A stipulation by an employer that it refused to consider an alternative other than discharge from employment of an employee because her observance of the Sabbath as a Seventh-day Adventist conflicted with her assigned hours of work does not, standing alone, establish a policy or practice discriminatory in operation or that the employer discriminated against the employee because of religion (MCL 423.303; MSA 17.458[3]). Civil Rights Dep't v GMC,* 412 Mich 610.

CLASSIFICATION—*See*
ELECTIONS 3, 5, 6

CODE OF ETHICS—*See*
MASTER AND SERVANT 4

COLLATERAL ATTACK—*See*
DIVORCE 4

COMBINED REPORTING—*See*
TAXATION 3, 5-8

COMMON LAW.

*See, also,* ATTORNEY AND CLIENT 1; FRAUD 2; JUDGES 4, 5; LARCENY 1; NEGLIGENCE 1.

SUPREME COURT.

1. *The duty to interpret the common law in light of present circumstances rests with the Supreme Court (Const 1963, art 3, § 7). Friedman v Dozorc,* 412 Mich 1.

COMMUTATION OF SENTENCE—*See*
CRIMINAL LAW 22

COMPELLING STATE INTEREST—*See*
ELECTIONS 5, 7, 8

COMPETING EVIDENCE—*See*
CRIMINAL LAW 18

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CONCLUSIVE PRESUMPTIONS—*See*
CONSTITUTIONAL LAW 4
WORKERS' COMPENSATION 2-4

CONDITION OF PROBATION—*See*
CRIMINAL LAW 20

CONFESSIONS—*See*
CRIMINAL LAW 7

CONFLICTING EVIDENCE—*See*
CRIMINAL LAW 18
HOMICIDE 5

CONFLICT OF INTEREST—*See*
ATTORNEY AND CLIENT 11

CONSENT JUDGMENT—*See*
DIVORCE 11

CONSTITUTIONAL LAW.
*See, also,* CIVIL RIGHTS 1, 12; COMMON LAW 1; CRIMINAL LAW 1, 22; ELECTIONS 1-14.

ESTABLISHMENT OF RELIGION.

1. *The traditional view is that to be constitutional under the Establishment Clause a law concerning religion must reflect a clearly secular legislative purpose, have a primary effect that neither advances nor inhibits religion, and avoid excessive governmental entanglement with religion; that test, however, only serves as a guideline to identify impairments of the objectives of the Establishment Clause and does not set the precise limits to the necessary constitutional inquiry (US Const, Am I; Const 1963, art 1, § 4). Civil Rights Dep't v GMC,* 412 Mich 610.
2. *Total separation between church and state is not called for by the constitution, and incidental, indirect, or remote benefits to religion do not alone render a particular law constitutionally invalid (US Const, Am I; Const 1963, art 1, § 4). Civil Rights Dep't v GMC,* 412 Mich 610.
3. *The requirement of the State Fair Employment Practices Act that an employer make reasonable accommodation to the religious practices of an employee where that can be done without undue hardship to the conduct of the employer's business is*

CONSTITUTIONAL LAW—Cont'd

*entirely consistent with the necessary governmental neutrality in matters of religion because the primary and direct effect is simply to provide certain individuals with a greater opportunity to secure or retain employment without giving up the practices of their religion; the requirement is not tainted by the evils of sponsorship, financial support, and active involvement of the government against which the Establishment Clause of the constitution was intended to afford protection (US Const, Am I; Const 1963, art 1, § 4). Civil Rights Dep't v GMC,* 412 Mich 610.

WORKERS' COMPENSATION.

4. The decision of the Supreme Court of the United States that the conclusive presumption of the Missouri workers' compensation act that widows, but not widowers, were wholly dependent upon their deceased spouses for financial support constitutes gender-based discrimination against female wage earners and surviving male spouses, violative of the provisions of the Equal Protection Clause, is binding on the Supreme Court of Michigan pursuant to the Supremacy Clause of the United States Constitution (US Const, art VI, § 2, Am XIV). *Day v Foote Memorial Hosp,* 412 Mich 698.

CONSTRUCTION OF POLICY—*See*

AUTOMOBILES 4, 10, 12, 14, 17
INSURANCE 1-5, 7, 8

CONSTRUCTION OF STATUTES—*See*

ADMINISTRATIVE LAW 1
CIVIL RIGHTS 4, 15
PUBLIC UTILITIES 3
WORKERS' COMPENSATION 1, 18-26, 28, 30-32, 35-37, 43, 44

CONTEMPT—*See*

ATTORNEY AND CLIENT 2
JUDGES 6, 7

CONTRACTS.

*See, also,* DIVORCE 2, 3, 5-7, 10-13; FRAUD 1; LARCENY 4-6; MASTER AND SERVANT 1; REMEDIES 1.

FRAUD.

1. The test in a case of fraud in the inducement for determining the existence of reliance on a misrepresentation is whether it exerted a material influence on the mind of the complaining party, although it might be only one of several motives, acting together, which produced the result of formation of a contract. *U S Fidelity & Guaranty v Black,* 412 Mich 99.
2. A trial court erroneously concluded that the defendants in an action for reimbursement under an indemnity agreement had not established the affirmative defense of fraud in the inducement where the court found that the defendants in signing the indemnity agreement relied in part on misrepresentations by

CONTRACTS—Cont'd
the plaintiff's agents that other parties would be liable before the defendants would be liable in the event that indemnification was required; the facts that the defendants may have had other motives to sign the indemnity agreement and they continued to bargain on other issues before signing the indemnity agreement do not change the conclusion that they relied on the misrepresentations. *U S Fidelity & Guaranty v Black,* 412 Mich 99.

MISREPRESENTATION.
3. It may justifiably be presumed in a contractual bargaining situation that all material representations by a party are made with the intention to induce the other party to enter into the contract; thus, in cases involving privity of contract independent proof of intent to induce reliance on a misrepresentation is unnecessary to maintain an action in deceit or to establish the defense of fraud in the inducement of a contract. *U S Fidelity & Guaranty v Black,* 412 Mich 99.
4. *A claim of misrepresentation by the plaintiff's agents as a defense to the enforcement of a contract has been established if the trial court finds that the plaintiff's agents made a representation of a material fact, that the representation was false, and that the defendants relied on the representation as all or part of the inducement to enter into the contract. U S Fidelity & Guaranty v Black,* 412 Mich 99.

CONTRACTS OF ADHESION—*See*
INSURANCE 5

CONVERSION—*See*
LARCENY 1-6

CORPORATIONS—*See*
TAXATION 5, 6

COSTS—*See*
MALICIOUS PROSECUTION 2

COURT OF APPEALS—*See*
JUDGES 10

COURT RULES—*See*
APPEAL 1
CRIMINAL LAW 17
MALICIOUS PROSECUTION 2
SUPERINTENDING CONTROL 2, 3

COURTS.
*See, also,* ATTORNEY AND CLIENT 2; DIVORCE 1, 2; JUDGES 1, 2, 11; SUPERINTENDING CONTROL 1, 2.

SUPREME COURT OF THE UNITED STATES.
1. *Summary affirmances or dismissals for want of a substantial*

COURTS—Cont'd
*federal question by the Supreme Court of the United States are decisions on the merits and must be given weight by all lower courts as precedents on the precise issues necessarily decided. Socialists v Secretary of State,* 412 Mich 571.
2. *A summary disposition by the Supreme Court of the United States rejects the specific challenges presented in the statement of jurisdiction filed under the Supreme Court Rules, and prevents lower courts from coming to opposite conclusions on the precise issues necessarily decided. Socialists v Secretary of State,* 412 Mich 571.

COVERED VEHICLES—*See*
AUTOMOBILES 23, 26

CREDIBILITY—*See*
CRIMINAL LAW 18, 24-27

CREDIT FOR TIME SERVED—*See*
CRIMINAL LAW 20

CRIMINAL LAW.
ASSISTANCE OF COUNSEL.
1. The right to counsel at a preliminary examination is one of constitutional dimension, and the standard for an inquiry as to the prejudice to the defendant caused by the failure of a magistrate to advise him of his right to a court-appointed lawyer at the preliminary examination is whether the error was harmless beyond a reasonable doubt (US Const, Am VI; Const 1963, art 1, § 20; GCR 1963, 785.4[3]). *People v Carter,* 412 Mich 214.
2. An accused may waive his constitutional rights during custodial interrogation, but the Supreme Court of the United States has strongly indicated that additional safeguards are necessary when the accused asks for counsel (US Const, Ams V, XIV). *People v Paintman,* 412 Mich 518.
3. An accused who has expressed the desire to invoke the right to counsel is not subject to further interrogation by the police until counsel has been made available, unless the accused himself initiates further communication, exchanges, or conversations with the police (US Const, Ams V, XIV). *People v Paintman,* 412 Mich 518.
4. Waivers of counsel must not only be voluntary, but must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege; the two questions are discrete inquiries, and a valid waiver cannot be established merely by showing that an accused who asked for an attorney responded to further custodial interrogation initiated by police officers even after he had been advised of his rights (US Const, Ams V, XIV). *People v Paintman,* 412 Mich 518.
5. The lawyer is the protector of the rights of the accused in his dealings with the police and courts; therefore, the Supreme Court of the United States has fashioned the rigid rule that an

CRIMINAL LAW—Cont'd

accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring all interrogation to cease (US Const, Ams V, XIV). *People v Paintman,* 412 Mich 518.

6. The Fifth and Fourteenth Amendments require a clear demonstration of waiver of the right to counsel once an accused has asked for it, and such clarity is not apparent when an accused's request for counsel is met by silence or inaction for a matter of days; nor does it exist when a defendant's request is followed by a move to solitary confinement, no matter what the reason (US Const, Ams V, XIV). *People v Paintman,* 412 Mich 518.

7. Use of confessions against defendants who had expressly requested counsel and were subjected to custodial interrogation without the assistance of counsel violated their rights under the Fifth and Fourteenth Amendments where neither defendant initiated the conversations from which their inculpatory remarks emerged, the police were aware that counsel had been appointed to represent one defendant and had filed an appearance, and the other defendant had expressed his desire to speak with an attorney to the chief assistant prosecutor, who then left, after which the police continued to talk with the defendant (US Const, Ams V, XIV). *People v Paintman,* 412 Mich 518.

BENCH TRIALS.

8. The role of a trial judge sitting as the trier of fact in a criminal case is more circumscribed than the role of a jury, significantly reducing or eliminating the possibility of an inappropriate compromise judgment because the judge's duty to find facts based on the evidence presented and to apply the law to those facts is reinforced by the requirement that the judge must articulate the facts found and the conclusions of law upon which his judgment is based, and on appeal a stricter standard of review is applied to findings of a trial judge. *People v Cazal,* 412 Mich 680.

INFORMATION.

9. A defendant's action in a trial for murder in prevailing upon the trial judge to instruct the jury on the charge of being an accessory after the fact was the equivalent of a motion to amend the information pursuant to statute to charge being an accessory after the fact (MCL 767.76; MSA 28.1016). *People v Williams,* 412 Mich 711.

LESSER INCLUDED OFFENSES.

10. The rule that in any criminal case where the charged offense is punishable by incarceration for more than two years the trial court, regardless of a request by the defendant, may not instruct the jury on lesser included offenses for which the maximum allowable incarceration period is one year or less, was adopted pursuant to the supervisory power of the Supreme Court over the courts of Michigan as a prophylactic measure, designed to reduce the possibility of prejudice to the defendant, and not pursuant to constitutional or statutory requirements (Const 1963, art 6, § 5). *People v Cazal,* 412 Mich 680.

11. The rule limiting a jury's consideration of certain lesser

CRIMINAL LAW—Cont'd

included offenses in felony trials incorporated policies designed to assure a defendant a fair trial, including limiting the number of charges the defendant would be forced to defend, providing the defendant with fair notice of the charges, avoiding undue confusion of the jury by presenting it with a limitless array of possible verdicts, and limiting the number of compromise resolutions where they are inappropriate. *People v Cazal,* 412 Mich 680.

12. The applicability of the policies underlying the adoption of the rule limiting a jury's consideration of certain lesser included offenses in felony trials is affected by a change in the role of the trier of fact, and reasons for imposing policies appropriate where a jury sits as the trier of fact are less compelling in the context of a bench trial. *People v Cazal,* 412 Mich 680.

13. The rule limiting a jury's consideration of certain lesser included offenses in felony trials is specifically applicable to jury trials and does not apply in cases in which a trial judge sits as the trier of fact because of the differences in the functions performed by a jury and a trial judge sitting as the factfinder. *People v Cazal,* 412 Mich 680.

14. The provisions of the Code of Criminal Procedure relating to bench trials and jury trials does not prohibit the Supreme Court from exercising its supervisory power over the courts of Michigan to accord criminal defendants fair trials and does not require that the rule limiting a jury's consideration of certain lesser included offenses in felony trials, which incorporated policies specifically directed at jury trials, be extended to bench trials (Const 1963, art 6, § 5; MCL 763.4; MSA 28.857). *People v Cazal,* 412 Mich 680.

15. The application of the rule limiting consideration of certain lesser included offenses in felony trials only to jury trials is based on the rational distinction between the functions of the jury and the functions of the judge when sitting as the trier of fact and does not deny a criminal defendant the equal protection of the law (US Const, Am XIV). *People v Cazal,* 412 Mich 680.

PLEA OF GUILTY.

16. There was no mandatory minimum sentence for subsequent offenders of which advice was required in accepting a plea of guilty of first-degree criminal sexual conduct where the defendant was not charged as being a second offender under the criminal sexual conduct statute, although he had been charged under the habitual offender statute, a charge which was dismissed as part of a plea bargain (MCL 750.520f; MSA 28.788[6]; GCR 1963, 785.7[1][d]). *People v Urynowicz,* 412 Mich 137.

17. The court rule which requires a trial court, prior to accepting a defendant's plea of guilty or nolo contendere of murder, armed robbery, or treason, to inform the defendant that as a consequence of his plea he cannot be placed on probation must be applied strictly; failure to comply requires reversal (GCR 1963, 785.7[1][f]). *People v Rogers,* 412 Mich 669.

CRIMINAL LAW—Cont'd

PRELIMINARY EXAMINATION.

18. The magistrate at a preliminary examination has the duty to pass on the weight and competency of the evidence, and the credibility of the witnesses, and may consider evidence in defense; the examining magistrate should not, however, discharge when evidence conflicts or raises reasonable doubt of the defendant's guilt, because that presents the classic issue for the trier of fact (MCL 766.13; MSA 28.931). *People v King,* 412 Mich 145.

19. The inquiry of an examining magistrate is not limited to whether the prosecution has presented evidence on each element of the offense, but he is required to make his determination after an examination of the whole matter. *People v King,* 412 Mich 145.

SENTENCING.

20. The principles of double jeopardy require giving a defendant credit for time spent in jail as a condition of probation where probation is revoked and a new sentence is imposed (US Const, Am V; Const 1963, art 1, § 15; MCL 771.3, 771.4; MSA 28.1133, 28.1134). *People v Sturdivant,* 412 Mich 92.

21. An earlier conviction of criminal sexual conduct must be charged and proved before a defendant's punishment for the current offense can be enlarged, as required by statute (MCL 750.520f; MSA 28.788[6]). *People v Urynowicz,* 412 Mich 137.

22. A trial court cannot set aside a valid sentence and impose a new one because to do so would infringe on the exclusive power of the Governor under the constitution to commute sentences (Const 1963, art 5, § 14). *People v Whalen,* 412 Mich 166.

23. The existence of unenforceable promises made by FBI agents to a criminal defendant that he would not serve time on state convictions if he worked for them as an informant and the belief that the promises should be kept do not provide justification for declaring the defendant's state sentences invalid on any recognized ground or public policy. *People v Whalen,* 412 Mich 166.

WITNESSES.

24. Impeachment of a witness by demonstrating on cross-examination that the witness has a bad general moral character is improper (MRE 608). *People v Chaplin,* 412 Mich 219.

25. Evidence of character offered to impeach or support a witness's credibility, other than evidence of prior conviction of a crime, must be limited to the particular trait of truthfulness (MRE 608). *People v Chaplin,* 412 Mich 219.

26. To demonstrate that a witness is a prostitute is not to show that she has the character trait of untruthfulness for purposes of impeachment (MRE 608). *People v Chaplin,* 412 Mich 219.

27. Permitting cross-examination of a defense witness about her activities as a prostitute to show her bad moral character and her bias in favor of the defendant, for whom she would sell her body, was reversible error; the evidence was not admissible for purposes of impeachment because the conduct involved was

CRIMINAL LAW—Cont'd
unrelated to truthfulness (MRE 608). *People v Chaplin,* 412 Mich 219.
28. Evidence of the activities of a defense witness as a prostitute which suggested to the jury that the defendant was closely associated with her and may have been her pimp, insofar as it was relevant to show bias of the witness, should have been excluded because the danger of unfair prejudice substantially outweighed its probative value (MRE 403). *People v Chaplin,* 412 Mich 219.

CRIMINAL SEXUAL CONDUCT—*See*
CRIMINAL LAW 16, 21

CROSS-EXAMINATION UNDER STATUTE—*See*
PHYSICIANS AND SURGEONS 2

CUSTODIAL INTERROGATION—*See*
CRIMINAL LAW 2-7

DAMAGES.
*See, also,* TRIAL 1.
MITIGATION.
1. The common-law doctrine of mitigation of damages does not operate against a recovery of full damages if the effort, risk, sacrifice, or expense which the person wronged must incur in order to minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it. *Bower v Whitehall Leather Co,* 412 Mich 172.

DEDUCTION FROM VERDICT—*See*
TRIAL 1

DEFENSES—*See*
CONTRACTS 2-4
FRAUD 1
REMEDIES 1
WORKERS' COMPENSATION 17

DELIBERATION—*See*
HOMICIDE 3

DEPENDENCY—*See*
CONSTITUTIONAL LAW 4
WORKERS' COMPENSATION 2-4

DISCHARGE—*See*
CIVIL RIGHTS 18
MASTER AND SERVANT 1-5

DISCIPLINE OF LAWYERS—*See*
ATTORNEY AND CLIENT 2

DISCIPLINE OF LAWYERS—Cont'd
JUDGES 3

DISCRETION—*See*
HOMICIDE 1, 3, 5
TAXATION 1, 5-8

DISCRIMINATION—*See*
CIVIL RIGHTS 1, 6, 7, 9
CONSTITUTIONAL LAW 4
ELECTIONS 6
WORKERS' COMPENSATION 2

DISOBEDIENCE OF ORDER—*See*
JUDGES 13

DISQUALIFICATION—*See*
WORKERS' COMPENSATION 5-12

DISRUPTIVE CONDUCT—*See*
JUDGES 1, 2

DIVORCE.

JURISDICTION.

1. *A circuit court presiding over divorce matters does not wield general powers of equity but is limited to the powers specifically granted by statute. Kasper v Metropolitan Life Ins,* 412 Mich 232.

PROPERTY SETTLEMENT.

2. A property settlement in a judgment of divorce agreed to by the parties to it may contain provisions which a court would not otherwise have the power to compel them to perform. *Kasper v Metropolitan Life Ins,* 412 Mich 232.
3. A provision of a judgment of divorce requiring the husband to maintain the minor child of the parties as the beneficiary of a life insurance policy until the child is 18 years of age, if it was the result of an agreement between the parties to the divorce, is enforceable by the child. *Kasper v Metropolitan Life Ins,* 412 Mich 232.
4. A party to a divorce who has entered into a property settlement may not collaterally attack the judgment of divorce after all the benefits obtained under it have been fully accepted. *Kasper v Metropolitan Life Ins,* 412 Mich 232.
5. An action to determine whether a provision of a judgment of divorce requiring the husband to keep the child of the parties as named beneficiary of a life insurance policy until the age of 18 should be enforced must be remanded to the trial court to determine whether the parties agreed to the contested provision where that is unclear from the record. *Kasper v Metropolitan Life Ins,* 412 Mich 232.
6. *Summary judgment for a plaintiff named beneficiary in an action on an insurance policy on the life of the plaintiff's*

DIVORCE—Cont'd

*deceased son was improper where there was a genuine issue of material fact whether a provision of a judgment of divorce requiring the decedent to maintain his minor child as the beneficiary of the policy until the child became 18 years of age was the result of an agreement between the parties to the divorce (GCR 1963, 117.2[3]). Kasper v Metropolitan Life Ins,* 412 Mich 232.

7. *A provision of a judgment of divorce requiring the husband to maintain the minor child of the parties as the beneficiary of a life insurance policy is enforceable where the parties agreed to the provision and where the provisions of the judgment show an intent to provide continued support for the child by keeping him as beneficiary of the life insurance policy until the age of 18. Kasper v Metropolitan Life Ins,* 412 Mich 232.
8. *There is no statutory authority for the circuit court to award marital property to anyone but the parties to the divorce. Kasper v Metropolitan Life Ins,* 412 Mich 232.
9. *A circuit court distributing marital property in a judgment of divorce cannot ignore or destroy valid encumbrances on the property which favor third parties, nor can it distribute property which has been validly conveyed by the parties, or one of them, before the judgment of divorce. Kasper v Metropolitan Life Ins,* 412 Mich 232.
10. *Agreements between married persons to distribute marital property pending a divorce or legal separation are valid as long as they do not offend public policy by encouraging a breakdown of the marriage and are free from fraud and coercion. Kasper v Metropolitan Life Ins,* 412 Mich 232.
11. *Marital property may be distributed to third parties by a property settlement agreement which is incorporated into a judgment of divorce, but such incorporation renders that part of the judgment a consent judgment, and the agreement between the parties speaks, not the court. Kasper v Metropolitan Life Ins,* 412 Mich 232.
12. *A distribution of marital property to third parties cannot depend on the judgment of divorce; proof of an agreement creating the interest of the third party must be made independently of the judgment of divorce. Kasper v Metropolitan Life Ins,* 412 Mich 232.
13. *A provision of a judgment of divorce requiring the husband to maintain the minor child of the parties as the beneficiary of a life insurance policy on the husband's life until the child is 18 years of age is void and unenforceable by the child where there is no evidence in the record that the insurance provision was included in the judgment as a result of an independent agreement between the parties to the divorce. Kasper v Metropolitan Life Ins,* 412 Mich 232.

DOUBLE JEOPARDY—*See*
CRIMINAL LAW 20

DOUBTFUL CLAIMS—*See*
ATTORNEY AND CLIENT 8

DRIVER'S LICENSE—*See*
SEARCHES AND SEIZURES 1

DRIVER'S OBLIGATION—*See*
AUTOMOBILES 6-8

DUTY—*See*
ATTORNEY AND CLIENT 3, 10-14
NEGLIGENCE 1, 2

DUTY OF EMPLOYER—*See*
CIVIL RIGHTS 2, 10

DUTY OF MAGISTRATE—*See*
CRIMINAL LAW 18, 19

DUTY TO DISCLOSE—*See*
FRAUD 5-7

EARNING CAPACITY—*See*
WORKERS' COMPENSATION 41, 42

ELECTIONS.
CONSTITUTIONAL LAW.
1. The provision of the Election Law which requires a new political party to file a petition meeting certain requirements and to obtain a minimum vote in the primary election before it may qualify for a place on the general election ballot violates the First and Fourteenth Amendments to the United States Constitution and the Equal Protection Clause of the Michigan Constitution, and exceeds the constitutional authority of the Legislature to enact election laws (US Const, Ams I, XIV; Const 1963, art 1, § 2; art 2, § 4; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685). *Socialists v Secretary of State,* 412 Mich 571.
2. The doctrine of res judicata does not preclude an action to challenge a provision of the Election Law as unconstitutionally restricting the access of new political parties to the general election ballot where the decision in a prior action between the same parties did not consider the public's interest in the dissemination of ideas by minor political parties, but relied on then-existing number of precincts using voting machines which can accommodate only a limited number of political parties, and reserved the question, raised in the subsequent action, of the constitutionality of the statute as it applied to the plaintiffs in subsequent elections (MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685). *Socialists v Secretary of State,* 412 Mich 571.
3. To determine whether a statute restricting access to the general election ballot violates the First and Fourteenth Amendments, the court must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of

ELECTIONS—Cont'd

the classification (US Const, Ams I, XIV). *Socialists v Secretary of State,* 412 Mich 571.

4. The rights of individuals to associate for the advancement of political beliefs and of qualified voters to cast their votes effectively both are basic to effective political expression and merit strong constitutional protection; restrictions on access to the ballot burden those fundamental rights directly (US Const, Ams I, XIV). *Socialists v Secretary of State,* 412 Mich 571.
5. Plaintiffs challenging a statute which restricts access to the ballot on the ground that it violates the Equal Protection Clause have the burden of demonstrating a discrimination of some substance before the state must establish that the statutory classification is necessary to serve a compelling state interest (US Const, Am XIV; Const 1963, art 1, § 2). *Socialists v Secretary of State,* 412 Mich 571.
6. A plaintiff political party which was excluded from the general election ballot in 1980 by operation of the statutory requirement that a new political party must file a petition meeting certain requirements and must obtain a certain number of votes in the primary election, a member of the political party who claims a denial of the right to associate, and other plaintiffs who seek relief as voters denied effective expression of political preference, have demonstrated sufficient discrimination so that the state must establish that the statutory classification is necessary to serve a compelling state interest (US Const, Ams I, XIV; Const 1963, art 1, § 2; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685). *Socialists v Secretary of State,* 412 Mich 571.
7. The state has a compelling interest in the protection of the integrity of its election process; regulation of elections by effectively restricting access to the ballot is constitutionally permissible, and prevention of the clogging of the state's election machinery and avoidance of confusion of the voters are legitimate objects of regulation (US Const, Ams I, XIV; Const 1963, art 1, § 2). *Socialists v Secretary of State,* 412 Mich 571.
8. A state may not choose means that unnecessarily restrict constitutionally protected liberty even when pursuing a compelling interest in protecting the integrity of its elections; it is required to adopt the least drastic means to achieve the end (US Const, Ams I, XIV; Const 1963, art 1, § 2). *Socialists v Secretary of State,* 412 Mich 571.
9. Restrictions on access of new political parties to the general election ballot in order to limit the number of parties to the capacity of voting machines, nine parties, were not the least drastic means to further the state's interest in the integrity of elections where the restrictions operated to eliminate new parties from the ballot before the nine-party capacity of the machines was reached, and were not rationally related to the interest where, because the restrictions were tied to success in the primary election and not to machine capacity, they did not rule out the possibility of more than nine parties qualifying for the general election (US Const, Ams I, XIV; Const 1963, art 1,

ELECTIONS—Cont'd
§ 2; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685). *Socialists v Secretary of State,* 412 Mich 571.
10. The Legislature has the constitutional authority to enact laws to preserve the purity of elections; any statute which adversely affects that purity is constitutionally infirm (Const 1963, art 2, § 4). *Socialists v Secretary of State,* 412 Mich 571.
11. It would be anomalous for the constitution to require equality of treatment for all candidates whose names appear on the ballot and not to limit the Legislature's ability to block access to the ballot; the concept of purity of elections unmistakably requires fairness and evenhandedness in the election laws of the state (Const 1963, art 2, § 4). *Socialists v Secretary of State,* 412 Mich 571.
12. The Legislature may regulate the ability or failure of a political party or candidate to gain access to the ballot; however, it may not use unfair restrictions indirectly to deny a political party or candidate placement on the ballot (Const 1963, art 2, § 4). *Socialists v Secretary of State,* 412 Mich 571.
13. The provision of the Election Law which requires a new political party to file a petition meeting certain requirements and to obtain a minimum vote in the primary election before it may qualify for a place on the general ballot imparts a substantial unfair advantage to political parties entitled to automatic placement on the general election ballot; therefore, the statute violates the constitutional authority of the Legislature to enact election laws (Const 1963, art 2, § 4; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685). *Socialists v Secretary of State,* 412 Mich 571.
14. *Summary affirmance by the Supreme Court of the United States of a decision by a three-judge panel of a United States District Court that the provisions of the Michigan Election Law relating to requirements for a new political party to be put on the ballot are not unconstitutional necessarily decided the issue of constitutionality, both "facial" and "as applied", where the jurisdictional statement filed by the appellants shows that both "facial" and "as applied" constitutionality was challenged, and that decision is precedent binding on the Supreme Court of Michigan (US Const, Ams I, XIV; MCL 168.560a, 168.560b, 168.685; MSA 6.1560[1], 6.1560[2], 6.1685). Socialists v Secretary of State,* 412 Mich 571.

ELECTRICITY—*See*
PUBLIC UTILITIES 1, 2, 7, 10-12

ELEMENTS OF CRIME—*See*
LARCENY 5

ELEMENTS OF TORT—*See*
ATTORNEY AND CLIENT 7
MALICIOUS PROSECUTION 3

EMPLOYERS—*See*
CIVIL RIGHTS 2-6, 8-10, 13, 14, 16-18

EMPLOYERS—Cont'd
CONSTITUTIONAL LAW 3

EMPLOYMENT CONTRACT—*See*
MASTER AND SERVANT 1, 2

ENHANCED PUNISHMENT—*See*
CRIMINAL LAW 16, 21

EQUAL PROTECTION—*See*
CONSTITUTIONAL LAW 4
CRIMINAL LAW 15
ELECTIONS 1, 3, 5-8, 14
WORKERS' COMPENSATION 2, 3

EQUITY—*See*
REMEDIES 1

ESTABLISHMENT OF RELIGION—*See*
CONSTITUTIONAL LAW 1-3

ETHICS—*See*
MASTER AND SERVANT 4

EVIDENCE—*See*
CRIMINAL LAW 28
HOMICIDE 1-3
MALICIOUS PROSECUTION 5
PHYSICIANS AND SURGEONS 3

EXCLUSIONS—*See*
AUTOMOBILES 1, 3-5, 10-20
INSURANCE 6-8

EXPERT WITNESSES—*See*
PHYSICIANS AND SURGEONS 1, 2

FACIAL NUMBNESS—*See*
PHYSICIANS AND SURGEONS 3

FAIR DEALING—*See*
FRAUD 5

FAIR EMPLOYMENT PRACTICES ACT—*See*
CIVIL RIGHTS 1-11, 13-18
CONSTITUTIONAL LAW 3

FAVORED WORK—*See*
WORKERS' COMPENSATION 5-13

FEDERAL LAW—*See*
CIVIL RIGHTS 1

FEDERAL LAW—Cont'd
CONSTITUTIONAL LAW 4

FELONIES—*See*
CRIMINAL LAW 10-12, 14, 15

FIRST AMENDMENT—*See*
ELECTIONS 3

FIRST-DEGREE MURDER—*See*
HOMICIDE 1-5

FOURTEENTH AMENDMENT—*See*
ELECTIONS 3

FRAUD.

*See, also,* CONTRACTS 1-4; REMEDIES 1.

CONTRACTS.

1. There is no distinction in the requirements for an action to recover damages for innocent misrepresentation and for innocent misrepresentation as an affirmative defense to an action to enforce a contract in Michigan because in both instances the object is to make the injured party whole. *U S Fidelity & Guaranty v Black,* 412 Mich 99.

MISREPRESENTATION.

2. The general common-law rule that to constitute actionable fraud a material misrepresentation must be made with the intention that it be acted upon has been modified in Michigan by the "innocent misrepresentation" rule; the terms "actionable fraud" or "actionable fraudulent misrepresentation" encompass more than the traditional common-law definition of fraud in that they apply in some cases where the misrepresenter has no *scienter. U S Fidelity & Guaranty v Black,* 412 Mich 99.
3. Where there was in fact a misrepresentation, even though made innocently, and its deceptive influence was effective, the consequences to the victim being as serious as though it had proceeded from a vicious purpose, the victim has an action for the damages caused by it where the misrepresentation is made in connection with making a contract between the parties and the loss of the party deceived inures to the benefit of the other. *U S Fidelity & Guaranty v Black,* 412 Mich 99.
4. Any representations made by one party to another in a transaction between them which are false in fact and actually deceive the other party, and are relied on by him to his damage, are actionable, where the loss of the party deceived inures to the benefit of the other; it is unnecessary for the plaintiff to prove a fraudulent purpose or intent on the part of the defendant. *U S Fidelity & Guaranty v Black,* 412 Mich 99.

SILENCE.

5. Fraud may be consummated by suppression of facts and of the truth where there is a legal or equitable duty of disclosure; one who remains silent when fair dealing requires him to speak

FRAUD—Cont'd
may be guilty of fraudulent concealment. *U S Fidelity & Guaranty v Black,* 412 Mich 99.
6. A trial court erroneously concluded that a plaintiff underwriter had no duty to defendants who were negotiating an indemnity agreement required by the underwriter for performance bonds to disclose that the underwriting requirements for the bonds had been modified where the trial court specifically found that two employees of an insurance agency were agents of the plaintiff underwriter; the defendants had discussed with the agents their concern about potential liability under the indemnity agreement and were openly trying to limit that liability; and the agents knew, or should have known, that the defendants were relying on their representations that all the underwriting requirements had been met. *U S Fidelity & Guaranty v Black,* 412 Mich 99.
7. A party to a business transaction generally is under an obligation to exercise reasonable care to disclose to the other party, before the transaction is consummated, any subsequently acquired information which he recognizes as rendering untrue, or misleading, previous representations which, when made, were true or believed to be true. *U S Fidelity & Guaranty v Black,* 412 Mich 99.

FREE ACCESS—*See*
ATTORNEY AND CLIENT 13

FREQUENT AND REGULAR USE—*See*
AUTOMOBILES 1, 5, 10, 12, 13, 15

FRIVOLOUS LITIGATION—*See*
MALICIOUS PROSECUTION 1

FULL DISCLOSURE—*See*
MALICIOUS PROSECUTION 6

FUNDAMENTAL RIGHTS—*See*
ELECTIONS 4

FURNISHED FOR REGULAR USE—*See*
AUTOMOBILES 1, 5, 10, 12, 13, 15, 16, 19, 20

FURTHER COMPENSATION—*See*
WORKERS' COMPENSATION 14-17

GENDER-BASED DISCRIMINATION—*See*
CONSTITUTIONAL LAW 4
WORKERS' COMPENSATION 2, 3

GENERAL MORAL CHARACTER—*See*
CRIMINAL LAW 24

GENERATING CAPACITY—*See*
PUBLIC UTILITIES 7

GOVERNOR—*See*
CRIMINAL LAW 22

GUILTY PLEA—*See*
CRIMINAL LAW 16, 17

GUN-CONTROL ORDINANCE—*See*
JUDGES 9

HABITUAL OFFENDERS—*See*
CRIMINAL LAW 16
INDICTMENT AND INFORMATION 1-3

HARMLESS ERROR—*See*
CRIMINAL LAW 1

HOME-RULE ACT—*See*
MUNICIPAL CORPORATIONS 1

HOMICIDE.
*See, also,* CRIMINAL LAW 17.
FIRST-DEGREE MURDER.
1. The refusal of an examining magistrate to bind the accused over for trial on a charge of first- or second-degree murder was not an abuse of discretion where the magistrate found, on evidence presented by the defense of intoxication and provocation, that malice and premeditation were lacking and decided to bind the accused over for trial on a charge of manslaughter (MCL 750.316, 750.317; MSA 28.548, 28.549). *People v King,* 412 Mich 145.
2. *The element of malice was demonstrated at a preliminary examination on a charge of first-degree murder where the testimony showed that there had been previous antagonism between the defendant and the decedent and that the defendant had been drinking liquor for a substantial time immediately before the killing; the defendant informed the decedent approximately one-half hour before that he was going to "blow him away"; the defendant then drove to the house where the decedent was staying, armed with a loaded .22-caliber pistol, demanded entry into the house, and tried to kick the door down; the defendant fired the fatal shot through the door while the decedent was leaning against it; and the defendant burst into the house and stated, in effect, "You got what you wanted" (MCL 750.316; MSA 28.548). People v King,* 412 Mich 145.
3. *The refusal of an examining magistrate to bind the accused over for trial on a charge of first- or second-degree murder was clearly an abuse of discretion where the magistrate did not indicate that he found the evidence on intent either incompetent or without credibility, and there was credible evidence both supporting and negating the existence of malice, premeditation, and deliberation (MCL 750.316, 750.317; MSA 28.548, 28.549). People v King,* 412 Mich 145.

HOMICIDE—Cont'd

4. *The finding by an examining magistrate that the defendant was so intoxicated as to negate the requisite elements of first-degree murder and that the actions of the defendant did not at a minimum constitute a wanton and willful disregard of the likelihood that death or great bodily harm would result, are issues appropriately left to the finder of fact upon trial (MCL 750.316; MSA 28.548). People v King,* 412 Mich 145.

5. *The refusal of an examining magistrate to bind the accused over for trial on a charge of first- and second-degree murder was an abuse of discretion where the testimony at the preliminary examination showed a factual conflict as to issues of defense presented on lack of malice and premeditation and the magistrate decided to bind the accused over for trial on a charge of manslaughter (MCL 750.316, 750.317; MSA 28.548, 28.549). People v King,* 412 Mich 145.

IMPARTIAL JUDICIARY—*See*
JUDGES 5

IMPEACHMENT—*See*
CRIMINAL LAW 24-27

IMPROPER PURPOSE—*See*
ATTORNEY AND CLIENT 6, 7
MALICIOUS PROSECUTION 4, 10, 12
PROCESS 1, 2

INCLUDED OFFENSES—*See*
CRIMINAL LAW 10-15

INCOME TAX ACT—*See*
TAXATION 1-8

INDICTMENT AND INFORMATION.

*See, also,* CRIMINAL LAW 21.

HABITUAL OFFENDERS.

1. A prosecutor must file a supplemental information charging the defendant as being an habitual offender, if at all, not more than 14 days after the defendant is arraigned in the circuit court (or has waived arraignment) on the information charging the underlying felony, or before trial if the defendant is tried within that 14-day period (MCL 769.13; MSA 28.1085). *People v Shelton,* 412 Mich 565.

2. The purpose of requiring a prosecutor to proceed promptly to file the supplemental information charging a defendant as being an habitual offender is to provide the accused notice, at an early stage of the proceedings of the potential consequences should the accused be convicted of the underlying offense; a standard which would find filing on the day of trial to suffice is inadequate (MCL 769.13; MSA 28.1085). *People v Shelton,* 412 Mich 565.

INDICTMENT AND INFORMATION—Cont'd
3. A prosecutor is not foreclosed from proceeding against an habitual offender after conviction when he is unaware of the prior felony record until after conviction, nor when the delay is due to the need to verify out-of-state felony convictions based on the "rap sheet" (MCL 769.13; MSA 28.1085). *People v Shelton,* 412 Mich 565.

INDUCEMENT—*See*
CONTRACTS 1-4
FRAUD 1
REMEDIES 1

INFORMANTS—*See*
CRIMINAL LAW 23

INFORMATION—*See*
CRIMINAL LAW 9

INFORMED CONSENT—*See*
PHYSICIANS AND SURGEONS 1, 3

INHERENT POWER—*See*
JUDGES 1, 2

INITIATIVE—*See*
MUNICIPAL CORPORATIONS 1

INNOCENT MISREPRESENTATIONS—*See*
FRAUD 1, 3, 4, 7

INSTRUCTIONS TO JURY—*See*
CRIMINAL LAW 9-11, 13, 15

INSURANCE.
*See, also,* AUTOMOBILES 1-20.
CONSTRUCTION OF POLICY.
1. Any clause in an insurance policy is valid as long as it is clear, unambiguous, and not in contravention of public policy. *Raska v Farm Bureau Ins Co,* 412 Mich 355.
2. A contract of insurance is ambiguous and should be construed against its drafter if a fair reading of the entire contract leads to the understanding that there is coverage under particular circumstances and another fair reading of it is that there is no coverage under the same circumstances. *Raska v Farm Bureau Ins Co,* 412 Mich 355.
3. A contract of insurance, however inartfully worded or clumsily arranged, which fairly admits of but one interpretation may not be said to be ambiguous. *Raska v Farm Bureau Ins Co,* 412 Mich 355.
4. The expectation that a contract of insurance will be enforceable other than according to its terms may not be said to be

INSURANCE—Cont'd
reasonable; to allow one person to bind another to an obligation not covered by the contract because the first person thought the other was bound to such an obligation is neither reasonable nor just. *Raska v Farm Bureau Ins Co,* 412 Mich 355.

5. *When a standardized insurance contract is put before a consumer to take it or leave it, the doctrine of the adhesion contract has been applied, in view of the disparate bargaining status of the parties, to ascertain the meaning of the insurance contract which the insured would reasonably expect. Raska v Farm Bureau Ins Co,* 412 Mich 355.

EXCLUSIONS.

6. *The power of the insurer to draft the policy is restricted by the doctrines of unconscionability and reasonable expectations. State Farm v Ruuska,* 412 Mich 321.

7. *The language of an insurance policy chosen by the insurer must be given the construction of which it is susceptible most favorable to the insured in case of ambiguity or contradictions; exceptions to the liability of the insurer are to be strictly construed against the insurer. Raska v Farm Bureau Ins Co,* 412 Mich 355.

8. *Not only the provisions of an insurance policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he reasonably had a right to expect; to that end doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in the insured's favor. Raska v Farm Bureau Ins Co,* 412 Mich 355.

INSURED VEHICLES—*See*
AUTOMOBILES 25, 26

INTEGRITY OF ELECTIONS—*See*
ELECTIONS 7-9

INTEGRITY OF JUDICIARY—*See*
JUDGES 12

INTENT—*See*
CONTRACTS 3
FRAUD 1-4
HOMICIDE 3, 4

INTEREST—*See*
TAXATION 1, 8

INTERROGATION—*See*
CRIMINAL LAW 2-7

INTOXICATION—*See*
HOMICIDE 1, 2, 4

INVESTIGATION—*See*
ATTORNEY AND CLIENT 3

ISSUANCE OF SECURITIES—*See*
PUBLIC UTILITIES 1, 4, 5, 8-11

ISSUES OF LAW—*See*
JUDGMENTS 1, 2

JUDGES.

*See, also,* SUPERINTENDING CONTROL 1.

ATTORNEYS.

1. A court should use the least possible sanction adequate to achieve the proper end sought, and it necessarily has the inherent power to preserve or restore order by temporarily ejecting from the courtroom disruptive and disorderly persons, including attorneys (Code of Judicial Conduct, Canon 3). *Matter of Hague,* 412 Mich 532.
2. The power to remove disruptive attorneys from the courtroom may not be used as an artifice or guise to eject counsel with whom a judge has a personal or professional disagreement, whose presence inhibits the court, or toward whom the judge entertains a personal animosity but who is not, in fact, disruptive or disorderly (Code of Judicial Conduct, Canon 3). *Matter of Hague,* 412 Mich 532.
3. Ejecting attorneys and permanently barring them from practicing law in a judge's courtroom is unwarranted, unjustified and an abuse by the judge of the powers of his office where the attorneys were not ejected because of any disruptive or disorderly conduct, but because of their roles in obtaining orders of superintending control against the judge (Code of Judicial Conduct, Canon 3). *Matter of Hague,* 412 Mich 532.

COMMON LAW.

4. Failure to follow the rule of stare decisis is not per se judicial misconduct; however, a judge is not free to willfully refuse to enforce the law (Code of Judicial Conduct, Canons 2, 3). *Matter of Hague,* 412 Mich 532.
5. The judiciary must strive to create and preserve the image of the judicial system as an independent, impartial source of reasoned actions and decisions (Code of Judicial Conduct, Canons 2, 3). *Matter of Hague,* 412 Mich 532.

CONTEMPT.

6. The decision whether to initiate proceedings under the prostitution ordinance of the City of Detroit belongs to the prosecuting attorney, not the trial judge; therefore, an order from the bench that he would hold the Assistant Corporation Counsel for Detroit, or the police, in contempt merely for initiating the prosecution of prostitution cases under the Detroit ordinance was improper. *Matter of Hague,* 412 Mich 532.
7. The power of contempt is awesome and must be used with the utmost restraint; a completely unjustified threat of contempt is conduct prejudicial to the administration of justice and abuse of

JUDGES—Cont'd

the court's power of contempt which constitutes judicial misconduct warranting discipline (GCR 1963, 932.4[b][iv]; GCR 1963, 953[1]; Code of Professional Responsibility and Canons, DR 1-102[A][5]). *Matter of Hague,* 412 Mich 532.

MISCONDUCT.

8. Gratuitous advice by a trial judge to officers of the executive department not to prosecute certain cases is not a violation of the constitutional doctrine of separation of powers and is not an abuse of judicial authority (Const 1963, art 3, § 2). *Matter of Hague,* 412 Mich 532.

STARE DECISIS.

9. A decision of a Recorder's Court Judge in the Traffic and Ordinance Division not to enforce the City of Detroit's gun-control ordinance violated his oath of office, engendered disrespect for the law and improperly interfered with the proper administration of justice where it was directly contrary to precedent of which he was aware and obviously based on his widely publicized personal belief about what the law should be rather than what it is, and the judge publicly declared his refusal to follow precedent, saying that the Court of Appeals does not make the law in this state (Const 1963, art 11, § 1; Code of Judicial Conduct, Canon 2; GCR 1963, 953[1]). *Matter of Hague,* 412 Mich 532.

10. When a panel of the Court of Appeals has jurisdiction and declares a law to be valid and enforceable, a trial judge is bound by that decision until another panel of the Court of Appeals or the Supreme Court rules otherwise; whatever his contrary personal view of appellate authority, a judge is not free to disregard it (Code of Judicial Conduct, Canon 3; GCR 1963, 912). *Matter of Hague,* 412 Mich 532.

SUPERINTENDING CONTROL.

11. A judge of the Recorder's Court of Detroit in the Traffic and Ordinance Division was bound to obey orders of superintending control issued by the Wayne Circuit Court to stop his dismissal of prostitution cases initiated by "appearance" or traffic ticket forms where the case-by-case appeal of the hundreds of cases dismissed by him would not have been a practical, efficient, or commonsense remedy for his persistent, wholesale dismissal of such cases (Code of Judicial Conduct, Canon 2; GCR 1963, 711). *Matter of Hague,* 412 Mich 532.

12. The maintenance of public confidence in the integrity of the judiciary requires a judge to avoid even the appearance of defiance of valid judicial orders; if he wishes to question in good faith the precise meaning of orders of superintending control, he should seek clarification and guidance from the superior courts (Code of Judicial Conduct, Canon 2). *Matter of Hague,* 412 Mich 532.

13. Intentional disobedience of valid orders of superintending control necessarily constitutes judicial misconduct; public confidence, integrity, and impartiality of the judiciary can only be eroded by the spectacle of a judge refusing to follow the law

JUDGES—Cont'd
(Code of Judicial Conduct, Canon 2). *Matter of Hague,* 412 Mich 532.

JUDGMENTS.
*See, also,* DIVORCE 4; ELECTIONS 2.
RES JUDICATA.
1. Relitigation of an issue of law in a subsequent action between the same parties is not precluded by the doctrine of res judicata where a new determination is warranted to take account of an intervening change in the applicable law or to avoid inequitable administration of the laws. *Socialists v Secretary of State,* 412 Mich 571.
2. A rule of law declared in an action between two parties should not be binding on them for all times, especially as to claims arising after the first proceeding, when other litigants are free to urge that the rule should be rejected. *Socialists v Secretary of State,* 412 Mich 571.

JUDICIAL MISCONDUCT—*See*
JUDGES 4, 7, 9, 13

JURISDICTION—*See*
DIVORCE 1, 2
JUDGES 11
SUPERINTENDING CONTROL 1-3

JURISPRUDENCE—*See*
JUDGES 5

JURY INSTRUCTIONS—*See*
CRIMINAL LAW 9-11, 13, 15

KNOWLEDGE—*See*
FRAUD 2, 3, 6

LABOR RELATIONS—*See*
CIVIL RIGHTS 1-6, 8-10, 13, 14, 16-18
CONSTITUTIONAL LAW 3

LARCENY.
CONVERSION.
1. The purpose of the statute prohibiting larceny by conversion is to cover one of the offenses against property not covered by common-law larceny, in which a person with lawful intent obtains possession of another person's property but subsequently converts the property to his own use (MCL 750.362; MSA 28.594). *People v Christenson,* 412 Mich 81.
2. Larceny by conversion, like common-law larceny, is a crime against possession and not against title (MCL 750.362; MSA 28.594). *People v Christenson,* 412 Mich 81.
3. A person cannot convert his own funds; thus, if an owner

LARCENY—Cont'd
intends to part with title as well as possession to the defendant, there can be no crime of larceny by conversion (MCL 750.362; MSA 28.594). *People v Christenson,* 412 Mich 81.

4. Title and possession of progress payments made by the purchaser of a modular house passed to a defendant residential builder under a sales agreement and construction contract for the house and, accordingly, there could be no larceny by conversion arising out of the defendant's use of the money to pay debts other than those incurred in doing the work for which payments were made where there is no testimony that there was not sufficient work done to justify the amount of the progress payments under the contract or that the defendant misrepresented to the agency which financed the building and controlled the progress payments that the payments were to be made to the manufacturer or that he was the agent of the manufacturer, the defendant is not charged with conversion of funds belonging to the manufacturer, and there was no testimony that the purchaser misunderstood the defendant's relation to the manufacturer or that the purchaser intended to retain any title to the payments (MCL 750.362; MSA 28.594). *People v Christenson,* 412 Mich 81.

5. The element of conversion is not established, in a trial for larceny by conversion, by the facts that the complaining purchaser of a modular house gave money as partial payments to a defendant residential builder for a specific purpose, to pay for the house or for preparation of the site, but that the defendant did not use it for that purpose, in the absence of an agreement that the defendant would apply the specific funds he received from the purchaser as progress payments for particular work to pay the laborers and materialmen responsible for that work or of a requirement that the defendant would establish a separate trust account for each purchaser's particular funds (MCL 750.362; MSA 28.594). *People v Christenson,* 412 Mich 81.

6. *There can be no conversion of money unless there is an obligation on the part of the defendant to keep intact or deliver the specific funds he received from the complainants for the intended purpose (MCL 750.362; MSA 28.594). People v Christenson,* 412 Mich 81.

LEGISLATIVE ACTS—*See*
MUNICIPAL CORPORATIONS 1

LEGISLATIVE INTENT—*See*
AUTOMOBILES 2, 8
WORKERS' COMPENSATION 29, 30, 33, 45

LEGISLATIVE POLICY—*See*
AUTOMOBILES 22, 27

LEGISLATIVE PURPOSE—*See*
WORKERS' COMPENSATION 1, 43, 44

LESSER INCLUDED OFFENSES—*See*
CRIMINAL LAW 10-15

LIFE INSURANCE—*See*
DIVORCE 3, 5-7, 13

LIMITATION OF ACTIONS—*See*
TAXATION 2-4, 7

LOCAL GOVERNMENT—*See*
MUNICIPAL CORPORATIONS 1

LOWER COURT—*See*
SUPERINTENDING CONTROL 3

MALICE—*See*
ATTORNEY AND CLIENT 5, 6
HOMICIDE 1-5
MALICIOUS PROSECUTION 3, 4

MALICIOUS PROSECUTION.
*See, also,* ATTORNEY AND CLIENT 4-9.

ATTORNEY AND CLIENT.

1. *A viable action for malicious prosecution is necessary to give substance to the attorney's duty not to bring frivolous litigation (DR 7-102[A]). Friedman v Dozorc,* 412 Mich 1.

COSTS.

2. *A court rule should be adopted to allow the trial judge to order the payment of the prevailing party's actual expenses, including reasonable attorneys' fees and limited consequential damages, where an action was wrongfully initiated, defended, or continued; that remedy would provide an appropriate measure of deterrence against wrongful litigation and reasonable compensation for wronged litigants without imperiling the right of free access to the courts. Friedman v Dozorc,* 412 Mich 1.

ELEMENTS OF TORT.

3. The elements of a tort action for malicious prosecution of civil proceedings, in addition to special injury, are the termination of prior proceedings in favor of the present plaintiff, the absence of probable cause for bringing those proceedings, and malice, or a purpose other than that of securing the proper adjudication of the claim. *Friedman v Dozorc,* 412 Mich 1.

IMPROPER PURPOSE.

4. *The strict requirements of lack of probable cause and malice,* i.e., *improper purpose, are more appropriate guardians of free access to the courts and of promoting the honest use of the judicial process than the artificial requirement of special injury. Friedman v Dozorc,* 412 Mich 1.

PROBABLE CAUSE.

5. The absence of probable cause in bringing a civil action may not be established merely by showing that the action was

MALICIOUS PROSECUTION—Cont'd
successfully defended; to require an attorney to advance only those claims that will ultimately be successful would place an intolerable burden on the right of access to the courts. *Friedman v Dozorc,* 412 Mich 1.

6. One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information. *Friedman v Dozorc,* 412 Mich 1.

PUBLIC POLICY.

7. *The Supreme Court should preserve free access to the courts for meritorious claims, rather than deny it for persons who have suffered harm, but not special injury, from wrongful litigation by continuing the requirement of special injury in an action for malicious prosecution. Friedman v Dozorc,* 412 Mich 1.

SPECIAL INJURY.

8. Special injury, an interference with the plaintiff's person or property, is an essential element of the tort action for malicious prosecution of civil proceedings. *Friedman v Dozorc,* 412 Mich 1.

9. Special injury should be retained as an element of the tort of malicious prosecution of civil proceedings to limit the circumstances in which an action for the tort can be maintained; the limitation serves the dual purpose of allowing the honest plaintiff to press his case without threat of suit and of limiting vexatious lawsuits. *Friedman v Dozorc,* 412 Mich 1.

10. *Proof of special injury should not be required in actions for the malicious prosecution of civil proceedings because the other elements of the action, such as a lack of probable cause and an improper motive, provide the necessary protection for bona fide litigants. Friedman v Dozorc,* 412 Mich 1.

11. *The requirement of special injury limits the potential recovery for malicious prosecution of civil proceedings and thereby protects the right of free access to the courts; however, the limitation is too broad because suits arising out of meritorious as well as vexatious actions are disallowed. Friedman v Dozorc,* 412 Mich 1.

12. *The requirement of special injury should be eliminated from actions for malicious prosecution of civil proceedings; the requirements of lack of probable cause and improper purpose, and functions of the judge and jury, strike a proper balance between unfettered access to the courts for those with tenable claims and the need to redress the harm caused by an abuse of the judicial system. Friedman v Dozorc,* 412 Mich 1.

MALPRACTICE—*See*
ATTORNEY AND CLIENT 13, 14

MALPRACTICE—Cont'd
PHYSICIANS AND SURGEONS 1-3
PROCESS 2

MANAGEMENT DISPUTE—*See*
MASTER AND SERVANT 3

MANDATORY MINIMUM SENTENCE—*See*
CRIMINAL LAW 16

MANSLAUGHTER—*See*
HOMICIDE 1

MARITAL PROPERTY—*See*
DIVORCE 9, 10

MASTER AND SERVANT.

*See, also,* CIVIL RIGHTS 2, 5.

TERMINATION OF EMPLOYMENT.

1. Generally, either party to an employment contract for an indefinite term may terminate the contract at any time for any or no reason, absent contractual provisions to the contrary; however, some grounds for discharge of an employee may be so contrary to public policy as to sustain a cause of action for wrongful discharge. *Suchodolski v Gas Co,* 412 Mich 692.
2. Discharge, discipline, or other adverse treatment of an employee acting in accordance with a statutory right or duty, where specifically prohibited by the Legislature, may sustain a cause of action for wrongful discharge; so may a retaliatory discharge where sufficient legislative expression of policy justifying a cause of action is implied, as where the alleged reason for discharge was a failure or refusal to violate the law in the course of employment. *Suchodolski v Gas Co,* 412 Mich 692.
3. A corporate management dispute resulting in the discharge of an employee is insufficient to sustain a cause of action by the employee for wrongful discharge, absent support of a clearly mandated public policy prohibiting such a discharge. *Suchodolski v Gas Co,* 412 Mich 692.
4. Dismissal of an employee for refusal to violate the code of ethics of a private association is not so contrary to public policy as to sustain a cause of action for wrongful discharge. *Suchodolski v Gas Co,* 412 Mich 692.
5. The statutory regulation of the accounting systems of public utilities does not confer any rights on the employees of the utilities; thus, an allegation by an employee discharged by a utility that his discharge was in retaliation for complaints regarding the utility's internal accounting procedures which could have interfered with the ability of the Public Service Commission to perform its regulatory function is insufficient to sustain a cause of action for wrongful discharge (MCL 483.113; MSA 22.1323). *Suchodolski v Gas Co,* 412 Mich 692.

MINIMUM BENEFIT—*See*
WORKERS' COMPENSATION 18-42

MINIMUM VOTE—*See*
ELECTIONS 1

MISCONDUCT—*See*
JUDGES 4, 6-9, 12, 13

MISDEMEANORS—*See*
CRIMINAL LAW 10-12

MISREPRESENTATION—*See*
CONTRACTS 3, 4
FRAUD 1-4

MITIGATION—*See*
DAMAGES 1
WORKERS' COMPENSATION 12, 13

MONEY—*See*
LARCENY 6

MOTOR VEHICLES—*See*
AUTOMOBILES 22-25

MUNICIPAL CORPORATIONS.

INITIATIVE.

1. The words "initiative" and "referendum" have a legislative connotation; a right of referendum authorized by the home-rule act extends only to legislative acts of local government. *Beach v Saline,* 412 Mich 729.

REAL PROPERTY.

2. The purchase of real property by a city constitutes an administrative act not subject to a referendum. *Beach v Saline,* 412 Mich 729.

MURDER—*See*
CRIMINAL LAW 17

NEGLIGENCE.

*See, also,* ATTORNEY AND CLIENT 10-14.

DUTY.

1. Whether the defendant in a negligence action owed an actionable duty to the plaintiff is a question of law which a court decides after assessing the competing considerations of policy for and against recognizing the asserted duty. *Friedman v Dozorc,* 412 Mich 1.
2. Reliance is an appropriate fact to be considered in deciding whether a professional person owes a duty to a third party to avoid negligence in performing professional services. *Friedman v Dozorc,* 412 Mich 1.

NO-FAULT ACT—*See*
WORKERS' COMPENSATION 4

NO-FAULT INSURANCE—*See*
AUTOMOBILES 1-27
INSURANCE 1-4, 8

"NON-OWNED AUTOMOBILE"—*See*
AUTOMOBILES 3, 5, 10, 11, 13, 15

NOTICE—*See*
INDICTMENT AND INFORMATION 2

NUCLEAR POWER—*See*
PUBLIC UTILITIES 7

OBLIGATION TO INVESTIGATE—*See*
ATTORNEY AND CLIENT 4

OBSERVATION—*See*
SEARCHES AND SEIZURES 1

ONE-YEAR-BACK RULE—*See*
WORKERS' COMPENSATION 14-17

ORAL SURGEONS—*See*
PHYSICIANS AND SURGEONS 1, 3

ORDER OF SUPERINTENDING CONTROL—*See*
SUPERINTENDING CONTROL 1

OWNED VEHICLE—*See*
AUTOMOBILES 16-20

OWNER'S OBLIGATION—*See*
AUTOMOBILES 6, 8

PARENT AND CHILD—*See*
DIVORCE 7

PARKING TICKET—*See*
SEARCHES AND SEIZURES 1

PARTIAL DISABILITY—*See*
WORKERS' COMPENSATION 39

PARTIAL ENFORCEMENT—*See*
REMEDIES 1

PART-TIME EMPLOYEES—*See*
WORKERS' COMPENSATION 40-42

PERMANENT DISABILITY—*See*
WORKERS' COMPENSATION 15

PHYSICIANS AND SURGEONS.

MALPRACTICE.

1. Whether a surgeon before operating should advise the patient of the possible result ordinarily requires expert testimony of the standard of care for the jury to evaluate. *Rice v Jaskolski,* 412 Mich 206.
2. The defendant in an action for medical malpractice, on cross-examination by the plaintiff as an adverse witness under the statute, may supply the necessary expert testimony to establish the standard of care (MCL 600.2161; MSA 27A.2161). *Rice v Jaskolski,* 412 Mich 206.
3. Testimony by a defendant oral surgeon in an action for medical malpractice, on cross-examination by the plaintiffs, was sufficient expert testimony on the standard of care to withstand the directed verdict he sought at the close of the plaintiffs' case for failure to warn that the surgical removal of four molars could result in facial paralysis where the defendant testified, for example, that if the general standard of care for his specialty as to warning of numbness were different than his own, he would know it, he explained what his standard of care was, and he affirmed his deposition on the standard of practice of oral surgeons. *Rice v Jaskolski,* 412 Mich 206.

PIMPS—*See*
CRIMINAL LAW 28

PISTOLS—*See*
SEARCHES AND SEIZURES 1

PLEADING—*See*
PROCESS 2

PLEA OF GUILTY—*See*
CRIMINAL LAW 16, 17

POLICY—*See*
CRIMINAL LAW 10-12, 14
MASTER AND SERVANT 2-4

POLITICAL PARTIES—*See*
ELECTIONS 1, 2, 6, 9, 12-14

POSSESSION—*See*
LARCENY 1-4

POWER PLANTS—*See*
PUBLIC UTILITIES 1, 2, 7, 10-12

PRACTICE OF LAW—*See*
ATTORNEY AND CLIENT 2
JUDGES 3

PRECEDENT—*See*
COURTS 1
ELECTIONS 14

PREJUDICE—*See*
CRIMINAL LAW 28

PREJUDICE TO DEFENDANT—*See*
CRIMINAL LAW 1

PRELIMINARY EXAMINATION—*See*
CRIMINAL LAW 1, 18, 19
HOMICIDE 1-5

PREMEDITATION—*See*
HOMICIDE 1, 3, 5

PRESERVING QUESTION—*See*
WORKERS' COMPENSATION 17

PRESUMPTIONS—*See*
CONSTITUTIONAL LAW 4
WORKERS' COMPENSATION 2-4

PRIMARY LIABILITY—*See*
AUTOMOBILES 27

PRIMARY PURPOSE—*See*
ATTORNEY AND CLIENT 9

PRIVATE CODE OF ETHICS—*See*
MASTER AND SERVANT 4

PROBABLE CAUSE—*See*
ATTORNEY AND CLIENT 4-9
MALICIOUS PROSECUTION 3-6, 10, 12

PROBATION—*See*
CRIMINAL LAW 17

PROBATION VIOLATION—*See*
CRIMINAL LAW 20

PROBATIVE VALUE—*See*
CRIMINAL LAW 28

PROCESS.
ABUSE OF PROCESS.
1. To recover for the tort of abuse of process the plaintiff must plead and prove, in addition to damages, that the defendant had an ulterior purpose and that there was an act in the use of process which is improper in the regular prosecution of the proceeding. *Friedman v Dozorc,* 412 Mich 1.

PROCESS—Cont'd
2. The action for abuse of process lies for the improper use of process, not for maliciously causing it to issue; a plaintiff physician did not properly plead an action for abuse of process against defendant attorneys who brought a malpractice action against him where the only act the plaintiff alleged that the attorneys committed was the issuance of a summons and complaint, which are properly used for the institution of a civil suit for medical malpractice. *Friedman v Dozorc,* 412 Mich 1.

PROFESSIONAL MISCONDUCT—*See*
ATTORNEY AND CLIENT 15
MALICIOUS PROSECUTION 1

PROGRESS PAYMENTS—*See*
LARCENY 4, 5

PROMISES TO DEFENDANT—*See*
CRIMINAL LAW 23

PROOF *ALIUNDE*—*See*
DIVORCE 12

PROPERTY SETTLEMENT—*See*
DIVORCE 2-13

PROSECUTING ATTORNEYS—*See*
JUDGES 6, 8

PROSTITUTES—*See*
CRIMINAL LAW 26-28

PROSTITUTION ORDINANCE—*See*
JUDGES 6

PROVOCATION—*See*
HOMICIDE 1

PUBLIC POLICY—*See*
ATTORNEY AND CLIENT 13
CRIMINAL LAW 23
INSURANCE 1
MALICIOUS PROSECUTION 7
WORKERS' COMPENSATION 13

PUBLIC SERVICE COMMISSION—*See*
PUBLIC UTILITIES 1-12

PUBLIC UTILITIES.
*See, also,* MASTER AND SERVANT 5.
PUBLIC SERVICE COMMISSION.
1. A rate hearing by the Michigan Public Service Commission

PUBLIC UTILITIES—Cont'd

under the transmission act or an investigation upon complaint under the general enabling act provides an adequate method for questioning the continued construction of a power plant without disturbing the ongoing construction; it is unnecessary and inappropriate to suspend the issuance of securities for the power plant under the utility securities act and to interrupt the construction while the necessity of the plants is fully and carefully considered (MCL 460.58, 460.301 *et seq.,* 460.552; MSA 22.8, 22.101 *et seq.,* 22.152). *Attorney General v MPSC,* 412 Mich 385.

2. The policy question whether approval by the Michigan Public Service Commission should be required before construction begins on a power plant is properly for the Legislature, and not for the Court, to decide. *Attorney General v MPSC,* 412 Mich 385.

3. The authoritative statement of the view of the Michigan Public Service Commission regarding the meaning of the utility securities act is to be found in its decisions and opinions (MCL 460.301 *et seq.;* MSA 22.101 *et seq.). Attorney General v MPSC,* 412 Mich 385.

UTILITY SECURITIES ACT.

4. In a proceeding under the utility securities act as written, the inquiry is limited to whether there is a need to issue securities to obtain funds for a lawful purpose of the utility and does not extend to whether, to accomplish that purpose, there is a need for the project to which the funds will be devoted (MCL 460.301 *et seq.;* MSA 22.101 *et seq.). Attorney General v MPSC,* 412 Mich 385.

5. The utility securities act requires that in the opinion of the Michigan Public Service Commission the use of the capital to be raised by the issuance of securities is reasonably required for the purposes of the utility; however, the inquiry is the need for the funds, not the need for the project (MCL 460.301 *et seq.;* MSA 22.101 *et seq.). Attorney General v MPSC,* 412 Mich 385.

6. The uses of the word "purposes" in the utilities securities act show that it means "the acquisition of property, the construction, completion, extension or improvement of facilities or * * * the improvement or maintenance of service or * * * the discharge or lawful refunding of obligations" (MCL 460.301 *et seq.;* MSA 22.101 *et seq.). Attorney General v MPSC,* 412 Mich 385.

7. No one has argued that construction of additional generating capacity is not a lawful utility purpose under the utility securities act; but it is a separate question whether the utility needs the additional generating capacity, as it is whether the additional capacity should be fossil- or nuclear-fueled or whether the proposed plant is cost-efficient or reasonable (MCL 460.301 *et seq.;* MSA 22.101 *et seq.). Attorney General v MPSC,* 412 Mich 385.

8. The utility securities act does not give the commission discretion to inquire into immaterial subjects in determining whether it should grant the authority to issue the securities (MCL

PUBLIC UTILITIES—Cont'd
460.301 *et seq.*; MSA 22.101 *et seq.*). *Attorney General v MPSC,* 412 Mich 385.

9. A securities issue proceeding, under the utility securities act, is limited to a review of the financial decisions of the utility, and does not go into the reasonableness of the underlying projects (MCL 460.301 *et seq.*; MSA 22.101 *et seq.*). *Attorney General v MPSC,* 412 Mich 385.

10. *The intention of the Legislature in the utility securities act was that there should be a complete feasibility examination of a power plant by the Michigan Public Service Commission both at the time of the original financing application and at the time of ratemaking, that is, when it is determined whether the plant should be included in the utility's rate base; at the time of a subsequent financing application a complete feasibility examination is not necessary and the more limited determination of the necessity of the financing is adequate (MCL 460.301 et seq.; MSA 22.101 et seq.). Attorney General v MPSC,* 412 Mich 385.

11. *The Legislature, by requiring property for which securities were to be issued by a public utility to be reasonably required for the purposes of the utility, intended two things: 1) that the property be employed, in this use, "for the * * * completion of facilities", and 2) that the property be reasonably required for a utility purpose within the overall context of utility regulation, namely property that would adequately serve consumers at a reasonable rate and make a reasonable return for the utility. Attorney General v MPSC,* 412 Mich 385.

12. *It was not the legislative intent to allow a utility's investors to invest billions of dollars in a facility that will be evaluated for viability at the time a company requests inclusion of the costs of the facility in its rate base, when failure to include the costs might bankrupt the utility and inclusion might compel the consumers to pay unreasonably swollen rates (MCL 460.301 et seq.; MSA 22.101 et seq.). Attorney General v MPSC,* 412 Mich 385.

PURITY OF ELECTIONS—*See*
ELECTIONS 10-13

PURPOSES—*See*
PUBLIC UTILITIES 6, 7

QUALIFICATIONS—*See*
ELECTIONS 1

QUESTION OF FACT—*See*
CIVIL RIGHTS 16

QUESTION OF LAW—*See*
NEGLIGENCE 1

QUESTIONS DECIDED—*See*
COURTS 1, 2

QUESTIONS DECIDED—Cont'd
ELECTIONS 14

QUESTIONS NOT DECIDED—*See*
ELECTIONS 2

RAPE—*See*
CRIMINAL LAW 16

RATEMAKING—*See*
PUBLIC UTILITIES 10-12

REAL PROPERTY—*See*
MUNICIPAL CORPORATIONS 2

REASONABLE ACCOMMODATION—*See*
CIVIL RIGHTS 2, 4, 8-10, 13, 14, 16, 17
CONSTITUTIONAL LAW 3

REASONABLE BELIEF—*See*
ATTORNEY AND CLIENT 4
MALICIOUS PROSECUTION 6

REASONABLE EXPECTATIONS—*See*
AUTOMOBILES 11, 13, 14, 18, 19
INSURANCE 4-6, 8

REASONABLE INVESTIGATION—*See*
ATTORNEY AND CLIENT 3

REASONABLENESS—*See*
DAMAGES 1

REASONABLE PRACTITIONER—*See*
ATTORNEY AND CLIENT 15

REASONABLE REFUSAL—*See*
WORKERS' COMPENSATION 6, 7, 9-12

RECORDER'S COURT—*See*
JUDGES 9, 11
SUPERINTENDING CONTROL 3

REDUCTION OF VERDICT—*See*
TRIAL 1

REFERENDUM—*See*
MUNICIPAL CORPORATIONS 1, 2

REFORMATION—*See*
REMEDIES 1

REFUND OF TAXES—*See*
TAXATION 1-4, 8

REFUSAL OF WORK—*See*
WORKERS' COMPENSATION 5-12

REGISTERED VEHICLES—*See*
AUTOMOBILES 21, 26

REGULAR USE—*See*
AUTOMOBILES 16, 19, 20

REGULATION OF ELECTIONS—*See*
ELECTIONS 7

REHABILITATION—*See*
WORKERS' COMPENSATION 44

RELEASE—*See*
TRIAL 1

RELIANCE—*See*
ATTORNEY AND CLIENT 14
CONTRACTS 1-4
NEGLIGENCE 2

RELIGION—*See*
CONSTITUTIONAL LAW 1, 2

RELIGIOUS DISCRIMINATION—*See*
CIVIL RIGHTS 2-17
CONSTITUTIONAL LAW 3

REMEDIES.

CONTRACTS.

1. Where the equitable defense of fraud in the inducement of a contract has been established the trial court must decide which remedy would be the most equitable under the circumstances; the court may consider abrogation, reformation, partial enforcement of the contract, or restitution as achieving the most just result. *U S Fidelity & Guaranty v Black,* 412 Mich 99.

RESIDENTIAL BUILDERS—*See*
LARCENY 4, 5

RESIDING IN SAME HOUSEHOLD—*See*
AUTOMOBILES 1, 3

RESIDUAL LIABILITY—*See*
AUTOMOBILES 1-3, 5-15

RES JUDICATA—*See*
ELECTIONS 2

RES JUDICATA—Cont'd
JUDGMENTS 1, 2

RESTITUTION—*See*
REMEDIES 1

RETALIATORY DISCHARGE—*See*
MASTER AND SERVANT 2, 5

RETROACTIVE COMPENSATION—*See*
WORKERS' COMPENSATION 14-16

ROBBERY—*See*
CRIMINAL LAW 17

SABBATH OBSERVANCE—*See*
CIVIL RIGHTS 17, 18

*SCIENTER—See*
FRAUD 2, 3

SCOPE OF INQUIRY—*See*
PUBLIC UTILITIES 4, 5, 8, 9

SEARCHES AND SEIZURES.
WITHOUT A WARRANT.
1. There was nothing improper about the police conduct that led to the discovery of a pistol under the defendant's clothing where police officers were writing a parking citation for the defendant's automobile when he came up to the vehicle and started to get inside, one officer ascertained by asking him that the defendant was the owner of the car and requested his driver's license, and as the defendant was reaching for the driver's license the officer observed a bulge in his clothing and asked whether it was a gun (US Const, Am IV; Const 1963, art 1, § 11). *People v Ingram,* 412 Mich 200.

SECOND DISABILITY—*See*
WORKERS' COMPENSATION 14

SECOND INJURY FUND—*See*
WORKERS' COMPENSATION 15-17

SECOND OFFENSE—*See*
CRIMINAL LAW 16, 21

SECURITIES—*See*
PUBLIC UTILITIES 1, 4-6, 8-11

SENTENCE CONSEQUENCES—*See*
CRIMINAL LAW 17

SENTENCING—*See*
CRIMINAL LAW 16, 20-23

SEPARATION OF POWERS—*See*
CRIMINAL LAW 22
JUDGES 8

SETTING ASIDE SENTENCE—*See*
CRIMINAL LAW 22, 23

SETTLEMENT—*See*
TRIAL 1

SEVENTH-DAY ADVENTISTS—*See*
CIVIL RIGHTS 17, 18

SEX DISCRIMINATION—*See*
CONSTITUTIONAL LAW 4
WORKERS' COMPENSATION 2, 3

SILENCE—*See*
CRIMINAL LAW 6
FRAUD 5-7

SOLITARY CONFINEMENT—*See*
CRIMINAL LAW 6

SPECIAL INJURY—*See*
MALICIOUS PROSECUTION 4, 7-12

SPECIFIC FUNDS—*See*
LARCENY 6

SPECIFIC INTENT—*See*
HOMICIDE 1

SPECIFIC-LOSS BENEFITS—*See*
WORKERS' COMPENSATION 15

STANDARD OF CARE—*See*
PHYSICIANS AND SURGEONS 1-3

STARE DECISIS—*See*
JUDGES 4, 9, 10

STATUTES—*See*
ADMINISTRATIVE LAW 1
AUTOMOBILES 22-24, 26
CIVIL RIGHTS 4
CONSTITUTIONAL LAW 1, 2
DIVORCE 1, 8
ELECTIONS 1-3, 5-8, 10-14
LARCENY 1
PUBLIC UTILITIES 1-3
WORKERS' COMPENSATION 18-26, 28, 30-32, 35-37, 40, 43-45

STAY OF PROCEEDINGS—*See*
APPEAL 1

SUFFICIENCY OF EVIDENCE—*See*
PHYSICIANS AND SURGEONS 3

SUMMARY DISPOSITION—*See*
COURTS 1, 2
ELECTIONS 14

SUMMARY JUDGMENTS—*See*
DIVORCE 6

SUNDAYS AND HOLIDAYS—*See*
CIVIL RIGHTS 18

SUPERINTENDING CONTROL.
*See, also,* JUDGES 11-13.

JUDGES.

1. A judge must obey an order of superintending control entered by a court with proper jurisdiction even if it is clearly incorrect (GCR 1963, 711). *Matter of Hague,* 412 Mich 532.

JURISDICTION.

2. The availability of an appeal in the individual case does not preclude superintending control when appeal does not provide adequate relief; a superior court always has jurisdiction to issue an order of superintending control, and the inadequacy of the appeal is not a jurisdictional test but merely a procedural requirement to be met before relief can be granted (GCR 1963, 711). *Matter of Hague,* 412 Mich 532.

RECORDER'S COURT.

3. The General Court Rules of 1963 confer authority on the Wayne Circuit Court to issue orders of superintending control to the Traffic and Ordinance Division of Recorder's Court of Detroit, which is indisputably a "lower court" to the circuit court (GCR 1963, 711). *Matter of Hague,* 412 Mich 532.

SUPERSEDEAS BOND—*See*
APPEAL 1

SUPERVISORY POWER—*See*
CRIMINAL LAW 10, 14

SUPPLEMENTAL INFORMATION—*See*
INDICTMENT AND INFORMATION 1-3

SUPPRESSION OF FACTS—*See*
FRAUD 5

SUPREMACY CLAUSE—*See*
CONSTITUTIONAL LAW 4

SUPREME COURT—*See*
COMMON LAW 1

SUPREME COURT OF THE UNITED STATES—*See*
COURTS 1, 2
ELECTIONS 14

SURGEONS—*See*
PHYSICIANS AND SURGEONS 1

TAXATION.
INCOME TAX ACT.
1. The tax commissioner had broad discretionary power under the Income Tax Act of 1967 to require or permit combined income tax reporting of subsidiary corporations, so that a right to a refund on a combined return did not arise until the combined return was accepted by the commissioner in place of individual returns previously filed, and interest on the refund did not start to run until the acceptance (MCL 206.335; MSA 7.557[1335]). *Clarke-Gravely v Treasury Dep't,* 412 Mich 484.
2. The Income Tax Act of 1967 unambiguously indicates a legislative decision to limit the time for the state to claim a deficiency and for the taxpayer to claim a refund (MCL 206.1 *et seq.;* MSA 7.557[101] *et seq.). Clarke-Gravely v Treasury Dep't,* 412 Mich 484.
3. Submission by plaintiff corporate taxpayers of an amended combined report to the tax commissioner more than three years after they filed separate returns must be construed as a claim for a refund for purposes of the statute of limitations of the Income Tax Act of 1967 (MCL 206.335, 206.441[2]; MSA 7.557[1335], 7.557[1441][2]). *Clarke-Gravely v Treasury Dep't,* 412 Mich 484.
4. A claim in 1975 by plaintiff corporate taxpayers of a refund for 1971 was timely where an audit and litigation of the 1971 federal tax return of the plaintiffs' parent corporation had tolled the three-year statute of limitations under the Michigan Income Tax Act of 1967; it is not necessary that the claimed state refund must "flow" from the federal action for the tolling provision to operate (MCL 206.325, 206.411[2], 206.441[2]; MSA 7.557[1325], 7.557[1411][2], 7.557[1441][2]). *Clarke-Gravely v Treasury Dep't,* 412 Mich 484.
5. *The tax commissioner had the discretion, under the Michigan Income Tax Act of 1967, to permit the election of combined reporting by two or more corporate taxpayers; inherent in the discretionary language of the statute is the authority to make combined reporting a prospective election only, or to give it limited retroactive effect (MCL 206.335; MSA 7.557[1335]). Clarke-Gravely v Treasury Dep't,* 412 Mich 484.
6. *That plaintiff corporate taxpayers were permitted to retroactively utilize combined reporting for certain years does not nullify the discretionary power of the tax commissioner, under the Income Tax Act of 1967, to reject the plaintiffs' belated*

TAXATION—Cont'd
*combined report for an earlier year (MCL 206.335; MSA 7.557[1335]). Clarke-Gravely v Treasury Dep't,* 412 Mich 484.
7. *It is not controlling that the tax commissioner used a three-year statute of limitations as a guideline in assessing belated requests to file combined reports under the Michigan Income Tax Act of 1967; combined reporting is a unique discretionary matter outside the scope of the statute of limitations for refunds and the tolling provisions (MCL 206.335, 206.411[2], 206.441[2]; MSA 7.557[1335], 7.557[1411][2], 7.557[1441][2]). Clarke-Gravely v Treasury Dep't,* 412 Mich 484.
8. *It was within the discretionary authority of the tax commissioner, under the Michigan Income Tax Act of 1967, to accept amended combined reports from plaintiff subsidiary corporations, who had originally filed separate reports, and to grant refunds for those years, but until that determination was made, the plaintiffs were not entitled to any refunds and,* a fortiori, *were not entitled to any interest (MCL 206.335; MSA 7.557[1335]). Clarke-Gravely v Treasury Dep't,* 412 Mich 484.

TERMINATION OF EMPLOYMENT—*See*
MASTER AND SERVANT 1-5

THIRD PARTIES—*See*
ATTORNEY AND CLIENT 10-14
DIVORCE 3, 5, 8, 9, 11-13
NEGLIGENCE 2

TIME FOR FILING—*See*
INDICTMENT AND INFORMATION 1-3

TITLE—*See*
LARCENY 2-4

TOLLING—*See*
TAXATION 4

TORT LIABILITY—*See*
AUTOMOBILES 2

TORTS—*See*
ATTORNEY AND CLIENT 7, 10
MALICIOUS PROSECUTION 3, 5, 6, 8, 9
NEGLIGENCE 1
PROCESS 1

TOTAL DISABILITY—*See*
WORKERS' COMPENSATION 15, 16, 38, 40-42

TRAFFIC AND ORDINANCE DIVISION—*See*
JUDGES 9, 11
SUPERINTENDING CONTROL 3

TRIAL.

DAMAGES.

1. When there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, the jury shall not be informed of the settlement or the amount paid, unless the parties stipulate otherwise; following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced. *Brewer v Payless Stations, Inc,* 412 Mich 673.

TRUTHFULNESS—*See*
CRIMINAL LAW 25-27

ULTERIOR PURPOSE—*See*
PROCESS 1

UNCONSCIONABILITY—*See*
AUTOMOBILES 20
INSURANCE 6

UNITED STATES OWNERSHIP—*See*
AUTOMOBILES 21

USE OF A MOTOR VEHICLE—*See*
AUTOMOBILES 1-3, 5

UTILITY SECURITIES ACT—*See*
PUBLIC UTILITIES 3-12

WAIVER OF COUNSEL—*See*
CRIMINAL LAW 2-4, 6, 7

WAIVER OF DEFENSES—*See*
WORKERS' COMPENSATION 17

WAYNE CIRCUIT COURT—*See*
JUDGES 11
SUPERINTENDING CONTROL 3

WEAPONS—*See*
SEARCHES AND SEIZURES 1

WEIGHT OF EVIDENCE—*See*
CRIMINAL LAW 18

WHOLESALE DISMISSAL—*See*
JUDGES 11

WIDOWERS—*See*
WORKERS' COMPENSATION 2-4

WIDOWS—*See*
WORKERS' COMPENSATION 2-4

WITHOUT A WARRANT—*See*
SEARCHES AND SEIZURES 1

WITNESSES—*See*
CRIMINAL LAW 24-28
PHYSICIANS AND SURGEONS 1, 2

WORDS AND PHRASES—*See*
CIVIL RIGHTS 7
FRAUD 2
NEGLIGENCE 1
PUBLIC UTILITIES 6

WORKERS' COMPENSATION.

*See, also,* CONSTITUTIONAL LAW 4; DAMAGES 1.

CONSTRUCTION OF STATUTES.

1. *The goal of the Worker's Disability Compensation Act is to provide, in an efficient and dignified form, certain financial and medical benefits for employees who suffer injuries at the workplace and to assure recovery of benefits, regardless of fault, in lieu of a tort recovery against the employer; the Court has construed the statute since its inception by weighing its humanitarian purposes and beneficent objectives (MCL 418.101 et seq.; MSA 17.237[101] et seq.). Gusler v Fairview Tubular Prod,* 412 Mich 270.

DEPENDENCY.

2. The conclusive presumption of the Worker's Disability Compensation Act that a widow was dependent upon her husband for financial support, but the determination of all other questions of dependency in accordance with the fact of dependency at the time of a compensable injury, constitutes a gender-based classification, violative of the Equal Protection Clause (US Const, Am XIV; MCL 418.331; MSA 17.237[331]). *Day v Foote Memorial Hosp,* 412 Mich 698.

3. The legislative history of the Worker's Disability Compensation Act indicates an intent by the Legislature to deny a conclusive presumption of dependency to widowers and to limit the presumption to widows; therefore, because the presumption is violative of the Equal Protection Clause as a gender-based classification, and because an invalidation of the presumption would be more consonant with the legislative scheme for providing compensation than extension of the presumption to widowers, all surviving spouses must prove their degree of dependency in fact to receive workers' compensation benefits (US Const, Am XIV; MCL 418.331; MSA 17.237[331]). *Day v Foote Memorial Hosp,* 412 Mich 698.

4. That the no-fault automobile insurance act permits recovery of benefits for survivor's loss by the dependents in fact of a deceased person without distinction between widows and wid-

WORKERS' COMPENSATION—Cont'd

owers does not provide a basis for extending the conclusive presumption of dependency of the Worker's Disability Compensation Act to both spouses because the no-fault act requires proof of actual loss, and workers' compensation benefits are paid to widows without proof of previous dependency (MCL 418.331, 500.3108; MSA 17.237[331], 24.13108). *Day v Foote Memorial Hosp,* 412 Mich 698.

DISQUALIFICATION.

5. The burden is on an employer asserting that an injured employee should be disqualified for workers' compensation benefits by his refusal of an offer of favored work to show that it offered the claimant favored work which the employee could perform. *Bower v Whitehall Leather Co,* 412 Mich 172.
6. Forfeiture of workers' compensation benefits for refusing an offer of favored work is a drastic remedy and cannot be applied without an assessment of the reasonableness of the employee's actions. *Bower v Whitehall Leather Co,* 412 Mich 172.
7. It may be reasonable for an injured employee claiming workers' compensation benefits to refuse an offer of favored work which the employee is physically able to perform; the factfinder must examine the facts and circumstances in each case which are relevant to the important policies of the Worker's Disability Compensation Act, rather than rigidly apply the favored work doctrine to disqualify the employee for workers' compensation benefits. *Bower v Whitehall Leather Co,* 412 Mich 172.
8. The critical factor justifying a denial of workers' compensation benefits because of an interruption of favored work by the injured employee is that the employee has willfully, through some choice of his own, left a job he could physically perform. *Bower v Whitehall Leather Co,* 412 Mich 172.
9. An injured employee should not be disqualified for workers' compensation benefits where the employee, after his work-related injury, moved from Michigan to Florida and obtained other employment there which he could perform, and later refused an offer of favored work in Michigan, which was made six months later at the hearing on his claim; to deny benefits in such a case not only would be a harsh and unjust result but also would severely undercut the rehabilitative and mitigative purposes of the Worker's Disability Compensation Act. *Bower v Whitehall Leather Co,* 412 Mich 172.
10. An employer may not, by the threat of forfeiture of workers' compensation benefits, force an injured employee to accept an offer of favored work without an assessment by the Bureau of Workers' Compensation of the physical and emotional reasons for the employee's refusal of the offer; however, not every personal consideration or change of residence may excuse, under the policies of the Worker's Disability Compensation Act, a refusal of a good-faith offer of favored work which the employee is physically able to do. *Bower v Whitehall Leather Co,* 412 Mich 172.
11. The Workers' Compensation Appeal Board properly took into account the non-physical circumstances of a claimant's refusal

WORKERS' COMPENSATION—Cont'd

of a good-faith offer of favored work which the employee was physically capable of performing where the employee, after his work-related injury, moved from Michigan to Florida and obtained other employment there, and then refused an offer of favored work in Michigan which was made six months later at the hearing on his claim. *Bower v Whitehall Leather Co,* 412 Mich 172.

12. A decision by the Workers' Compensation Appeal Board that an injured employee's refusal of a good-faith offer of favored work, made by his former employer in Michigan, was reasonable and that it did not require a forfeiture of workers' compensation benefits is amply supported on the record where the claimant had moved to Florida after his injury, he actively sought and obtained other employment in Florida, the proceeds of which mitigate the workers' compensation benefits otherwise payable, his wife also obtained employment in Florida, and they had established a permanent new residence there more than nine months before his former employer offered him favored employment. *Bower v Whitehall Leather Co,* 412 Mich 172.

FAVORED WORK.

13. The "favored work" doctrine is a purely judicial creation which permits the wages earned at less strenuous work after a work-related injury to be set off against workers' compensation benefits and thus mitigate the loss, and it also serves a rehabilitative function by encouraging the employee to return to productive work rather than to remain idle. *Bower v Whitehall Leather Co,* 412 Mich 172.

FURTHER COMPENSATION.

14. An application for workers' compensation benefits for the same category of disability is an application for "further compensation" subject to the one-year-back rule of the statute which limits the retroactive award of workers' compensation to the year immediately preceding the application for further compensation, but an application for compensation for a second disability is not so limited (MCL 418.833[1]; MSA 17.237[833][1]). *Piwowarski v Detroit Sulphite,* 412 Mich 716.

15. The one-year-back rule of the statute which limits the retroactive award of workers' compensation to the year immediately preceding an application for "further compensation" does not limit the obligation of the Second Injury Fund to pay benefits for total and permanent disability where the benefits previously paid were specific-loss benefits (MCL 418.833[1]; MSA 17.237[833][1]). *Piwowarski v Detroit Sulphite,* 412 Mich 716.

16. *The one-year-back rule of the statute which limits the retroactive award of workers' compensation to the year immediately preceding an application for further compensation limits the obligation of the Second Injury Fund to pay benefits for total and permanent disability where specific-loss benefits were previously paid for the same injury, loss of the use of hands, and the applicant did not suffer any further development of his*

WORKERS' COMPENSATION—Cont'd

*disability (MCL 418.833[1]; MSA 17.237[833][1]). Piwowarski v Detroit Sulphite,* 412 Mich 716.

17. *Until a determination is made that an employee is entitled to additional benefits there is no reason to raise the defense of the one-year-back rule which limits the retroactive award of workers' compensation; therefore, the Second Injury Fund did not waive the defense of the one-year-back rule by failing to assert it before the Workers' Compensation Appeal Board where the hearing referee never reached the issue but found that the employee was not totally and permanently disabled (MCL 418.833[1]; MSA 17.237[833][1]). Piwowarski v Detroit Sulphite,* 412 Mich 716.

MINIMUM BENEFIT.

18. The Legislature did not intend that the minimum rates of weekly benefits should be adjusted each year by the Director of the Bureau of Workers' Disability Compensation in accordance with the increase in the average weekly wage in the covered employment (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

19. The legislative history of the Worker's Disability Compensation Act does not show that the Legislature intended to provide for adjustment of the minimum rates of weekly benefits in accordance with the increase in the average weekly wage in the covered employment where it provided unambiguously that the minimum rates for workers' compensation would remain unchanged from 1965 to 1969 while the maximum rates would increase each year, and further provided for adjustment of the maximum by a formula from 1969 on without mentioning the minimum (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

20. The plain language of the provision of the Worker's Disability Compensation Act for adjustment of the rates of compensation in accordance with the increase in the average weekly wage in the covered employment makes no reference to minimum rates; it would be unreasonable to conclude that "maximum rates" refers to anything more than the ceilings established in another provision of the statute to which the adjustment provision is cross-referenced (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

21. To conclude that the Worker's Disability Compensation Act does not provide for adjustment of the minimum rates of benefits in accordance with the increase in the average weekly wage in the covered employment does not destroy any substantive provision in the act, but merely renders the cross-reference "except as provided in section 355" after the clause establishing minimum rates surplusage and of the same significance it had when it was first enacted in 1965, before the adjustment provision became effective (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

22. To interpret the Worker's Disability Compensation Act as

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providing that the minimum rates of weekly benefits should be adjusted in accordance with the increase in the average weekly wage would require that the Court write into the statute a substantive amendment, an unconstitutional usurpation of the legislative power (Const 1963, art 3, § 2; MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

23. There is no plausible reason for the Legislature to make an adjustment in minimum rates of workers' compensation benefits for a disabled worker in accordance with the increase in the average weekly wage in the covered employment, while unambiguously providing no adjustment of the minimum rates for the surviving dependents of an employee killed in the course of his employment (MCL 418.321, 418.351, 418.355; MSA 17.237[321], 17.237[351], 17.237[355]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

24. The Worker's Disability Compensation Act should be construed, if possible, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error; one cannot ascribe to the Legislature an unexpressed intention that the minimum rates of compensation should be adjusted in accordance with the increase in the average weekly wage because it would impair the effectiveness of the provision for a yearly reduction of benefits after the age of 65 (MCL 418.351, 418.355, 418.357; MSA 17.237[351], 17.237[355], 17.237[357]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

25. It is unlikely that the Legislature intended to maintain an arbitrary difference of $37 between the maximum and minimum rates of workers' compensation benefits, which would be the effect of matching each adjustment in the maximum rates with an equal one in the minimum rates, because such a scheme would render the primary calculation of the benefit, two-thirds of the average weekly wage, ineffective in many cases (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

26. Adjustment of minimum weekly rates of workers' compensation benefits in accordance with the increase in the average weekly wage in the covered employment would not comport with the policy of the Worker's Disability Compensation Act to compensate workers for their loss of wage-earning capacity because it would eventually result in the compensation of all disabled workers at precisely the same rates whatever their loss of wage-earning capacity (MCL 418.351, 418.355, 418.371[1]; MSA 17.237[351], 17.237[355], 17.237[371][1]). *Gusler v Fairview Tubular Prod,* 412 Mich 270.

27. *Minimum weekly rates of benefits established by the Worker's Disability Compensation Act are to be adjusted once each year by the Director of the Bureau of Workers' Disability Compensation in accordance with the increase or decrease in the average weekly wage in the covered employment as determined by the*

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*Employment Security Commission (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

28. *The Worker's Disability Compensation Act should be construed, if possible, so that no part will be inoperative or superfluous, void, or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error; it is not persuasive to argue that the Legislature inadvertently or deliberately inserted language in one provision of the statute explicitly referring to another provision, which becomes meaningless in applying the other provision (MCL 418.101 et seq.; MSA 17.237[101] et seq.). Gusler v Fairview Tubular Prod,* 412 Mich 270.

29. *The provision of the Worker's Disability Compensation Act for adjustment of the rates of compensation in accordance with changes in the average weekly wage in the covered employment is the Legislature's attempt to provide some relief from the pervasive inflation which has particularly afflicted this state for over 20 years; the adjusted benefits are determined at the time of injury and remain static, although the minimum wage and the cost of living can be expected to rise, so that a claimant receiving the adjusted benefits would not be encouraged to malinger (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

30. *The Legislature has provided a clear signal of its intent to allow adjustments to reflect changes in the cost of living for both minimum and maximum benefits established by the Worker's Disability Compensation Act by removing the statutory language which limited the adjustments to the maximum rates; the Court would be arrogating the legislative power to itself if it were to read into the statute the precise limitations which the Legislature rejected (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

31. *The Court must give appropriate deference and weight to the longstanding construction given by the Bureau of Workers' Disability Compensation to the statute by its annual announcements of adjustments to the minimum workers' compensation benefits established by the statute, as well as the maximum rates, to reflect changes in the cost of living (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

32. *Silence of the Legislature in the face of an invariant interpretation by the Bureau of Workers' Disability Compensation and the Court of Appeals that there must be an annual adjustment to the minimum rates of workers' compensation benefits as well as the maximum, while not controlling, combines with the clear indication of legislative intent to give some relief to persons receiving minimum wages, to provide overwhelming evidence that the adjustments are to apply to the minimum benefits (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

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33. *The legislative intent of the Worker's Disability Compensation Act is to compensate loss of earning capacity, not merely lost wages; the Legislature clearly has not made the requirement that the benefits equal two-thirds of the employee's average weekly wage at the time of injury controlling in every case, and the legislative policy expressed in the statute can operate to compel an employer to pay an employee more in compensation than he would have paid in wages (MCL 418.101 et seq.; MSA 17.237[101] et seq.). Gusler v Fairview Tubular Prod,* 412 Mich 270.

34. *The requirement of the Worker's Disability Compensation Act that the benefits equal two-thirds of the employee's average weekly wage at the time of injury is superseded by the minimum rates of compensation for the claimant's classification as adjusted by the Director of the Bureau of Workers' Disability Compensation in accordance with the increase or decrease in the average weekly wage in the covered employment as determined by the Employment Security Commission where the adjusted rates exceed two-thirds of the employee's wages (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

35. *The decision to overrule established precedent and practice of adjusting the minimum rates of workers' compensation weekly benefits in accordance with the increase in the average weekly wage in the covered employment requires the Court to erase a clear legislative command, to avoid segments of legislative history, and to usurp the legislative function (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

36. *The plain language of the Worker's Disability Compensation Act subjected both the maximum and minimum rates of weekly benefits to the adjustment provision by its cross-reference "except as provided in section 355" (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

37. *The provisions of the Worker's Disability Compensation Act, when read together, mean that the adjustments of the rates of compensation in accordance with changes in the average weekly wage in the covered employment apply to all the dependency classifications listed; the plain language, including all the phrases and cross-references, suggests a legislative command which should not be judicially erased, particularly since it promotes the humanitarian and remedial aims of the Worker's Disability Compensation Act (MCL 418.351, 418.355; MSA 17.237[351], 17.237[355]). Gusler v Fairview Tubular Prod,* 412 Mich 270.

38. Compensation under the Worker's Disability Compensation Act may not be less than the statutory minimum when the incapacity is total (MCL 418.351; MSA 17.237[351]). *Irvan v Borman's, Inc,* 412 Mich 496.

39. The prohibition in the Worker's Disability Compensation Act against payments exceeding the employee's average weekly

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wage applies only when the disability is partial (MCL 418.371[1]; MSA 17.237[371][1]). *Irvan v Borman's, Inc,* 412 Mich 496.

40. Nothing in the language of the provision of the Worker's Disability Compensation Act which determines the compensation payable to a totally disabled employee shows an intent of the Legislature to limit the payment of the minimum compensation to full-time employees (MCL 418.351; MSA 17.237[351]). *Irvan v Borman's, Inc,* 412 Mich 496.

41. Where an injured worker's disability is total, the loss of earning capacity is total and the worker is entitled to the statutory minimum workers' compensation benefit; the emphasis should be on earning capacity, not on hours worked or wages earned (MCL 418.351; MSA 17.237[351]). *Irvan v Borman's, Inc,* 412 Mich 496.

42. There would be no logic in limiting a part-time employee, suffering an employment-related injury, to a fraction of the minimum workers' compensation benefit merely because at the moment of injury his working time was inconsistent with his capacity; the employer for whom he was working should shoulder the burden of the compensatory minimum provided by the statute (MCL 418.351; MSA 17.237[351]). *Irvan v Borman's, Inc,* 412 Mich 496.

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43. The Worker's 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 to deny benefits (MCL 418.101 *et seq.;* MSA 17.237[101] *et seq.). Bower v Whitehall Leather Co,* 412 Mich 172.

44. The purpose of the Worker's Disability Compensation Act is not only to compensate the employee while he is incapacitated, but also to encourage him to rehabilitate himself; it is in the interest of the employer, the employee, and the public to have the employee return to gainful employment as soon as possible (MCL 418.101 *et seq.;* MSA 17.237[101] *et seq.). Bower v Whitehall Leather Co,* 412 Mich 172.

45. The primary goal of the Worker's Disability Compensation Act is to compensate injured employees for loss of earning capacity, not merely lost wages; it also seeks to avoid the payment of windfalls to those who are still able to work (MCL 418.101 *et seq.;* MSA 17.237[101] *et seq.). Irvan v Borman's, Inc,* 412 Mich 496.

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